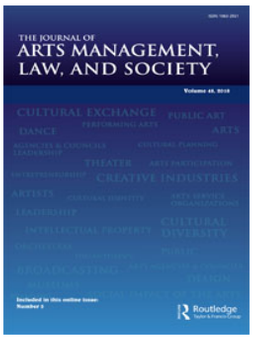

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Private Property Concerning Digitized Cultural Goods: Artificial Scarcity and Appropriation through Reproduction

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ABSTRACT

Intellectual property is a legal concept used to regulate cultural goods and artistic forms of expression. It constitutes a peculiar regulation, as it applies the categories of private property to intangible goods. With the spread of Information and Communications Technology (ICT), which has allowed for the reproduction and global diffusion of these cultural goods, conflicts concerning intellectual property have increased. This article attempts to analyze some difficulties in using a concept such as private property to approach the marketing of cultural goods, especially when technology eliminates the quality of scarcity of these goods, which can be infinitely reproduced at almost zero cost.

KEYWORDS

Copyright; digitalization; intellectual property; private property; rivalry; scarcity

Introduction

Technological advances, such as the press, information technology, and the Internet, have deeply altered the way human beings relate to the production and accumulation of goods with cultural, intellectual, or artistic content. From the development of the press within a capitalist context to the spread of information technology and the objectification of Internet users, the legal basis of the rules protecting cultural creation remains the same: private property (in its specific category of intellectual property, or rather, of a temporarily limited private property). Computers allow us to *transform* some cultural goods to zeros and ones; that is, to *digitize* some artistic creations (Ceruzzi 2012). That digitization has resulted in revealing certain inconsistencies when it comes to regulating certain goods, which, due to their characteristics and social functions, cannot be privately appropriated in a peaceful manner. With the term "regulation," we are referring to the main legal framework regarding the commercialization (thus, exchange) of intellectual and artistic work. Intellectual property (and specifically, copyright) presumes that cultural goods must function as if they were just another commodity. It does not consider, therefore, other ways of understanding the creation and dissemination of art and culture, which can be seen in other cultures (Drahos 2011; Mitsui 1993; Simons 2000). As copyright laws are very similar in most countries (besides the differences regarding the so-called "moral rights"), the result is also similar: cultural goods are mostly created and distributed through markets.

Cultural, intellectual, and artistic creations can be digitized, and then easily reproduced. They can also be disseminated once digitized, because of a technology like the Internet. But the

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Internet is not a neutral medium (Anderson 2012). Rather, it is a place where many problems concerning intellectual property emerge, and where conflicts related to its very determination are produced. Moreover, it is a medium that has been strongly commercialized, wherein a definite process of objectification of its users has been carried out in order to generate vast amounts of money through mass advertising (Kang and McAllister 2011; Kreps 2011; Fuchs 2012), characteristic of a hegemonic economic system in whose nucleus we find the concept of property. This is relevant in the field of copyright because the Internet has contributed to demonstrating the potentially unlimited nature of reproduction and "digital" storage and, likewise, dissemination.

Since its inception, the concept of private property has encountered some problems regarding goods of cultural content (e.g., guaranteeing how creators can create and subsist with dignity, or guaranteeing a fair distribution of these goods). The following is an analysis of the legal and philosophical basis of these difficulties, with a focus on the problems that arise when regulating as property an element—human cultural, intellectual, and artistic production—that can be technically reproduced and disseminated at very low costs. Therefore, in this article we refer to "intangible goods" as cultural goods that can be digitized; that is, convertible *ones* and *zeros* interpreted by a machine. The aim is to address the need of "exploring the entanglement between digital technologies, culture, media, and public policy-making" (Roberge and Chantepie 2017, 295).

Digitization, infinite reproduction, and artificial scarcity

Cultural goods are regulated as property (even if they are a special kind of property, limited in time) in order to function as any kind of commodity (that is, a good that can be object of trade in the markets). Yet, by being goods of a specific nature (intangible and, in fact, limitlessly reproducible at minimal costs, just as they can be disseminated across the world), they encounter serious difficulties in adjusting to traditional commercial workings. In general, markets have problems and limitations satisfying the needs of a society. Their functioning, based on the accumulation of wealth, implies that specific activities are carried out if they do not entail the securing of economic benefits. Thus, not even through markets can a distribution of wealth that guarantees to all society dignified living conditions be produced. These problems also affect cultural goods, which are generated and distributed almost exclusively through commercial dynamics. Moreover, these goods have some specific problems deriving from their inherent characteristic of limitlessly reproducible intangible goods.

Like immaterial cultural goods, material goods have production costs. But, in the case of a car or a ballpoint pen, this cost is similar for each unit produced (given the same technological and production conditions) and, in any case, it is a limited production, since the earth's resources are finite. Cultural goods, instead, have production costs that can be very high—as in the case of cinema—but their reproduction rates are very low. That is to say, cultural goods, unlike the majority of material goods, can be limitlessly produced and at almost zero cost. This analysis, however, appears excessively simplistic, because it presupposes a uniformity of cultural goods that does not exist. There are significant differences if, for example, we compare a book (which would always require more or less fixed printing costs, unless we opt for a digital version) with a film (which requires an initial investment of considerable capital). And a sculpture cannot be digitized in the same manner as a photograph in a book.[1] Even if we could make an exact replica, it seems obvious that it would not have the same aesthetic value as the original (Benjamin 2008). The analysis proposed herein presupposes the possibility of digitizing these works. In some cases, this occurs in similar ways (an *.avi*

file for a film, or an electronic book in *.pdf* format); in others, in inventive or alternative ways (like the template for a 3D print of a sculptural figure or photographs of a painting).

This would partly owe to the very characteristics of cultural goods (in short, thought, knowledge, artistic expression) that are intangible, and whose value lies in their abstract expression, even if this articulates itself or materializes in a physical object.

In this sense, the situation is similar to Stefano Rodotà's affirmations concerning property and the environment, a good that is by nature common (like human knowledge) and whose inherent characteristics clash against the structure of private property. In terms of safeguarding the environment, Rodotà affirms that "the use of the property model can only be applied by strongly distorting reality" (Rodotà 1986, 58). This is because cultural goods are complex and eminently social, and do not respond well to the needs of the individualization and objectification of the institutions of property. Damaging the environment—even if we have property rights over a plot of land, for example—can vitally affect a whole group of people who do not have rights (in the classical sense) over this natural space. Likewise, the faculties that allow for the practice of appropriation of a cultural good—prohibiting its use or access to it, imposing economic barriers, commercializing it regardless of the artistic importance that it may bear—tend to alter the creation and distribution by consenting greater importance to its economic attributes than to its aesthetic or intellectual value.

On the other hand, technological advances—especially in the fields of Internet and information technology—have contributed to these goods not adapting ideally to traditional commercial workings. These goods may have an important use value (even if on some occasions that are not easy to determine) and a very low production cost. The current technological reality enables the costs of reproduction of these goods—especially when they are digitized—and their global distribution to be minimal, nearly zero (Hutter 2003, 122). Certain works, therefore, have an initial production cost that is not always objectively identifiable (in the case of a novel, for example, we should not only calculate the publishing, editing, printing, and distribution costs, but also the costs that the author incurs and his or her living expenses during the time that he or she is dedicated to writing). In addition, these same works could have very low reproduction and distribution costs. Consequently, digitized cultural goods could have a very high use value but the exchange value—due to this possibility of limitless reproduction—could be very low. This makes it difficult to adapt those goods to traditional markets.

In this sense, information technology and the Internet allow for the generation of as many versions of a single good as there are citizens in the world (an *.mp3* file containing a song), without altering one iota of the use value of these goods, their quality (neither objective, like the file, nor subjective; that is to say, if it is artistic), or the reproduction costs. In other words, they are non-rivalrous goods (Koloğlugil 2015). Nor does this affect the initial production costs, which would be the same whether one single copy is produced, or one million copies generated later on. Nevertheless, we can confirm that access to this kind of good—ultimately, knowledge—is an indispensable requirement for the genesis of other cultural goods. Human knowledge is, as we have said, cumulative, and artistic and intellectual innovations rely on prior creations that allow successive generations to not build themselves up from scratch.

This can be seen as an element of opportunity, since it implies that with an initial investment—whatever is needed for each good to be generated—any cultural good can subsequently be limitlessly reproduced, something that does not occur with traditional material goods, such as an apple or a car. Yet this presents a problem for the capitalist market, as it cannot establish the traditional price barrier, the element determining who can and who cannot access the good. The price, particularly concerning intellectual property, allows not only

to recover that initial investment, but also to guarantee continuous profits (at the cost, as has been said, of permitting or hindering access to these goods).

We can think, for example, of a book whose author died forty years ago. Even so, the rights to his or her work are in force, so that a publishing house can continue—exclusively—selling the book. Scanning it and placing it on the Internet would be considered, without a doubt, an illegal act, regardless of whether it is a book of artistic or intellectual importance, or if the publishing house has more than recovered the initial investment, earning six-figure profits. What is more, the publishing house may have sold these rights (as if they were any other good) for a ridiculously low price to another company, which can continue exploiting them, even if they did not participate in the process of investment or publishing of the work. Cultural goods basically function as any other economic asset, without taking into consideration their social importance or role in the representation of the identifying features of the culture of a community.

If the present cost of reproduction of this kind of good tends to be zero, the exchange value, within an economic system of free trade, would also tend to reach almost nothing. This is independent of the use value that it can have for its users or for society (Blondeau et al. 2004, 102). Therefore, the exchange value of the cultural good—which in our markets evidently tends not to be zero—appears to be artificial, imposed and, more importantly, fundamental for establishing limits for its dissemination. Intellectual property allows these goods to be treated in a clearly distinct manner from other material goods (even within the mechanisms of functioning inherent to the capitalist system) by establishing a stable and continuous price on a good whose reproduction is practically free of costs. This implies the imposition of a fictitious limit to reproduction through the establishment of a price that does not correspond to the real cost. The intention is to generate an artificial scarcity conceding (or maintaining) the exchange value of a good which otherwise, after some time, would lose almost all its value in the market.

The expression *artificial scarcity* is used to explain any measure limiting the practices—technically possible—of reproduction and distribution of goods by mechanisms parallel to those of the market. These measures can be vastly different, such as the imposition of economic barriers against accessing these goods (inherent element of the goods themselves and of the system of commercial exchange in which they find themselves inserted), or a state intervention—legally establishing the prohibition to share these digitized goods.

Even though national legislation and international treaties regulating intellectual property agree that artistic and cultural creation are beneficial for society—as is the maximum dissemination of these goods—and, as we have seen, that in absence of such guidelines, the exchange value of these goods tends towards zero (increasing the very possibilities of access and dissemination), intellectual property legislation regulates these goods in such a manner that their quality of technically possible limitlessness is legally penalized. The intervention of penal codes, million-dollar sanctions, Internet connectivity cuts, or the intensive anti-pirating campaigns orchestrated by states are examples of the role that judicial and political power play in the defense of a commercial model of regulating cultural goods.

The nature of these goods and the existing technical possibilities push towards another manner of regulating (in occasions that are neither commercial nor economic) human knowledge, but the law establishes some limits and structures for accommodating cultural goods to traditional commercial dynamics. In doing so, the role of the state is fundamental, not only because it holds the power to impose this situation (establishing coercive measures to achieve this, if necessary), but for its ability to *normalize*—in the sense French sociologist

Pierre Bourdieu (2000) provides—a specific form of managing a society's production of culture and knowledge. The study of how capitalism deeply modified European societies of the seventeenth century onwards allow us to examine how far this process has impacted the structure of society, the state, law, and social relations.

The transformation of monarchic privileges over printing into intellectual property occurred in societies that, in pioneering and forceful ways, experienced liberal revolutions—late seventeenth- and eighteenth-century England and France, respectively. The expansion of these regulations on copyright, especially during the nineteenth century, took place in a world in which capitalism had already extended itself notably. How then could a field so economically relevant in the last decades as knowledge remain on the margins of the dominant norms of the economic system which dominated (and dominates) the global panorama?

Even though this artificial scarcity requires state and law intervention in order to be effective, from a strictly economic point of view, the guidelines regulating intellectual property claim that, due to the non-existence of such regulations, and precisely because of new technologies, authors and creators hardly receive any economic benefit from their creations. Nevertheless, they continue creating for reasons that are very distinct from economic incentives, even if they very often live in a state of precariousness (Ramos Toledano 2017; Towse 2010).

A recurring argument is that sharing goods of cultural content by ways alternative to the traditional market—including the total absence of profit on the part of who shares—is akin to theft. In theft or robbery, the original owner sees him or herself deprived of the good. This does not occur if a digitized cultural good is shared. Yet, it is claimed that, in this manner, whoever invested in the production of the good does not recover the investment. Even if this holds true, it is because, among other things, we are dealing with a commodity with elements that make it profoundly distinct from traditional goods. To say it in other words, if apples were infinitely reproducible and at decreasing costs, the apple market could not function the way it does today.

In any case, the establishment of artificial scarcity entails the imposition of an economic barrier against accessing these goods. Thus, individuals with greater economic capacity can access as many goods as they want, implying a greater cultural capital, which, in turn, can also imply an increase in economic capital. That is to say, intellectual property as it is shaping itself can end up acting as a mechanism that generates or perpetuates inequalities related to the economic resources of each person—this concerns individuals as well as states, as the latter also suffer the consequences of being the consumers and not the producers of cultural goods.

Since the imposition of an economic barrier against accessing cultural goods is no more than the mechanism—and its consequence—consenting exchange value, it can be said that digitization and the Internet have played a fundamental role in revealing the deficiencies of the system of intellectual property; allowing for a kind of alternative market (in reality, it is often nothing more than a collaborative path to almost inexistent prices for accessing as many goods as one wishes) has revealed the arbitrariness and insufficiency of the current regulation of the creation and distribution of cultural goods when it comes to their access. This is especially true because new information and communication technologies not only allow for the generation of conditions for transforming cultural goods into goods that behave in a distinct manner in the markets (unlimited reproducibility at zero cost), but also for the negotiation of the limits and coercive measures that nations, through legal regulation, attempt to impose on those who do not interact with the legally established market (Drahos 1995).

The commercialization of digitized cultural goods through intellectual property

From a legal point of view, intellectual property allows us to confirm a commonly accepted reality: it constitutes a complex and legally peculiar figure. Regulating intangible goods through the concept of property is a political choice answering to capitalism's need to privatize technical knowledge (Wong 2011).

Private property not only confers a definite right of disposal over objects to owners, but also converts the former into goods. It is a necessary assumption for the existence of the market and the private circulation of wealth. Thus, we are faced with a legal concept that seizes everything it finds and turns it into merchandise. The object is configured as a *commodity* in order to be exchangeable and consumable, exchanged and consumed (Barcellona 1996). This, as we have seen, poses some problems when approaching a kind of good that can be digitized, and thus reproduced and disseminated at very low costs.

However, we find ourselves facing not an objectification of the earth—the first element to be designated as private property—but also confronting an "objectification of man that has permitted, through the contract, the relinquishing as a 'thing' of his very energies, his capacities, his creative power, his very attitude in the face of a command …" (Barcellona 1996, 140). That is to say, the conversion into goods of the intellectual and artistic work of human beings. In summary, the legal figure of private property has ended up regulating not only the result of physical work, but also human intellectual work. We are not saying that human labor and artistic creations are not a commodity—they are in the present legal framework. What we are arguing is that the conversion of human physical or intellectual labor into a commodity poses some difficulties.

Paradoxically, and even if copyright law grants the author the right to decide how and when he or she wishes his or her work to be divulged, the fact is that traditionally this has been impossible without alienating, or at least partially ceding, the rights of use over a work. As the means of production and distribution (publishing houses, producers, recording houses) are in private hands, the creator has no other option but to cede the accessible part of his ownership of the work. The creator's possibilities concerning how to manage the good is determined by its legal configuration, which consents him or her to preserve certain rights—this can be seen in the "continental" intellectual property law, but it is not so clear with copyright (Newman 1997)—but forcefully impels the dissolution of ownership rights so that the good can circulate in the market.

This has some effects on two important aspects of intellectual and artistic creations. First, it makes it difficult for citizens to access cultural goods without paying a price. Cultural goods are bought and sold like any other good, and people with low income cannot equally access those goods—that, as we have seen, could be easily reproduced for everyone. Traditionally, those problems have been partially solved by public intervention (as in the classical example of a public library). But markets do not offer optimal solutions. Some museums, for example, do not offer their collections because of the effects of intellectual property law, as has been brought to attention in this very journal (Navarrete 2014).

Secondly, it affects the artists themselves, because they must rely on private companies to publish and distribute (and sometimes create) their intellectual work. In the negotiations, artists are usually the weak party, and they hardly get enough income to continue their creation activity or make a living from it (ALCS 2007, 2013, 2014; Kretschmer 2005).

Artistic and intellectual creations are difficult to attribute to a specific individual or group of individuals without considering their necessary socialization. These works rest on those created before them (as happens with some other knowledge linked to inventions, for example);

therefore, access to human cultural heritage is an indispensable requirement for an artistic and intellectual production continued over time at the heart of a society. Hence, these creations are the product of a human who has necessarily been socialized and is able to access prior works. In other words, though it is often argued that without economic benefit there would be no intellectual creation—an argument that is already doubtful in itself—what is revealed is that it would be impossible to produce culturally as humans do without access to previous intellectual creations. In fact, this is not a feature exclusive to cultural goods, but rather to all technical and scientific knowledge. This explains how not even patents, brands, or designs function in a peaceful manner under the structure of private property (Wong 2011; Boldrin and Levine 2009).

In this sense, there are different human communities that do not understand artistic expression as something appropriable by a single subject and, even less, something with which one can trade. On the contrary, in many cases, artistic forms of expression merge with myths, legends, customs, and cultural characteristics pertaining to communities that consider them part of a realm that goes beyond the individual, defining them as a group. The absolute individualization of cultural creation and its conversion into a commodity, typical of industrialized societies, can only exist by disregarding the communitarian elements that make it possible. This is the case of Australian Indigenous creations, or Japanese precapitalistic creations (Drahos 2011; Mitsui 1993; Simons 2000). But international intellectual property treaties do not allow countries to approach their artistic and intellectual fields from different points of view, as the treaties force them to consider cultural goods as an object of trade (Sell 2004; Drahos 1995).

Knowledge, information, and artistic expression are understood by intellectual property laws as goods with which we can trade, without recognizing elements such as the need to access prior creations in order to innovate, nor the role of society—with its contribution to popular knowledge—in this process. The law understands intellectual and artistic creation as isolated, identifiable, and attributable to a single subject—or a very definite group of these. Western regulation of cultural goods proves itself unable to deal with artistic and intellectual creation as a collective fact produced for and by a society. A profoundly individualistic legal configuration has determined this form of regulating cultural goods; hence, it is by no means a natural manner of understanding artistic creation, as demonstrated by the variety of manners in which other societies have approached the question, or the difficulties it encounters in adapting to certain technological contexts.

In this sense, the expansion of intellectual property or copyright around the world can be explained more by attempts to impose the Western neo-liberal juridical-political model on the rest of the world than to the suitability of this model.

Intellectual property is thus a legal concept that personalizes and commercializes an element that is necessarily social, such as a cultural, artistic, or intellectual good. It is a legal abstraction that is necessary to permit the commercial circulation of these creations, but which encounters serious problems when guaranteeing access to and dissemination of these goods. This is because the market's almost exclusive control over their distribution imposes the requirements of price and economic benefit as indispensable for exchange. This is, without a doubt, a central element explaining the tensions and difficulties in regulating cultural goods as if they were any other kind of commodity.[2]

The technological transformation of the last twenty-five years has brought on new problems that have definitely threatened this commercial vision of goods with a cultural content, as we have seen with digitization.

Appropriation through reproduction

Artistic and intellectual creation, as we have said, cannot be understood as a process in which the creative subject generates a work "from scratch." All artists are indebted to their professional colleagues and (this is the essential element) if they could not have accessed these works, they would not have been able to produce their own. In addition, the society in which one develops—the language, the climate, the relationship with the community, the landscape, etc.—also largely determines the formation of the artist as subject, that which influences his or her work. In some way, all artists adopt specific cultural and creative elements that are fundamental to their own work. The writer, for example, uses a means of expression common among a certain number of people (language), which is neither private nor susceptible to being privatized. He or she self-expresses through this, giving it form, a rhythm, a structure. Through the legal regulation, the product is converted into an economically private work, whose use or benefit—whose access, if we disregard an excessively economical terminology—can be denied to any person because a privilege that allows for the imposition of barriers in order to access this good exists over it.

In specific artistic works, such as photography and cinema, the final "product" consists of a legally appropriable expression (film, image) on something that already was previously private property (a building, a car). The new property, generated by an apparatus (camera, video camera), does not affect the object whose image it appropriates, but poses questions insofar as it supposes an appropriation of something that has already been appropriated. It is what French philosopher and jurist Bernard Edelman called over-appropriation (Edelman 1980[3]).

In cinema and photography, there is a much greater component of reproduction than in other forms of artistic expression. A machine captures what the lens focuses on, whether it be a single image or a sequence, and this is reproduced afterwards. At first, the law resisted accepting photography and cinema as artistic creations, because it was believed that the work had been produced by a machine; the human subject was merely the operator. Art and cinema were considered opposites; where the latter was mechanical, the former was intelligence. The technician who operates the machines thus does not express his personality in cinema as an artisan or a painter does. The filmmaker is an autonomous individual; the work could be carried out by anyone. The artist, in contrast, demonstrates his or her talent through the work. Edelman explains that, at the beginning of the twentieth century, cinema was understood as a "spectacle of curiosity," as a mere entertainment that "proposed itself to excite and, at times, move public curiosity, rather than awaken and develop the aesthetic sense of the spectators" (Edelman 1980, 64).

This perception of cinema, photography, artistic aesthetic and, most of all, legal regulations changed when "photography and cinema [were] taken into consideration by the industry, [what] went on to produce the most unexpected legal effects: the soulless photographer would be enthroned as an artist, the filmmaker became creator when the production relations demanded it." Edelman continues, "What soul is this (creation), which ultimately depends on relationships of production?" (Edelman 1980, 66). Furthermore, the entry of cinema and photography into commerce and legal regulation established the necessary recognition of the author and, at the same time, the necessary limitation of this recognition. That is, the photographer and the filmmaker are recognized as artists, "protected" by regulations of intellectual property. In turn, as with the rest of artistic and intellectual works, protection does not so much concern the subject creator as much as the subject producer, or rather, the one who possesses the capital to produce or appropriate the cultural good.

Edelman's analysis allows us to see how the law has molded itself to the needs of the emerging photographic and cinematographic industries' consideration of these two forms of expression as art. This consideration was intended to apply a protectionist regulation in favor of the owners, not the author. At a certain moment in time, cinema and photography found themselves situated under the legal umbrella of intellectual property, transforming the technician who operates a machine into an author, an artist, and his work into a commodity. We are not questioning—neither is it Edelman's approach—whether cinema and photography are or are not susceptible to being considered artistic expressions. On the contrary, the aim is to highlight how such considerations were the result of a purely commercial interest, precisely because cinema and photography were regulated with the same parameters as other very different forms of art–scores, sculptures, novels–due to the final aim to homogenize such creations under a simple institution that allows for their exchange without considering their specificities or property.

In other words, the consideration of two forms of artistic expression, such as cinema and photography, as susceptible to being recognized as intellectual property *is a result of commercial needs*, and not because this form of regulating artistic creation—intellectual property/copyright laws—is inherent to all types of expression. It is a legal and political decision, ultimately motivated by economic interests. It enforces the idea that a legislation truly intending to protect creators and their works should deal with each of these in a differentiated way, paying attention to their specific features.

In this sense, the capturing of images—in movement or still—has some very specific features, since photography and cinema can be, without a doubt, considered works of high artistic content, but they also can record facts in an important historic document. Given the current regulation of intellectual property, Edelman's concept of over-appropriation allows us to understand up to what point it is possible to appropriate (oneself) of—convert into private property—the reproduction of common elements (to use the language of the realm of copyright, of public domain), like a square, a forest, or a beach. In this sense, it is argued that the result of photographing or filming may be considered as a (new) form of property. In addition, the process of over-appropriation does not entail any damage or loss to the reproduced object, yet this does not prevent reproduction from being denied by the owners of this good.

The question of appropriation (or over-appropriation) through machine recording is conflictual precisely due to the legal regulation of intellectual property. The privatizing tendency of these regulations provoked an inversion of terms, with the consequence that today we understand all creation as private work, belonging to someone and economically quantifiable. Therefore, it can only become part of public domain when the ownership rights dominating it expire. Everything, hence, is susceptible to being privatized, including historical events.

In 1963, an amateur filmmaker happened to record the assassination of President John F. Kennedy. He sold the 480 images to *Life*. Writing a book on the event, Josiah Thompson was sued for illicitly using twenty-two of the 480 images. The writer argued that the event formed part of public domain and that the reproduction, as is, of facts was not susceptible to appropriation. The judge understood that, even though the heart of the matter was a current event, not susceptible to protection by copyright laws, the form was protectable as an element that personalizes the reproduction, since every photograph reflects "the personal influence of the author and no two are alike" (Edelman 1980, 88). It goes without saying that the lawsuit was not filed by the amateur filmmaker but by *Life* magazine, owner of the images.

An element that is shared or of collective domain is therefore compelled or shifted by the appropriation of the event through a specific concrete form. Obviously, the historic event (the

idea, information) cannot be privatized, but the visual document proving its occurrence—and the fact that it is a fundamental moment of history—can. In fact, the judge's logic allowed Edelman to signal that intellectual property ultimately understands history, facts, as "an abstract expression of all property," since the camera can, consenting it a concrete form, appropriate it, transforming it into private property. "The over-appropriation of the real is constituted by the simple recording of the real" (Edelman 1980, 88).

Conclusions

In summary, the regulation of artistic and cultural production and distribution through intellectual property law proves to be conflictual. We have seen how the current technological context enormously hinders cultural goods from circulating as commodities, just as any other tangible good. The existence of a single regulatory body for all kinds of artistic creation—ultimately, a peculiar kind of private property, limited in time—also entails problems and difficulties in both protecting artists and guaranteeing that they can continue developing their work. In addition, it makes it hard for people to access cultural goods without paying a price, even when that price does not reflect the real distribution cost.

In this sense, some initiatives have proposed different ways of approaching the distribution of cultural goods. For example, Creative Commons licenses emphasize the easy use and access to those goods over obtaining an economic benefit. This is a very interesting point of view, but at the same time those licenses do not solve the problem of how to remunerate artists, so they can continue with their artistic work and, if possible, make a living from it.

Intellectual property law has some intrinsic problems that allow us to question its suitability when approaching intellectual, cultural, and artistic creation and distribution. But there is not a clear and adequate alternative. It seems appropriate, though, to point out those problems and raise questions about how to approach the complex field of artistic creation and business dynamics.

It could be possible to address the problem from a public point of view. The creation of cultural goods, as well as the access from citizens to them, is a desirable situation for most countries in the world. Perhaps states could intensify their public intervention to guarantee an adequate remuneration to artists and the possibility of access to culture. Public libraries are a notable example, which could be explored further. A public repository of essential cultural creations, fiscal benefits for companies that invest in cultural goods (as happens in France), or public (both local and national) investment in artistic creations could help approach the field of intellectual creation from a public, as well as a commercial, point of view.

Notes

1. This statement may no longer hold true in a relatively short time due to the rapid development of 3D printers. This, however, goes beyond the aim and scope of this research.
2. Rosa M. García Sanz playfully argues: "Centuries have proven that without the legal recognition of the concept and without economic compensation, creators have produced more or less fortunately in terms of originality. Creation therefore exists independently of recognition and legal protection. It is business interests that cannot survive without being profitable" (2005, 188).
3. The original title of the work, very adequate for the theme Edelman outlines, is *Le droit saisi par la photographie: Elements pour une théorie du droit [Ownership of the Image: Elements for a Marxist Theory of Law]*.

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