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Relationship between Human Rights and Copyright Law: Bibliometric Analysis

Rajatpreet Modi, Abhijit Vasmatkar and Ujwal Prabhakar Nandekar†

Symbiosis Law School, Pune, Symbiosis International (Deemed) University, Pune — 411 014, Maharashtra, India

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Human rights are the paramount rights of the human race. Yet they are highly dynamic, much like the times we live in. With the change in human society, the regulations must change to suit the needs as well. This article analyses how Human Rights and Intellectual Property Rights, specifically copyrights are integral to each other when read together. The primary issue is the collision between copyright and the human right of free speech. The article discusses in detail how copyrights form a human right and the need for them to be recognized as the same. The nuance of free speech and copyrights in the internet domain and the need to account for the publisher's independence and IPR rights has been discussed. The article attempts to understand the reasons for copyright violations while exercising the human right of free speech and the possible legal solutions to this problem. The purpose of the article is to dig out all the research in this respect and to make the concept clear for future researchers. This bibliometric analysis is implemented using the Scopus and Web of Science repositories.

Keywords: Bibliometric Analysis, Copyrights, Free Speech, Human Rights, Intellectual Property Rights

Natural law, common realizations as a society, religious foundations, international treaties, international organizations and finally a country's grundnorm spells out the basic inalienable rights of a human being. Increasing global relations, content sharing, knowledge sharing, and trade relations bring about challenges and disputes among persons. Intellectual property such as copyrights, trademarks, and designs purport to protect the creator as well as reward them. The law governing intellectual property is meant to govern the usage of intellectual property by other persons. Strict intellectual property rules can stifle another person's freedom of speech and expression.[1] For instance, in the case of designs, often designers take inspiration from other designs. Writers take inspiration from other literary works. Free Speech is one of the constitutionally guaranteed freedoms in most democratic countries across the world.

Copyright is available to the owner of an intellectual work[2] such as literary works, cinematographic works, Dramatic and Musical Works, Works of Art, and Manuscript[3], computer programs[4], etc. Copyright law operates almost entirely in the realm of speech.[5] If copyright owners get injunctions against the use of their work, then this would limit freedom of speech and expression.[6] According to the literature found the European Court of Human Rights has heard a number of cases.[7]

However, a bibliometric analysis of this topic would show that the United States of America and the European Union are the major States who are researching in this area. A bibliometric analysis is done to gain insights into the research output of a particular topic.[8] There is a research gap in other countries. Therefore, this article will show an analysis of the knowledge available in this area.

The present article presents the prior available literature in the realm of 'copyright' and 'free speech'. For the purpose of doing a bibliometric analysis, the Scopus and Web of Science repositories were used. The search terms were 'copyright' and 'free speech' so that the most relevant literature will be shown. 146 records were found on Scopus and 133 on Web of Science through the years 1980-2020. Bibliometric analysis has been done by way of clustered columns, pie charts on the number of publications each year, the document types i.e., articles, book reviews, conference papers, etc. and the prominent journals which make publications in this area.

Related Works

The clash between intellectual property and human rights especially fundamental freedoms is a highly debated topic. The present study of related works seeks to bring out the existing literature available on the topic and the author's reviews.

†Corresponding author: Email: ujwal.nandekar@symlaw.ac.in

One of the earliest publications in this regard was authored by Gulasekaram 2005.[9] This article shows that earlier, US courts used the theory of private real property in trademark infringement cases. In the earliest cases pertaining to Trademark Law and the First Amendment, the courts were uncertain and unclear. When courts tried to incorporate free expression concerns, they were ambiguous in their approach. The Federal Trademark Dilution Act of 1995 freed liability of 'non-commercial' uses. However, courts were reluctant to use this provision and the incorporation of the First Amendment into Trademark analysis. The author posits that a trademarked product can be used for non-commercial purposes by 'defining the outer boundary of trademark rights'. The author contends that the liability to a trademark owner ought to be decided by whether the use of the mark is for artistic purposes or for commercial purposes. Therefore, the deciding factor should be usage- commercial or non-commercial. But the author was futuristic in his vision that the boundary between trademark and free speech could be blurred and may have to be rethought because of commercialization.

Rothman, in her article[10] shows the US courts generally do not accept any First Amendment defenses in case of copyright infringement. She proposes liberty and a substantive due process-based approach to check the expanding reach of copyright law. The Challenges to the First Amendment approach are spelled out. The liberty approach is meant to distinguish personal uses that must be constitutionally privileged versus other uses that must not be. She moves on to explain that the use of copyrighted works is sometimes integral to personal identity. These uses must get constitutional protection under the substantive due process approach. This approach is important now in the digital age because blogs, videos, etc. are increasingly using copyrighted works. The courts could not be persuaded to take up the First Amendment approach because the difference between uses could not be made. Scholars who have attempted to distinguish uses have flaws in their theories such as Wendy Gordon and Joseph Liu. The author's contention is that identity-based usages deserve protection. Furthermore, while discussing her approach along with the fair-use doctrine she contends that the liberty approach cannot be simply incorporated with fair use because the current fair-use will not be able to protect individualistic uses with reliability.

Marsoof in his article[11] sheds light on the fact that The Digital Millennium Copyright Act (DMCA), 1998 enacted in the United States offers internet intermediaries, that provide access, storage and linking to online content, conditional immunity with a 'Notice and Takedown' approach for copyright infringements. However, this is antithetical to freedom of expression. The author identifies that right holders have a pertinent task of "policing and enforcing their rights" both in the physical world and in the online world. Prior to the enactment of the DMCA, internet intermediaries were held liable for copyright infringement, but the Act now provided regulatory control. This enabled online technologies to flourish. However, the 'Notice and Takedown' approach operates only on the information provided by the copyright owner. The content linking service will have to make a decision on its own whether to remove said content or not. The author notes that in the UNHRC, this aspect was raised that it infringes on freedom of opinion and expression. The author studies various projects such as the Liberty Project, the Multatuli project, and the Urban-Quilter study. These studies noted the US DMCA and EU e-commerce directives. It is noted that several challenges arise in determining whether there is a copyright infringement such as when the material under scrutiny was actually taken from the copyrighted work, whether it comes under the fair-use doctrine or not, etc. Empirical evidence shows flaws associated with these directives. Thus, the author concludes by stating that reforms need to be brought about to remove these flaws so that internet free-speech rights are protected.

Buss[7] identifies that the United States and the European Union have different approaches toward the interlinking between copyright and free speech. Copyright is afforded protection under Article 17(2) of the Charter of Fundamental Rights, as interpreted by the European Court of Human Rights (ECHR). Buss states that free speech gets an upper hand over other fundamental rights in the United States whereas copyright and freedom of expression are on the same footing in Europe. This statement is contradictory to what Rothman states in her article. The author analyses mostly cases in this domain before the ECHR and notes the case of *Axel Springer Verlag AG* v *Germany* and *Von Hannover* v *Germany* (No. 2)[12] identified a "clear set of criteria" while deciding on these two rights in conflict. The author's conclusion is

that the debate between copyright and freedom of speech has been going on for a long in the United States, but it had received importance only recently in the European Union.

In a recent publication, a highly specific study was done into access to textbooks which is a subset of the right to education and copyrighted books. Beiter was motivated by the fact that copyrights are an impediment to knowledge distribution by way of textbooks.[13] Textbooks are a means to impart education which is a fundamental right. However, in developing countries, the distribution of textbooks to every child is a distant dream. Moreover, copyrights and paying a licensing fee to the owner of the work increase the price of books. This makes books unaffordable for many, thus depriving them of their fundamental human right. On the other hand, copying and distribution of an author's work would amount to copyright violation. The Agreement of Trade-Related Aspects to Intellectual Property (TRIPS) provides the international framework that signatories are obliged to comply with. According to the author, developed states often urge developing countries to adopt strict IP norms. Thus, the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) should take measures and adopt norms keeping in mind that these trade norms often affect a plethora of persons and their rights. This is a recently published paper i.e., in 2020 and focuses, particularly on Africa.

Since copyrights are now not limited to traditional media and have now expanded to digital media, Moreno[14] in his recent article brings out the problems and human rights violations while enforcing Article 17 of the Copyright Directive in the Digital Single Market (the CDSM). The main objective of the said Article 17 is to protect copyright holders and enable negotiation to get compensation for their work. Article 10 of the European Convention on Human Rights specifically spells out Freedom of expression subject to license requirements by broadcast enterprises and reasonable restrictions.[15] In order to protect copyright holders, in digital content sharing platforms, 'upload filters' are meant to check whether any content is infringing copyrighted content. The main contention of the author is that these 'upload filters' must be directed at commercial usages. Otherwise, it would violate the human rights of a fair trial, privacy, and freedom. The author brings out problems associated with the implementation of the CDSM, the e-commerce directive and the GDPR Policy. The author concludes by making the contention that unless the safeguards are adopted during the implementation of Article 17, the same would violate Articles 6, 8 and 10 of the European Convention on Human Rights.

Findings and Discussions

In order to analyze the available research done in the realm of copyrights and free speech, research was done into the Scopus repository and Web of Science repository. Using the keywords 'copyrights' and 'free speech', 146 relevant records were found in the Scopus repository (Fig. 1) and 133 relevant records were found in the Web of Science repository (Fig. 2).

An analysis of a sample ofresearch papers, articles, and book chapters found on the Scopus repository shows that in the area of the intersection of free speech and copyright reveals that there is a huge want of research in this area in countries other than the United States. The United States has the highest

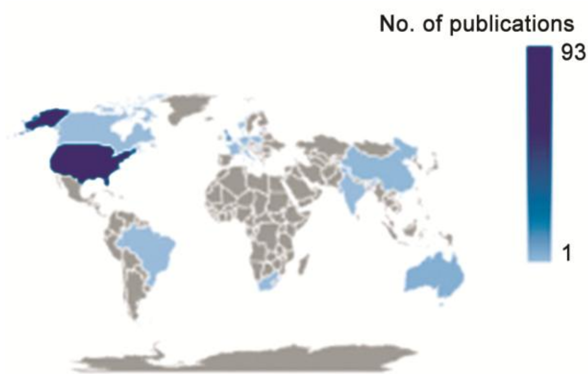

Fig. 1 — Publication records in 'copyright' and 'free speech' found on Scopus on 11/06/2021. 20 records out of 146 were not tagged in relation to the country.

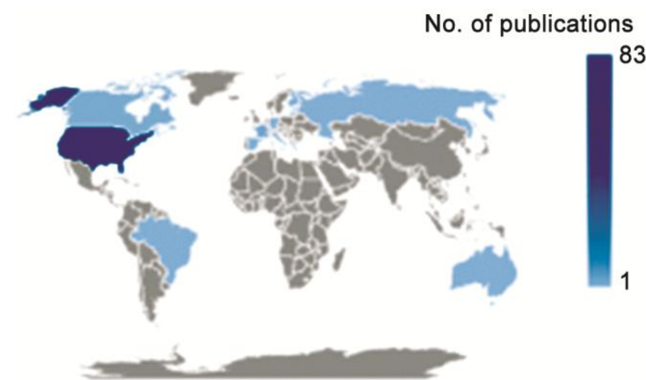

Fig. 2 — Publication records in 'copyright' and 'free speech' found on Web of Science on 11/06/2021. 26 records out of 122 were not tagged in relation to the country.

number of publications. European countries follow with the United Kingdom having 13 publications on Scopus. Australia is the third highest with 4 publications (Scopus). This shows that a lot of research can be done in this area in countries like India, Japan, Canada, Oceanic countries and African countries.

This data shows that the United States of America has the highest number of publications. In Scopus, 93 records of the USA were found (a whopping 60% of total records). Similarly, in Web of Science, 83 records (62%) were found relating to the USA. The United Kingdom constitutes 8% with 13 records on Scopus and England has 6 records on Web of Science (4.5%). Other countries have a significantly lesser number of publications. Australia and Netherlands have 4 records each (3%). Web of Science had 6 records from Israel which are at par with England. Other countries just have 1-2 records each. It is to be noted that 20 records on Scopus (13%) and 26 records on Web of Science (19.5%) have not been tagged in relation to the country.

Figures 3 and 4 shows that every year only a handful of publications are done. 2012 and 2013 witnessed a boost in publications in the topic of "copyrights" and "free speech". The rise in the publication could be seen from 2005 in Scopus and 2002 in Web of Science. This could be because of increasing digitization and internet usage and databases. Data in the year 2012-13 in Scopus account for 21% of records in the given topic. Data in Web of Science in 2012-13 account for 12%. However, records in WoS do not have a huge gap between them and publications are more or less around the number of 5 to 8 per year. This shows that more research can be done according to the current changes in the law.

Figures 5 and 6 show that scholars generally prefer to write articles. However, it is to be noted that books gain much more prominence and are highly cited. For example, Copyright's Paradox by Neil Natanel gained 103 citations as of date. Keyword analysis can provide a deep insight into which publication gains more attention. The probable reason that articles are the highest form of publication can be that the author can express their views as well as provide in-depth research into a given topic. Reviews occupy the second position with 16% -17%. Books occupy a small proportion i.e., 5% - 6% followed by conference papers/meetings (3% - 5%). A reasonable inference

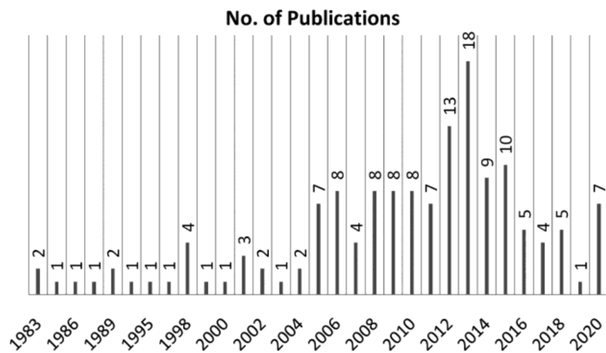

Fig. 3 — Number of publication records in 'copyright' and 'free speech' found on Scopus on 11/5/2021

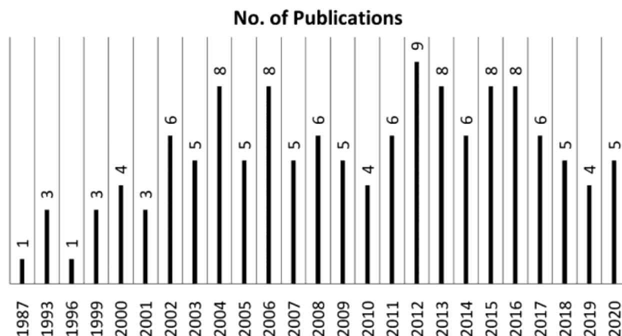

Fig. 4 — Number of publication records in 'copyright' and 'free speech' found on Web of Science on 11/5/2021

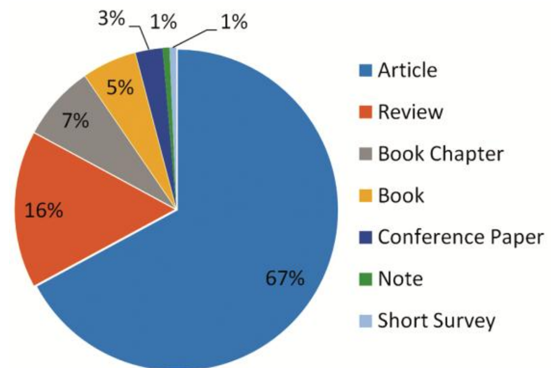

Fig. 5 — Type of publications found on Scopus on 11/06/2021

Fig. 6 — Type of publications found on Web of Science on 11/06/2021

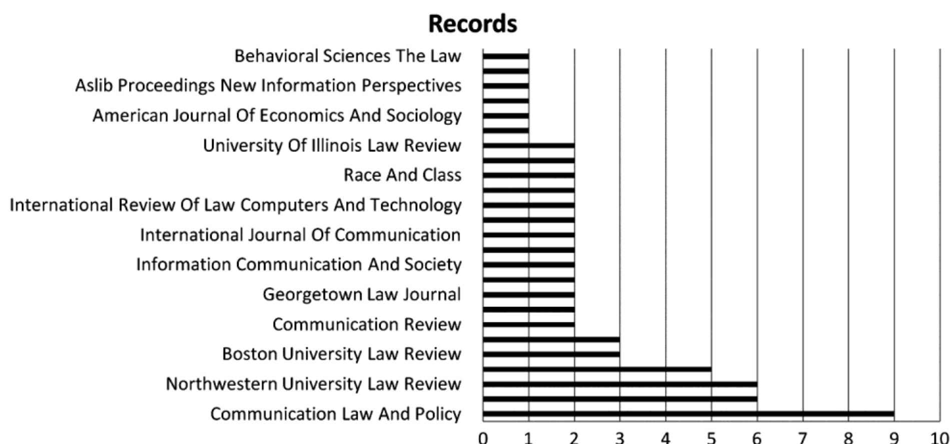

Fig. 7 — Sources of publications from Scopus on 11/06/2021

Fig. 8 — Sources of publications from Web of Science on 11/06/2021

can be made that articles have a better chance of being published in reputed journals.

Figures 7 & 8 show the Journals that publish on the topic of copyright and free speech. Most of the Journals are from the USA. Communication law review generally accepts these articles as aforementioned because it has 9 publications under its name. California law review found of the Web of Science, New York University Law Review and Vanderbilt Law review have records of 5 publications each. Other law journals include Leiden Journal of International Law and Queen Mary Journal of Intellectual Property, etc. which are outside the United States but have only one record each as found on Scopus. International Journals are also in the spotlight for publishing on the topic of ‘copyrights’ and ‘free speech’.

Limitations

Data analysis of open sources such as Google Scholar, JSTOR etc. could not be done due to the vast amount of data and many irrelevant records. This could be a research point for a larger project. Moreover, it is to be noted that data herein collected contains some number of publications that do not pertain to intellectual property law and human rights which are not relevant to the present study such as Science and Technology, etc. However, this would not affect the general trend as seen from the results.

Conclusion

It is well said that copyright is at once “an engine of free speech” as well as an impediment to it.[17] Neil Natanel in his book argues that copyright imposes a burden and stifles free speech rather than enhancing expression.[16] He goes on to make the point that digital technology could contribute to copyright infringements because ‘consumers and artists could sidestep copyright distribution channels altogether’.[16] Frosio points out that the over-reach of copyright

protection sometimes makes public withdraw their support from Copyright Law.[17] If copyright policy has to be made right, then it has to take care of multiple variables.[17] Harmonising and balancing these two vast areas of law is highly imperative. Researchers have identified that researching the trend and judicial development in case laws could be another research point.

Moreover, research also needs to be done in other Intellectual property areas which affect human rights. As pointed out by Beiter, human rights i.e., the right to education will be affected if copyright law is not liberal. Another instance could be that patents and designs could affect freedom of expression. Further, various agencies like educational institutions, newspapers etc. are also required to follow ethical and moral obligations and not to commit the violation of rights of the original creator.[18]

Furthermore, authors should also keep in mind keyword analysis while writing so as to gain attention and enable their work to reach other researchers. A bibliometric analysis could provide key insights into available literature and could thus guide scholars about which areas lack research or which are over-researched. Legal literature lacks bibliometric analysis. Other forms of analysis such as informetric, webometrics etc.[19] provide huge avenues for study as well.

Therefore, this article seeks to be one of the first studies in the field of bibliometric study in law.

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