



**Governing Innovation and Expression: New Regimes, Techniques and
Strategies**

An Introduction

by

Katja Weckström*

* Doctor of Laws, University Lecturer of Commercial Law, Åbo Akademi University (Turku, Finland)

Nordic Journal of Commercial Law
Issue 2013#1

1 Introduction

New multi-party agreements have changed the international intellectual property law landscape and increased its global impact. Two central actors, the EU and the US routinely leverage their bargaining strength by including extensive intellectual property chapters in their bilateral agreements with developing countries. A shift in *international intellectual property law-making* seems apparent. Stagnated multi-lateral *processes* in established forums such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) are abandoned and issues are shifted to faster side-tracks unburdened with even semi-open or semi-democratic decision-making. The pace of generating intellectual property norms with general or global effect thus remains high, but keeping step with contemporary legal problems has legitimacy costs. We also see a topical shift, where more general and controversial *issues* are decided in these new forums. Are these norms open to scrutiny from the rest of the legal system?

Substantive intellectual property law-making is also in flux on the national and regional level. Patent laws are under reform in the EU and the US. Furthermore, the changing political and societal role of social media raises questions related to privacy and more generally the regulation of internet-based expression and communication. Social networks and location services challenge data protection and privacy laws. At the same time, criminal enforcement of intellectual property rights proliferates and the threat of damages may assume the role of a deterrent. The question of whether intellectual property rights holders may target internet service providers instead of direct infringers poses a direct challenge to our virtual infrastructure. New bottlenecks and gatekeepers emerge continuously. What are the legal hurdles social networks and internet service providers currently face? How should they be regulated – and why?

The focus of the book is on new regimes, strategies and techniques in regulating such recent and on-going changes. The authors ask whether such reforms are “business as usual” or whether they could signify more fundamental changes in the way innovation, creativity and especially Internet-based expression are governed globally and locally.

The book is divided in three parts under the following themes:

- New Innovation and Intellectual Property Regimes;
- Governing the Internet and Social Networks; and
- New Strategies and Techniques of Enforcement.

2 New Innovation and Intellectual Property Regimes

Prof. Fiona Macmillan asks whether the public domain is real, meaning has a concrete legal function and meaning, or whether it is only a figment of our imagination. If it is real, then what is its nature and function and even more, its potential? Can we divide intellectual space into common or public space, which rivals private space that is created via ownership of intellectual property and can we argue that law could or should respect these boundaries in securing that *prime intellectual space* be kept outside the privatized sphere? Macmillan argues that “the public domain is the only space in which the power of corporate giants can be challenged and resisted” and that preserving the binary opposition between public and private is risky, if we equal public and private with one simple legal tool, private property rights. Instead, we need to recognize a more complex architecture of ownership in intellectual space that defines the publicly or commonly owned in terms of exclusion of prime intellectual space from private ownership. Macmillan concludes that a concept of (true) group or communal rights mirroring the Roman concept of *res universitatus* need be developed that may separate culturally or socially significant spaces from public ownership, but inside promoting creativity, innovation, invention and cultural conversation.

Prof. Yoshiyuki Tamura challenges some conceptual fallacies behind the idea of not protecting intellectual works. He argues that intellectual works, which are the result of human intellectual, creative or inventive labor, can remain “unprotected” by intellectual property legislation without necessarily stifling innovation or creativity in society. He deals, in turn, with the three most common flawed assumptions for protecting intellectual works; 1) that there is a “thing” or object that embodies an intellectual work, 2) that no or insufficient protection of this “object” will have negative consequences for society because the object belongs to its creator; and 3) that protection of intellectual works should be provided for by law. Tamura introduces a pluralistic market-oriented theory to justifying intellectual property, which takes into account the cost from the legal intellectual property institutions themselves. Protection of intellectual works by way of legislation is only justified, if adequate protection cannot be achieved by the market itself. Thus, he argues that we need to recognize the role of market mechanisms in creating and supporting incentives, when intellectual property legislation and protection is tailored.

Prof. Doris Estelle Long argues for recognizing deviant globalization in multilateral protection of intellectual property. Deviant globalization may provide grounds for revised standards of protection, thus serving both a predictive and normative function. Long argues that deviant globalization, “with its emphasis on trade and innovation across socio-economic levels, and its focus on unmet consumer demands ... [brings] ... new understandings of the relationship between compensation, access, and distributional innovation in present intellectual property debates.” This globalization is “deviant” not in the moral sense, but because it deviates in significant ways from the globalization that is the focus of scholars, economists and popular writers that influence intellectual property law-making. Long introduces some ground norms of deviant globalization: 1) fair compensation fuels the market; 2) consumers matter; 3) innovative

business models deserve adequate breathing space to flourish; and 4) markets necessarily require regulation, which challenge and enrich traditional intellectual property standards.

3 Governing the Internet and Social Networks

Advocate General Niilo Jääskinen discusses some recent judgments of the European Union Court of Justice on liability of online service providers for intellectual property infringement occurring by the services they offer. Jääskinen distinguishes between the legal obligations placed on internet access providers and online service platforms, which facilitate participation to the internet. These services may or may not, partly or completely fall within the safe harbors of the E-Commerce Directive depending on the degree to which the functionality of the service depends on third-party content. The question of liability for internet access providers concern the extent of the service provider's obligation to assist in the protection of IP rights. *Scarlet Extended*, *Promusicae* and *Bonnier* each discussed issues relating to monitoring or filtering of traffic and disclosure of user data to right holders, which pitted data protection against effective copyright protection. A different setting altogether underlies the other strand of cases (*Google France*, *L'Oreal and Others*, *SABAM* and *Wintersteiger*) concerning online service platforms, since they concerned comparative advertising, trademark protection and territorial jurisdiction. Jääskinen concludes that the current situation which advances case-by-case balancing of rights and interests of different parties in national courts creates legal uncertainty, and urges the EU legislator to remedy the situation.

Krisztina Stump compares EU and US law concerning liability for online service platform providers for defamatory content. This chapter focuses on legal responsibilities related to the passive hosting of third party content including illegal defamatory content, i.e. any false statement that harms the reputation of another person, on e.g. a social network, a dating website, a blog or a video sharing site. In addition to the question of monitoring vast amounts of content and other Internet-typical issues, defamatory content poses the legal hurdle of widespread anonymity with both cost and uncertainty relating to it. Stump notes the effect of practical and technical realities in molding secondary liability doctrines in this area, but raises and discusses the many counterarguments against liability for online service platform providers that render technical or practical measures unsuitable due to the very nature of the content in question. Stump notes the strengths and weaknesses of the approach to liability in the US and the EU, performs an extensive comparison of regulatory approaches in EU member states and concludes with a nuanced analysis of alternative liability regimes for illegal third party content.

Edward Morris and *Sarah Clayton* discuss social media marks governance by drawing parallels to cyber-squatting at the turn of the millennium in the area of domain names. The authors recognize the problems involved in all contemporary internet service providers having to administer and manage Terms of Service as well as breaches and disputes separately and

uniquely. Due to the increasing number of cases and the lack of uniform rules the authors advocate for a centralized regulatory regime for social media marks and a mandatory dispute resolution policy for social media. Since social media marks are linked to similar technology of assignable accounts as domain names, social medial marks disputes could easily be incorporated into ICANN's Uniform Domain-Name Dispute Resolution Policy (UDRP).

Juha Vesala discusses unfair conditions imposed on content creators by powerful buyers as abuse of dominant position. He focuses on the licensing terms imposed by some popular content platforms like Apple's iTunes and Google News, leveraging their position on the market to force (unnecessarily broad) assignment of rights in exchange for access to the platform. While concerns are warranted and the effects may be harmful to consumer welfare, competition law offers only limited relief against unfair prices and terms in content licensing. Contemporary standards of competition law limit liability of content platforms to relatively extreme conditions, which are likely not to be commercially necessary for content distributors to employ. Nevertheless, disproportionate or unnecessary conditions that credibly threaten content creation and consumer welfare in the market concerned may warrant intervention to the extent that achievement of pro-competitive benefits could be reached by less restrictive means.

Katja Weckström discusses preliminary and interim injunctions against internet service providers to end copyright or trademark infringement on their respective services. She discusses injunctions against internet access providers and the interplay between national and EU law stemming from the E-Commerce Directive, Enforcement Directive and Copyright Directive. She argues that none of the directives support an interpretation that right holders are entitled to an injunction against intermediaries when there is proof that infringement occurs. Instead, the Enforcement Directive distinguishes between injunctions against infringers (Article 11) and injunctions against intermediaries (Article 9), where the latter requires careful scrutiny of the effects of the measure on the rights of the infringer, the intermediary and the right holder. She concludes that the legislator has placed a number of procedural safeguards in order to guide courts in decision-making and in tailoring the injunction to abide by standards of reasonableness and proportionality.

4 New Strategies and Techniques of Enforcement

Prof. Peter Yu discusses the combined effect of several global and national IP enforcement measures on US consumers, technology developers and small and mid-sized firms. From this point of view, Yu scrutinizes the content of the Anti-Counterfeiting Trade Agreement (ACTA) and Trans-Pacific Strategic Economic Partnership Agreement (TPP) and assesses the public interest costs and benefits of wording and policy underlying the agreements. Similarly, he assesses two national legislative proposals Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) and their potential effect, if implemented. All of the enforcement measures discussed

raise broader policy concerns than mere protection or non-protection of IP against counterfeiting or piracy. Yu concludes that policy in this area should be more carefully drafted, since the proposed measures seem to fail equally in protecting IP holders and civil liberties.

Prof. John Cross discusses remedies available for misappropriation of not positive, but negative secret information. A negative trade secret is information that suggests what *not* to do and naturally becomes valuable, if it is unknown to others in the industry. Trade secret protection is particularly problematic, when it comes to injunctions, since protection seizes at the moment that the information is no longer secret. Consequently, everyone is free to use the information at that point. Thus, enjoining a misappropriator permanently, when other companies are free to use the information, may become unreasonable. On the other hand, the misappropriator should not enjoy an economic advantage over others for having wrongfully broken trade secret protection. Negative trade secret protection seeks to remedy the harm of someone else using the information in question. However, it is difficult to tailor a remedy against something that the misappropriator is not doing. Injunctive relief, ordering the misappropriator to stop engaging in activity that it is not engaging in makes no sense, which renders injunctions unsuitable in these cases. Similarly, damages are problematic, since any measurable loss usually boils down to testing costs of the right holder. Assessing the damage from not doing something places strain on royalty calculations, however, this may be the only available remedy for protecting negative secret information.

Branislav Hazuha, Hsiao-Chien Liu and Toshihide Watabe have undertaken to measure consumer acceptance of a variety of technological protection measures in place to secure respect of copyright protection. This unique study shows that consumer attitudes differ greatly depending on the underlying social norm of acceptance of the protection measure in question which corresponds to a lesser or greater need of external incentives to achieve compliance. The results of the study show that the cost and efficiency of individual technological protection measures may vary and it identifies the factors which have major impact on the cost and efficiency of individual measures in relation to different types of copyrighted works (music and movies on pre-recorded media, broadcasted television programs and videogames for video consoles). This information is valuable for policy makers and copyright holders in designing new strategies and techniques for exercising and enforcing exclusive rights.

Anne-Mari Lummevuo discusses patent law hurdles to the protection of employee inventions in situations, where the invention is a product of global R & D and cross-border collaboration in a multinational company. Arising conflicts of law are not traditional conflicts of laws, where ultimately one law applies, but the company *must comply with all* conflicting or mutually exclusive national laws in order to secure global patent protection for the invention in relevant markets. Lummevuo highlights junctures at which national law may hinder effective transfer of entitlement from the inventor to the company, which in turn may harm the effective securing of protection of these inventions. Lummevuo also discusses the issue of compensation, which may place the company in an awkward position between legal obligations and equality of

employees from different countries that have different labor laws. Lummevuo offers insight into recognizing potential conflicts as well as examples to solutions that assure compliance, which ultimately secures protection of the fruits of the company's main endeavor.

Rosa Maria Ballardini, Pamela Lönnqvist, Perttu Virtanen, Nari Lee, Marcus Norrgård and Olli Pitkänen discuss the challenges of the “One-Size Fits All” European Patent System in the software context. The study investigates the tension between technology- neutrality and technology-specificity within the “inner limits” of patent protection, i.e. when applied to the question of acquisition of rights. Thus, the focus is on how the European Patent Organization tailors the European Patent Convention to the complex technological reality of software patenting. Ballardini et. al. found that EPO Boards factor the technology-specificity differently depending on the particular patentability requirement in question. While faced with the question of whether the invention satisfies the requirement of constituting patentable subject matter, EPO favored a technology-neutral approach, while technology-specificity was the norm, when assessing inventive step, person-skilled-in-the-art or disclosure requirements. Ballardini et. al conclude that technologically oriented concepts of patent law might be more adequate (than technology policy-driven principles or technology based standards in legislation) for taking into account the specific characteristics of different technologies.

We conclude with a brief disussion from the concluding panel on the three themes of the 4th Conference on Innovation and Communications Law. *Prof. Peter Mezei, Prof. John Cross and Prof. Adam Candeub* served as panelists that sought to identify recurring points of contention and reflection in the discussions and individual presentations at the conference.