BOOK REVIEW

INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW

Jan Rosen (ed.)

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This edited collection is a culmination of the 29th ATRIP Congress held in Stockholm from 24th-26th May 2010. The book analyses the intertwining of Intellectual Property (IP) values in the protection of human efforts and the creativeness of individuals as well as the enhancement of individual creativeness in a collective setting. Key aspects discussed, include:

- the importance of intellectual property rights (IPRs) for the development of the economy;
- the interests of the individual users and society at large together with the incentive provided by IPRs, for IPR holders, to create and invest in tangible assets ;
- the importance of striking a fair balance between the interests of individuals and the interests of exploiters of IPRs;
- the challenge which faces policy makers in ensuring IPRs keep abreast of technological developments as well as societal advancements; and ,
- the perennial question of how one may achieve and maintain an equitable balance amongst legal, technological and societal demands in granting IPRs.

The book commences with an exploration of the impact of the different forms of ownership (individual, multiple and collective) and its interface with intellectual property protection and competition law by Prof. Reto M. Hilty. The author ponders over the extent of the impact on competition if the rules of the different forms of 'ownership' of IP are modified, (while also discussing open source, open access and open innovation); and how the three regulations, aimed at limiting the freedom of certain market players, play a crucial role.

This is followed by an interesting chapter by Rudolp J. R. Pertiz which discusses the economic aspects of patent and copyright law, with particular reference to Willliam Lande's and Richard Posner's work *The Economic Structure of IP Law*[1]. The author directs us to the core question of IP policy: when does the private incentive of IP protection promote the public benefits of progress. Policy makers are pressed to make decisions yet the lack of analytical methodology can impede them from making rational decisions. The author then goes on to analyse Supreme Court decisions that reflect the view of patent law as favouring free competition (thereby signaling the re-emergence of the competition base-line for patent protection). He brings to our attention the demise of the traditional privilege to engage in unauthorised

[1] William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, 2003, Cambridge, Mass: Belknap Press of Harvard University Press.

experimental use of a patented invention and the resultant propertisation trend that has been expanding IP protection in the United States.

In chapter three, Ole-Andreas Rognstad discusses the aspects of individual rights that are being transformed into multiple rights as a consequence of the territorial nature of IPRs and the resultant impact on competition law. He suggests that this transformation acts as an impediment to cross border transactions, more so as a result of the competition law problems even in situations where the original owner herself holds the bundle of territorial rights. Discussion on the choice of law and the content of the internal IP rules seek to ascertain whether IPRs will entitle right holders to block cross-border transactions. New concerns in this regard include the online environment where the territorial scope of IPRs and the aspect of collectivisation of rights and the controversy therein regarding European collective management of music performance rights (copyright) in the digital age merit consideration. The territorial based clearance system whereby the national societies gave each other the right to grant authorisation for public performance of musical works within territories has been challenged at different levels by the European Commission.

Part II deals exclusively with patent law and its individual and collective nature, wherein Geertrui Van Overwalle talks extensively about the legitimacy of IP ownership over human genes and access to improving licence management structures. The author analyses the existing problems in gene patenting, in light of the two decisive Supreme Court decisions, *Bilski v. Kappos*[2] and *Association for Molecular Pathology v. USPTO, Southern District of New York*[3].

Individualism and collectiveness in copyright law is presented in light of individual copyright licensing contracts held by authors or performers by Silke von Lewinski in chapter five. The focal point for the chapter is whether or not collectivism can be used to strengthen the bargaining position of authors or performers in individual licensing contracts in order to obtain equitable remuneration for their work. The author examines individual contractual relationships, USA labour law and the German Copyright Contract Law (2002) as examples of the replacement of individual negotiations by collective action as potential solutions to the current situation. The EC Rental Directive is then explored in depth as the most promising avenue for readjusting the current unequally balanced bargaining power between authors or performers and publishers, producers or broadcasting organisations in the realm of copyrights.

The problems associated with copyright ownership and protection of the investment and collective management's probable solutions in tackling these are discussed in a lucid manner by Sylvie Nerisson. Analysing two German cases,[4] the danger of ignoring the Collective Management Society is highlighted. The author also critically analyses the consequences of the European Commission Recommendation (2005) on collective cross-border management of copyright and related rights for legitimate

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[2] 130 S. CT. 3218 (2010).

[3] 653 F. 3d 1329 (Fed. Circuit, 2011).

[4] German Supreme Court (BGH) 18 December 2008 – Case I ZR 23/06,GRUR Int. 2009, p. 616 and *Klingeltone fur Mobiltelefone II*, German Supreme Court (BGH), Case I ZR18/08, 11 March 2010, GRUR 2010p. 920, no. 29 et seq.

online music services, all of which culminates in a call for legislative intervention with regard to the collective management of copyrights.

The topic of orphan works, defined generally as copyright-protected works for which the owner cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner, and their regulation is, undoubtedly, a cause for growing concern, especially due to the inability to locate the owner in order to secure authorisation for use of the work. This issue is considered in detail in chapter seven by Steven A. Hetcher which includes an in-depth analysis and criticism of the Copyright's Office Report on orphan works. In doing so, Hetcher argues for a collectivist quest to the orphan works problem by putting significant limitations on remedies for infringement when users of orphan work first perform 'reasonably diligent searches' for the owners as an alternative solution to the orphan works problem as opposed to the solution initially sketched out by the parties in the Google Book Search litigation, wherein the 12 million books that Google has digitalised are orphan works, which, over a period of time, Google will develop monopoly over its access .

Jens Schovsbo addresses the very promising interface of collectivisation of copyright and the dangers (and benefits) thereof as well as the aspect of balancing the interests of the public and the authors, users or collecting societies.

The extremely controversial Google book Revised Proposed Settlement (RPS) and its policy implications are discussed by John Cross and Fredrik Willem Grosheide in chapter nine, wherein two divergent perspectives: of the USA and EU are addressed. The authors suggest that there are inherent limitations to both. The author concludes, and correctly so in my opinion, that as the RPS was drafted with the US authors predominately in mind and subsequently the European context has been left out in the cold.

Irene Coalboli investigates reconciling the theme of individualism and collectiveness with regard to the highly controversial topic of trademark merchandising in the context of its acceptance within the legal framework in the USA. Solutions in this regard are suggested by providing for a limited protection of merchandising rights, thereby leading to a reconciliation of the individualism and collectiveness in trademark merchandising in today's society. It would do so by carefully balancing the increasingly unavoidable recognition of individual merchandising rights while also limiting these rights in the interest of market competition and collectiveness in general, while asserting that this protection would not distort competition or negatively impact consumers.

The European Union and German laws in relation to collective trademarks and its competitive significance are dealt with by Alexander Peukert. The lines of a co-relation between the competitive impact of collective marks on the one hand, and on the other hand, additional requirements for and limits of protection in light of the ECJs L'Oreal decision are discussed.

Hong Xue explores the ever-growing internet in terms of global governance in Multinational Corporations (MNCs). Once again, the Google Book Project comes into the limelight (particularly, because it represents a case of business global governance based on the dominant position in the market) along with the ICANN's trademark protection measures. The author ambitiously explores whether the new multi-

stakeholder model would develop into a more balanced regime to address IP issues globally.

The interesting aspect of sports in merchandising and trademarks is covered by Katja Weckstrom. The author discusses and compares protection already accorded under trademark law for sports merchandising and goes on to analyse 'what more' protections could be granted, offering an interesting discussion of the Nairobi Treaty on the Protection of the Olympic Symbol, 1981. The author proposes a more nuanced approach to IP rights in sports, as well as a holistic test to be used in trademarks in accordance with honest practices in industrial and commercial matters wherein protection is justified from a moral, legal or economic standpoint to serve the public or private interest trademark-centric view, emphasis on unfair competition is advocated.

The last section of the book pertains to teaching and research in IP law, and the individual and collective aspects therein which unfolds over two chapters. Laura Carlson and Sanna Wolk in chapter 14 bring into the foray the idea of a 'virtual teacher,' and the IP matters from the perspective of the teacher as well as the University as the employer and the issues involved therein in the context of recording of a lecture are discussed. This leads to a controversy as a result of the conflicting interests between the teacher and the university (as an employer) thereby creating an intersection between individualism and collectiveness. Aspects involved in these circumstances of moral rights and employment law are discussed and analysed, with the Swedish labour and employment law kept in view. The academic freedom which should be attributed to e-learning is the crucial point mooted here, with advocacy for maintaining the copyright custom of seeking permission from the teacher for lectures recorded in this context. The authors press for a new approach to legally regulating the rights in the recording of lectures, so as to ensure that education and research at institutions of higher learning is accessible and leads to further development.

The concluding chapter deals with the copyright issues involved in the African education sector, especially in the context of the digital age, as digital technology poses new and peculiar challenges to the copyright owners. The author provides an informative piece on the discourse from the African perspective in Nigerian universities as well as a comparison with the Ghanaian copyright legislation.

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