## Contents

*Preface and acknowledgements*  xi
*Abbreviations*  xiii
*Table of cases*  xv
*Table of legal instruments*  xx

1. The idea of the moral dimensions of IPRs  1
   1.1 The riddle in the rules  1
   1.2 Key concepts  5
      1.2.1 Hare and universal prescriptivism  5
      1.2.2 Searle’s theory of the construction of social reality  6
      1.2.3 Searle and Hare combined  8
      1.2.4 The logical implications of universal prescriptivism  9
   1.3 A look ahead to the moral dimensions of IPRs  11
   1.4 The literature on the moral dimensions of IPRs  13
   1.5 A note on methodology  17
      1.5.1 Reflective equilibrium  17
      1.5.2 The IP laws  18
   1.6 The way forward  19

2. Moral terms, moral meaning and morality  21
   2.1 The key question  21
   2.2 A re-examination of Hare’s theory  22
      2.2.1 Meta-ethics’ problematic triangle  22
      2.2.2 A critique of *The Language of Morals* and *Freedom and Reason*  27
      2.2.3 A critique of *Moral Thinking*  30
   2.3 Taking prescriptivism seriously  36
      2.3.1 A fresh start for universal prescriptivism  36
      2.3.2 Fundamental prescriptivism and its procedure  37
   2.4 Fundamental prescriptions and equal freedom and well-being  39
      2.4.1 The first FP – The Principle of Rationality  39
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.2</td>
<td>The second FP – The Principle of Freedom</td>
</tr>
<tr>
<td>2.4.3</td>
<td>The third FP – The Principle of Personhood</td>
</tr>
<tr>
<td>2.4.4</td>
<td>The fourth FP – The Principle of Equality</td>
</tr>
<tr>
<td>2.4.5</td>
<td>The fifth FP – The Principle of Moral Transparency</td>
</tr>
<tr>
<td>2.4.6</td>
<td>The sixth FP – The Principle of Cooperation</td>
</tr>
<tr>
<td>2.4.7</td>
<td>The equal right to freedom and well-being</td>
</tr>
<tr>
<td>2.4.8</td>
<td>The reality of morality</td>
</tr>
<tr>
<td>2.5</td>
<td>Fundamental prescriptivism and other theories</td>
</tr>
<tr>
<td>2.5.1</td>
<td>Gewirth – A debt and some differences</td>
</tr>
<tr>
<td>2.5.2</td>
<td>The Kantian categorical imperative</td>
</tr>
<tr>
<td>2.5.3</td>
<td>Fundamental prescriptivism and human rights</td>
</tr>
<tr>
<td>2.6</td>
<td>The function of moral terms in IP laws</td>
</tr>
<tr>
<td>2.7</td>
<td>Moral theory and the moral dimensions of IPRs</td>
</tr>
<tr>
<td>3.1.1</td>
<td>Justification and the equal right to freedom and well-being</td>
</tr>
<tr>
<td>3.1.2</td>
<td>Other theories</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Nozick’s entitlement theory</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Nozick and Locke’s proviso</td>
</tr>
<tr>
<td>3.2.3</td>
<td>Rawls’ theory of justice and the equal right to freedom and well-being</td>
</tr>
<tr>
<td>3.2.4</td>
<td>Justice theory and the design of property rights</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Consequentialism and IP laws</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Consequentialism versus the equal right to freedom and well-being</td>
</tr>
<tr>
<td>3.3.3</td>
<td>Economics and the equal right to freedom and well-being</td>
</tr>
<tr>
<td>3.4.1</td>
<td>Desert, entitlement and Lockean justification</td>
</tr>
<tr>
<td>3.4.2</td>
<td>Critique of Locke’s theory of property</td>
</tr>
<tr>
<td>3.4.3</td>
<td>The Lockean proviso</td>
</tr>
<tr>
<td>3.5</td>
<td>Hegelian justifications of property</td>
</tr>
<tr>
<td>3.6</td>
<td>Freedom and well-being as the foundation for IPRs</td>
</tr>
</tbody>
</table>
3.6.1 Moral terms and the justification of IPRs 86
3.6.2 The nature of intellectual property 88
3.6.3 The relationship between IPRs and freedom and well-being 90
3.6.4 Freedom and well-being and the structure of IP rights 100
3.6.5 Protection of freedom and well-being and the public domain 102
3.7 Conclusions on justifying IPRs 103

4. The dimension of design: National systems 104
4.1 Justifying IPRs and the justice of IPRs 104
4.1.1 The rhetoric of ‘balance’ and its point 104
4.1.2 The function of moral terms 106
4.1.3 The object and structure of this chapter 109
4.2 Moral terms in the Law of Undisclosed Information 110
4.2.1 Undisclosed information protection and freedom and well-being 110
4.2.2 Unfair competition 114
4.2.3 Trade secrets protection 115
4.2.4 The common law breach of confidence action 116
4.2.5 Protecting privacy under the action for breach of confidence 122
4.2.6 Undisclosed information protection as an IPR 129
4.3 Moral terms in copyright laws 130
4.3.1 The moral ideas in the central rules of copyright 130
4.3.2 The idea–expression dichotomy 134
4.3.3 Originality and substantiality 138
4.3.4 Moral terms in copyright exceptions and limitations 144
4.4 Moral terms in patent laws 150
4.4.1 Patents and freedom and well-being 150
4.4.2 Moral concepts in patent laws 153
4.4.3 The ‘Oncomouse’ in the US and Canada 155
4.4.4 Patentable subject matter under the EPC and in the EU 161
4.4.5 The role of the other dimensions of patent systems 167
4.5 Moral terms in trade mark laws 168
4.5.1 Trade marks and freedom and well-being 168
4.5.2 Moral terms and concepts in trade mark laws 171
6.3.2 The recommendations of the moral dimensions of IPRs 239

6.4 A coda on realism and the moral dimensions of IPRs 240

7. The moral dimension of the exercise of IPRs 242

7.1 Morality and the dimension of exercise 242

7.2 Enjoyment, exploitation and enforcement of IPRs 242

7.2.1 Enjoyment of IPRs 242

7.2.2 Exploitation of IPRs 243

7.2.3 Enforcement of IPRs 252

7.3 Legal expressions of the moral dimension of exercise 253

7.3.1 Legal underpinnings of the moral dimension of exercise 253

7.3.2 Common law resources 254

7.3.3 Competition and antitrust law resources 256

7.3.4 Resources under legal rules for enforcement 259

7.3.5 Compulsory licensing 260

7.4 Technological measures and the moral dimensions of IPRs 261

7.4.1 Technological measures and the moral justification of IPRs 261

7.4.2 TMs and the moral dimensions of IPRs 263

7.5 Conclusions on the moral dimensions of exercise 264

8. The moral dimension of reform of IPRs 265

8.1 Reform and the moral dimensions of IPRs 265

8.2 Judicial avenues for reform 267

8.2.1 Internal resources of the IPR systems 267

8.2.2 Resources in national constitutional and human rights laws 267

8.3 Reform in the administrative and political fora 272

8.3.1 Various administrative loci for reform 272

8.3.2 Legislative routes to reform and the role of morality in politics 274

8.4 The case of patents and medicines 275

9. Conclusions on the moral dimensions of IPRs 283

9.1 The moral dimensions redux 283

9.1.1 Answering the riddles in the rules 283

9.1.2 The force of the moral dimensions of IPRs 284

9.1.3 Implications for the participation right and public domain 286
9.1.4 The vulnerabilities of the moral dimensions
9.2 The future of IPRs – towards rights in the public domain?
9.3 A parting word

Bibliography
Index