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
v
The moral dimensions of intellectual property rights

2.4.2 The second FP – The Principle of Freedom 40
2.4.3 The third FP – The Principle of Personhood 41
2.4.4 The fourth FP – The Principle of Equality 41
2.4.5 The fifth FP – The Principle of Moral Transparency 42
2.4.6 The sixth FP – The Principle of Cooperation 43
2.4.7 The equal right to freedom and well-being 44
2.4.8 The reality of morality 45
2.5 Fundamental prescriptivism and other theories 50
   2.5.1 Gewirth – A debt and some differences 50
   2.5.2 The Kantian categorical imperative 53
   2.5.3 Fundamental prescriptivism and human rights 56
2.6 The function of moral terms in IP laws 58
2.7 Moral theory and the moral dimensions of IPRs 61

3. The moral dimension of justification 62
   3.1 Justificatory theories and justice 62
      3.1.1 Justification and the equal right to freedom and well-being 62
      3.1.2 Other theories 63
   3.2 Theories of justice and the justification of intellectual property 64
      3.2.1 Nozick’s entitlement theory 64
      3.2.2 Nozick and Locke’s proviso 67
      3.2.3 Rawls’ theory of justice and the equal right to freedom and well-being 69
      3.2.4 Justice theory and the design of property rights 73
   3.3 Consequentialist arguments for IPRs and freedom and well-being 76
      3.3.1 Consequentialism and IP laws 76
      3.3.2 Consequentialism versus the equal right to freedom and well-being 78
      3.3.3 Economics and the equal right to freedom and well-being 79
   3.4 Lockean theories and the equal right to freedom and well-being 80
      3.4.1 Desert, entitlement and Lockean justification 80
      3.4.2 Critique of Locke’s theory of property 81
      3.4.3 The Lockean proviso 83
   3.5 Hegelian justifications of property 85
   3.6 Freedom and well-being as the foundation for IPRs 86
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
viii

The moral dimensions of intellectual property rights

4.5.3 Trademarks as objects .......................... 176
4.5.4 Moral terms and the protection against trade
mark dilution ........................................ 180
4.6 Personhood and alienability and moral rights 184
4.6.1 Alienability and liberty ......................... 184
4.6.2 Moral rights .................................. 185
4.7 Public policy and morality and the ordre public
restrictions .......................................... 186
4.7.1 Public policy and the equal right to freedom and
well-being ......................................... 186
4.7.2 The EPC’s ordre public and morality restriction 189
4.7.3 The EU ‘Biotech Directive’ .................... 195
4.7.4 Freedom and well-being and ordre public and
morality ........................................... 201
4.8 The moral dimensions and protection of the public
domain .............................................. 209
4.8.1 Rights to a public domain ..................... 209
4.8.2 Legal protection for the public domain ...... 213

5. International IP laws and the moral dimension of design 216
5.1 International IP laws and the design of IPRs 216
5.2 Realpolitik and morality in the making of globalized
IP laws ............................................. 217
5.3 The moral terms in TRIPS ......................... 220
5.3.1 Moral terminology in the TRIPS Agreement 220
5.3.2 The ‘three-step test’ ........................ 223
5.3.3 United States – Section 110(5) of the US
Copyright Act .................................. 223
5.3.4 An alternative reading of the ‘three-step test’ 227
5.4 TRIPS-Plus .................................... 229

6. The moral dimensions of law: Interpretation and aims 230
6.1 The moral dimensions of law .................... 230
6.2 Moral meanings and legal interpretation .......... 231
6.2.1 Intentions and moral terms .................. 231
6.2.2 Legal meanings and morality in legal
interpretation .................................... 232
6.2.3 Moral theory and the interpretation of IP laws 235
6.3 The moral dimensions of law and the design of IPRs 236
6.3.1 Legal theory and the design of IPRs ......... 236
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
x

The moral dimensions of intellectual property rights

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