Introduction

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As part of the maxim *Lex specialis derogat legi generali*, the rule of *lex specialis* typically serves as an interpretative canon to determine which of two competing norms should govern.¹ Even within this narrow rubric, consideration of the maxim throws up some difficult questions: most fundamentally, what is the scope of this thing called ‘intellectual property law’ that constitutes a *lex specialis*, and which is the body of general law against which possible displacement by special rules is to be considered? As to the former, the vintage of the term ‘intellectual property’ has been the subject of some scholarly exploration.² At the international level, it might be thought to represent some amalgam of ‘industrial property’ (patents, designs and marks) dealt with by the Paris Convention and ‘literary and artistic property’ addressed by the Berne Convention.³ But that undoubtedly is too simple an explanation. Even with a definition of ‘intellectual property’ now contained in the TRIPS Agreement, there remains debate about the borders of the concept, let alone its essence.⁴ Thus, the narrow task of applying the maxim *lex specialis derogat legi generali* to such matters as copyright, patent, trade mark and their allied

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regimes (to pick a non-definitional phrase) would present plenty of opportunities for disagreement.

In this volume, the *lex specialis* label is used even more broadly, however, to connect a whole series of possible questions, including at the most abstract level: what is the relationship between intellectual property law and general legal principles? But this broader inquiry inevitably mimics some of the questions that would be at the heart of the narrower interpretative task. Most basically, to what extent are intellectual property laws exceptional? There is tendency – perhaps found in any area where a community of scholars and legal practitioners specialise – to think that what we do is special, advanced and not accessible to those not part of the specialist community. But when intellectual property comes to assume as prominent a social and economic role as it now does on a worldwide basis, it is especially important to question the costs and benefits of treating it apart from general principles of law.

Thus, several authors in this volume consider the extent to which intellectual property laws displace or conflict with generally applicable legal rules. This inquiry has perhaps been most developed in the private law sphere and that is reflected in the book. Giuseppina D’Agostino, Charles R. McManis and Brett Garrison, and Caroline Ncube each consider (in different ways) the interaction of intellectual property (especially copyright) law with principles of contract law. Branislav Hazucha, Hsiao-Chien Liu and Toshihide Watabe do the same as regards consumer protection principles in Japan.

Underlying much of the discussion in these chapters is a debate about the normative force of intellectual property principles, and the extent to which those norms should be impervious to alteration by market actors. That too is a tension underlying the contribution by Begoña Otero.

The centrality of intellectual property to contemporary society also brings it potentially into conflict with public law commitments, and such conflicts are addressed as part of a broader analysis by Gustavo Ghidini. The same is true of procedural law. Is it appropriate that disputes about intellectual property are increasingly adjudicated by specialist courts and judges, and how does it alter the development and interpretation of intellectual property law? In the US Supreme Court *Myriad* case, Justice Antonin Scalia joined the judgment of the Court, ‘except,’ he wrote, ‘[the portions] going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief.’

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wonders what this means for the rational development of patent law, or indeed for the standing of judicial decisions generally? Kimberlee Weatherall and Torsten Bjørn Larsen explore such adjectival and enforcement issues, areas where nation states have traditionally assumed greater sovereignty. If some convergence or harmonisation of such traditionally local principles is required or appropriate, is that easier if confined to matters of intellectual property law, rather than essayed with respect to procedure or enforcement generally?6

Exploring the purported exceptionalism of intellectual property sometimes provokes insights about the essence of intellectual property, or the need to revisit a precept that was thought to help define intellectual property (and perhaps set it apart). This lies at the heart, in particular, of the chapters by Severine Dusollier, Irene Calboli, and Abbe Brown and Charlotte Waelde.

Finally, in addition to helping us to look inward as intellectual property scholars, examining the interaction between intellectual property law and other bodies of law and critically assessing the exceptional nature of our regime allows us to look outwards and ask whether exceptionalism sacrifices law generally, learning the potential lessons of intellectual property law. Does its purportedly special nature preclude intellectual property law from contributing as fully as it might to the development of general legal principles, which may of course reinforce that suggestion that this is a narrow field, known only to, and requiring, specialists?

The question at the heart of this volume is thus a conduit for a number of different inquiries. They address the essence of intellectual property law, the role of intellectual property within broader legal institutions, and hopefully invite an engagement by legal scholars generally with a field of law that – for all its purported exceptionalism – is too significant socially and commercially to be considered only by specialists.

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6 Cf. TRIPS Agreement, art. 41(5) (‘this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.’).