A nouvelle vague? Author’s brief foreword

The need to incorporate the numerous and significant developments in legislation, case law and scholarly opinion at national and international level was an important factor in writing a much expanded edition of this work. However, it was not the primary motivation.

Above all, there was a desire to explore new perspectives on intellectual property and proposals for reform that have come to the fore in the past few years. Interpretative and legislative approaches, even at international level, which Jerome H. Reichman has defined as ‘over-protectionist’, no longer seem to be as dominant as they traditionally have been. Those earlier approaches, with cultural roots that can be traced back to Joseph Schumpeter, expressed an era and models of industrial development characterised by large capital-intensive investments that seemingly justified the call for strong patents and more generally for intellectual property rights with broad excluding powers. By contrast, today, boosted by the expansion of the knowledge economy, there is a growing worldwide desire to strike a new balance in the paradigms of intellectual property rights in a direction away from the strong and blanket exclusionary models that have traditionally held sway.

This rebalancing is not only advocated for trade with the developing world and especially with the least developed countries but now across the board. It is a way of advancing – through both interpretation and reform of positive law – the interests of individuals and groups other than the protagonists (intellectual property rights (IPR) holders and challengers/competitors) directly involved in the creation of intangible assets. These individuals and groups were previously relegated to the position of having to passively bear the effects of the application of the law. Now these interests are increasingly being recognised as of constitutional rank. They are the new ‘stakeholders’ whose protection deserves at least equal status to that afforded to the holders of intellectual property rights. I am referring to consumers and users of tangible goods, information and culture, as well as researchers and scholars involved in processes of cultural innovation. Furthermore, I am also referring to the interests of the citizens’ community as such in the development of innovation and the dissemination of information in a structurally competitive market that does not foster but actually reduces the opportunity for rent-seeking situations.

The heart of this nouvelle vague, which is spreading from the academic
world towards important social, economic and even institutional actors, such as the World Intellectual Property Organization (WIPO), is not primarily ‘legal’, although it aims at reshaping the normative framework. Indeed, the dynamics of economic competition and the innovation of the current industrial revolution (especially in the information technology, biotechnology and nanotechnology sectors) combine – in synergy with the speed of communication processes – to demand and foster new patterns of production and distribution. The progressive erosion of profit margins caused by the intensification of the competitive dialectic, by broader and more stringent business regulation, the ever increasing interdependence between technologies, systems and even research and production patterns, the role that ‘soft’ assumes in the knowledge economy compared to ‘hard’, are all factors that prefigure the expansion of horizons characterised by network effects and connections, forms of cooperation among competitors (‘co-opetition’) and even open innovation processes. And it seems reasonable to agree with the diffuse forecast that even the present global economic crisis will push towards more cooperation and interdependence, hence accelerating and strengthening those new dynamics.

These, then, promise to be the new research, production and distribution horizons of the fruits of human ingenuity and creativity, in connection with which processes of development and the circulation of the ‘new’ are no longer fostered but actually hindered by the traditional all-exclusionary effect of intellectual property rights in various industries marked by modern innovation. And the more so the further the technological frontier moves forward. To take just one example: software standards that are required for the direct dissemination and exchange of data via the Internet are – were born: functionally – more open than those designed for the personal computer.

This, therefore, is the greatest novelty, which in order to be grasped by the jurist in a timely way requires inter alia that the usual sources of documentation be supplemented by the ‘live’ expressions of economic and technical information, in line with an approach that from Levin Goldschmidt onwards has been kept alive by many a master of commercial law.

Of course, what I am describing is too recent a development (still clouded by uncertainty and contradictions, as well as the focus of harsh criticism) to predict that it will gain hegemony. History teaches that the emergence of new legal models corresponding to new phases of technological and economic development does not supplant previous models if the conditions that gave rise to those earlier models continue to exist in other areas of economic activity. However, the ongoing expansion of those new horizons is no longer an expression of wishful thinking by isolated academics, and it reinforces the tendency to read the rules through the lens of a more pronounced opening up to values/principles of free competition and the widespread dissemination of culture and information and the promotion of research and creativity. These
principles were those that founded and still underpin – resisting many attempts to chip away at them – the intellectual property system fashioned by the revolutions at the end of the 18th century. This system views exclusive rights as an exception compared to the fundamental freedom to know and do: in short, like islands in a sea of freedom.

The foregoing thoughts, together with more in-depth analysis of some issues and welcome comments and criticism) within the framework of a method that gives more weight to systemic consistence than to the (never decisive) ‘will of the legislator’. Altogether arguments enunciated in Intellectual Property and Competition Law (and elsewhere), offer suggestions for legislative reform as well as new interpretative proposals, for example regarding the impact of the TRIPs Agreement on North/South trading relations, compulsory and voluntary licences for patents, protection of secrets, shape marks, de facto trademarks, cumulation between patent and copyright protection, technological protection measures for data and works that are disseminated electronically, the scope of freedom to access and share copyrighted works, the relationship between the protection of exclusivity and competition rules (antitrust and unfair competition), and so on.

The suggestions which are offered to the reader aim, in the final analysis, to contrast that widespread interpretive inversion and associated social perception of intellectual property portraying exclusive rights as ends in themselves rather than as a means to promote ‘the progress of science and useful arts’, thereby expanding the size of the above-mentioned islands to the point where the surrounding sea becomes an interstitial channel.

I believe that it is possible as well as right to combat that approach also on the plane of positive law. What is required is that the jurist uses as her/his compass loyalty to the principles that embody the spirit of modern democratic legal systems: which is the spirit of freedom.

G.G.