Intellectual property law: economic and social justice perspectives: introduction

Anne Flanagan and Maria Lillà Montagnani

Intellectual property (IP) is deemed grounded in economics incentives and societal balancing of rights to fruits of one’s own labour, personality and good name with others’ interests in knowledge, progress and their by-products. Such foundations have underpinned the granting of patents, trademarks and copyrights (as well as the development of trade secret and industrial design laws) for centuries. Yet the recognition that intellectual property in the form of literature, science, knowledge and its fair dissemination and access to knowledge has a broader role to play in the development of all individuals as well as the fabric of society and democracy is not novel, although some would label it ‘neo-liberal’. This is made clear by the declaration on the role of law in this regard and the duty of policymakers to foster it made by John Adams, then future president, during a time when the United States of America could legitimately be called a developing country. Contained in the first Massachusetts’s state constitution of 1780, entitled ‘Encouragement of Literature, etc.’ this unique and then radical constitutional provision states:¹

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; . . . public schools, and grammar-schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures,

¹ David McCullough, John Adams (Simon & Schuster, 2001), pp. 222–3. (Noting this provision to be ‘like no other declaration to be found in any constitution ever written until then, or since’.)

x
and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.\(^2\)

Despite the broader potential envisioned thus, in the context of more recent IP developments it is the incentive and societal trade-off between exclusivity and accessibility that generally remain the rationales under which IP scholars seek to explain and to ground the changes occurring in IP laws at both international and national levels.\(^3\) This also serves to place the current reinforcement of intellectual property rights (IPRs) in terms of length, scope and strength\(^4\) within a well-known framework and one that is deemed to be still capable of supporting the current IP system. Indeed, even when confronting the much-debated overgrowth of IP protection – and the consequent disequilibria that the current IP system reveals – many still advocate the solution to rest merely in restriking somewhat the balance between the individual private and the public interests.\(^5\)

Not properly questioning the utilitarian approach and its incentives-to-innovate rationale – but rather taking them for granted – results in the failure to account adequately for the increasing importance of IP to situations and persons beyond the customary and historical, and that IP implications extend far beyond maximizing cultural and scientific progress. As Madhavi Sunder has astutely noted: '[p]roperty rights today balance myriad values, from efficiency to personhood, health, dignity, and distributive justice,'\(^6\) values that are not yet comprised, though, within IP which is, by contrast, still underpinned on market efficiency and welfare

---


\(^4\) Among the broad literature of those advocating the overgrowth of IP law see Lucie M C R Guibault, P Bernt Hugenholtz (eds), The Future of Public Domain (Kluwer, 2006).

\(^5\) For a different interpretation of the balance between the private and public interest see Abraham Drassinower, ‘From distribution to dialogue: remarks on the concept of balance in copyright law’, 34 Journal of Corporation Law (2009) 991 (arguing that copyright should be thought less as a balance between authors and users and more as a ‘dialogue’ between them since the concept of balance is not adequate to overcome the sweat of the brown theory). Also available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474374.

maximization. At the moment ‘there are not “giant-sized” intellectual property theories capable of accommodating the full range of human values implicit in intellectual production’. 

This analysis holds true as well when we look at the debate revolving around the ‘balance’ between intellectual property and public domains. A law and economics approach would justify the public domain and advocate the ‘tragedy of the anti-commons’ through the lens of efficiency. Information as commons deserves protection against propertization because the public domain is considered a key element of an efficient economic growth: a deposit of raw material for authors and inventors to make use of in order to create and invent. The balance here is customarily considered the key as impoverishing the public domain in favour of stronger IPRs limits innovation and creativity; weakening IPRs in favour of an empowered public domain prevents them from working as efficient incentives. This binary choice between IP and public domain, which has been central over the last few decades, still relies on the economics incentives and the societal trade-off between exclusivity and accessibility. But again, this approach neglects the distributive consequences of the commons. It has been observed that ‘leaving a resource in the public domain is not enough to satisfy societal ideals. It matters how that public domain is to be structured’. The failure to focus beyond the original dimension prevents the possible perspective that IP’s pervasiveness has grown to the extent of exposing the fragility of its economics foundations and of amplifying its social and cultural impacts, perhaps synergistically given the layering and overlapping of various forms of IPRs and their means of deployment beyond mere protective defenses to encroachments.

7 While the reality of what IP law has achieved may not reflect this ‘myriad’ of values.
8 Sunder, supra note 6 at 260.
12 Chander and Sunder, supra note 11 at 1337.
13 This does not intend to suggest that there have been no significant efforts in this regard, see, Pamela Samuelson, ‘Mapping the digital public domain: threats and opportunities’, 66, Law & Contemporary Problems (Winter/Spring 2003) 147 but rather that this is not as comprehensive or pervasive as it needs to be.
14 Sunder, supra note 6 at 260.
Criticism of the utilitarian foundation for IP also lies in the fact that the law and economics perspective of incentivizing innovation and creativity in order to maximize cultural production – though still central to the IP discourse – overlooks discussion of the true impact of cultural production maximization, on the one hand, and changes that are taking place within society and communities, on the other. A realistic consequence of this is that the utilitarian and law and economics’ vision of IPRs will overlook the IP social dimension, situating the choices for IPRs solely in the realm of individual right holders’ decision-making and control. Without purposive examination and full consideration of such issues, we might well find ourselves further down a track of greater imbalance between public and private interests almost by autopilot. As was recently observed, ‘Until 1990, there was a system of open access to knowledge but “we have moved in a completely opposite direction and there is no answer why we have moved away.”’

Therefore, consideration must be given not only to the economic-oriented incentive dimension of IP laws, but also to the regulatory dimension in terms of social goals that can be achieved through their construction. This approach is essential, if not the only one that can be employed to this end as several chapters here consider, if IPRs are truly to be granted for the ultimate goal of welfare maximization. Without regulating distributive justice issues through IPRs themselves that will share resources among creators and users, and among generations, it is questionable whether this ultimate goal will be met. Put it in another more radical way, the current IP system has been condemned for ignoring ‘matters of inegalitarian distribution of benefits arising from IP rights between persons within a nation, 

---

16 Shuba Ghosh, ‘When property is something else: understanding intellectual property through the lens of regulatory justice’, in Alex Gossiers, Alain Marciano and Alain Strowel (eds), Intellectual Property and Theories of Justice (Palgrave Macmillan, New York 2008) 106, 114 (arguing that IP can better be understood as systems of laws meant to define and regulate creative activity instead of a set of property rights).
between various nations, and between different regions and areas of the
globe. Enhancing the regulatory dimension (as well as the normative
effects) of IP laws would thus bring right into the policy picture those goals
that have been so far kept outside. It would morph IPRs from sources of
exclusivity to means for any number of social ends, such as combating
disease or providing access to educational content, or to the technology
needed to build capacity to address such issues as global warming.

Some of these features of the IP discourse are those that underpin the
topics discussed in this book. Without neglecting the importance of the
utilitarian approach and the law and economics perspective as a means
to shape IPRs as tools of market efficiency, the social dimension of IP is
analysed in different areas: from the traditional IPRs, such as patents and
copyright to less traditionally IP contexts, such as unfair competition and
unfair commercial practices.

Ramello in Chapter 1 posits that, as far as knowledge is concerned,
the law and economics theory does not give due weight to the complex-
ity of knowledge production, thereby distorting the meaning of maxi-
mizing cultural production. Rather, he considers that a social justice
approach can simultaneously produce IP-enhancing distributive effects
and realize market efficiency with the precondition being a lower level
of IP protection. This outcome is obtained given the nature of knowl-
edge as simultaneously an input, output and productive technology and
the specificity of its productive process, which belongs to the collective
context and is renewed through the sharing among individuals as an
indispensable feature for creative activity. In other words, it is not only
a matter, as the utilitarian approach would maintain, of maximizing
production regardless of the distributive effects that such maximization
generates.

That changes taking place at the level of society and in online and other
communities may be best addressed by other than the current balance

19 Keith Aoki, ‘Distributive and syncretic motives in intellectual property law
(with special reference to coercion, agency, and development) markets’, 40, U.C.
Davis Law Review (2007) 717, 735 (examining the distributive effects of American
and international property regimes). See also Margaret Chon, ‘Intellectual prop-
(proposing a normative principle of global intellectual property beyond utilitarian
measures of social welfare, to face challenges derived from the encounter between
intellectual property and development).

20 See, K Mara, ‘Informal UN Climate Talks Indicate Continued Divergence
On IP Issues’ (IP Watch 28 August 2009); William New ‘UN Climate Report
Envisions Modified TRIPS As Governments Seek Progress (IP Watch 1 September
2009).
between the private and public interest is also tackled here. As illustrated by Morando in Chapter 2, the impact of the Web 2.0 revolution changes the economics and status of authorship, calling into question the effectiveness and efficiency of the current copyright defaults. He shows that alternative copyright regimes premised on Creative Commons licenses could efficiently accord sufficient protections without undermining fairness or distributive social justice.

Sandeen in Chapter 3 questions why the utilitarian approach and its incentives-to-innovate rationale is so ingrained and narrow, given the other motivations to create that have always existed. She suggests that these ‘irrational’ values beyond efficiency could be promoted by IP policies to promote innovation for the benefit of society.

The increasingly stronger appropriation regime of intellectual property law affects the spread of knowledge to the detriment of not only efficiency, but also societal justice, which can be defined in various ways as shown herein. Definitions adopted include not only the fair societal-level distributive access to knowledge and products of knowledge, such as drugs or biomedical procedures,\(^{21}\) or the more restrictive concept of the means by which a society distributes burdens and benefits,\(^{22}\) but also the ability of a society to redress situational inequities in the balance of IPR exercised to the detriment of others, or flying in the face of the policy justifications underlying the grant of the IPR.\(^{23}\) The book addresses such phenomena in relation to patent and copyright law, which though indeed tools to incentivize innovation and creativity – and to reward inventors and creators for such activities – might now be addressed to other social ends.

Koopman in Chapter 4 considers how changes to disclosure requirements in patent could redress some inequities in the exploitation of traditional knowledge and bio-chemical materials and at the same time enable examiners to more readily ascertain the novelty and innovation so as to avoid undue propertization, which could undermine distributive justice and as well help to conserve traditional knowledge and biodiversity.

These authors have focused on how societal and distributive justice considerations can be addressed primarily in the context of existing or tweaked IP legal frameworks. Other authors, however, focus on how the current balance of interests under IP law can be changed by considerations of fairness or justice via the operation of legal frameworks external to IP

\(^{21}\) See Castro Bernieri, infra at Chapter 5.
\(^{22}\) See Koopman, infra at Chapter 4, note 5 and accompanying text.
\(^{23}\) See Flanagan, et al. infra at Chapter 6, Section 2.1.
law itself, such as antitrust/competition law and equity. Castro Bernieri in Chapter 5 explores how the recent intervention of the US Supreme Court in the test for whether a defendant may be enjoined from practicing a patent while the outcome of a patent case is determined has reset a balance in the principles of equitable relief, that is, injunction, which may serve to redress a growing offensive use of patents to preclude innovation and competition. She considers the impact that this rebalancing will have in the context of biomedicine, where offensive use of patents as a strategy can preclude whole lines of research and thereby create a biomedical ‘anti-commons’. While the significance in this important area of innovation may be therefore singular, the use of this equitable remedy, although recognized under the Patent Act (and thus technically an internal tool), was prevalent in most patent case appeals under the Federal Circuit’s exclusive jurisdiction due to its limitations on its availability. With this Supreme Court decision, injunctions will continue as a potential interim remedy to patent cases only where the traditional tests developed by courts at equity are met and the balance of the equities lie in its favour. Thus, substantive justice may ultimately be possible on the ultimate issues in many more cases since competitors will not be forced out of business if they are able to continue to practice their innovations where monetary damages will suffice to make the complainant whole.

The principles of equity, whether premised on historical notions of fairness, redressing balances or restoring situational justice according to the values of a society as determined to have been set in the original IP bargain, are also considered by Flanagan, Ghezzi and Montagnani in Chapter 6. They explore IP misuse doctrines in the US premised alternatively on equity and antitrust law in evaluating whether parallels may be found in the EU, under competition law or possibly its abuse of rights doctrine. Although US IP misuse can be considered an internal tool of IP, since after its untethering from equity it looks to the policy underpinning the grant of the IP right in question, it retains features of equity, including the great discretion of the courts in when to apply it. Abuse of rights in the EU, while very similar in its application, has other doctrinal limitations. As these are likely to address only the occasional IP over-appropriation in specific cases, the normative effect of these legal frameworks in their interaction with IP is to be questioned. In contrast, while the relationship between competition law and IP remains much debated, the former serves

---

24 Morando’s proposals involving Creative Commons licenses clearly encompasses not only copyright frameworks but contract law that would enforce these licenses.
as a broader external tool to compensate for the latter’s disequilibria and supports a balance between public and private interests, including by regulating the exploitation of IPRs beyond their grant by monopolists or dominant firms.

Chapter 7 by Frabboni continues this exploration of competition law as an external tool shaping IPRs to achieve distributive justice, here in the context of the collective exercise of IP rights, a unique and ironic convergence of issues. Using an economics approach, Frabboni evaluates the impact of an EU Commission competition law decision on collection societies in striking down their mutually reciprocal exclusivity clauses in light of online music distribution. The analysis highlights the ease with which an imbalance can be created within, or by accommodations made within, the IP framework itself where such changes as new forms of works or distribution channels providing access to works arise to tip the scales, suggesting that perhaps the IP framework alone cannot be left to discover the proper social dimension. Collection societies are historical structures created to facilitate fairness, equitable counterbalance and distributive justice in order to address the plight of the individual author versus powerful publishers and which still might be viewed as economically efficient. Now, however, as powerful national monopolies, their operations and arrangements are perceived to hinder the facile cross-border distribution of works online. As Frabboni notes, the Commission here uses competition law not to require actual competition among these societies, but to alter their practices impeding such online distribution, thus furthering a form of greater access to creative works. The use of competition law to further the EU information society goals of social and economic inclusion has underlined other Commission competition law decisions.25

Maggiolino in Chapter 8 continues the exploration of competition law as an external compensation in balance of the structure and exercise of IP rights by dominant firms to protect innovations, and analyses recent EU decisions imposing a duty to license, which arguably changes the scope of their national IPRs. She posits that fairness, equity and the protection of rivals’ welfare, which might be labelled ‘social justice’ considerations, are no longer the stated guiding principles or objectives under EU or US modern competition law, if they ever were. Rather, it is only allocative efficiency that requires the deterrence of behaviour that harms innovation

---

25 See, e.g., Case No Comp/M.1845 AOL./Time Warner (2000); Case No. Comp/M.174 MCI orldcom/Sprint (2000) Identrus. Whether competition law should address such broad social policy dimensions is considered by Maggiolino, infra at Chapter 8.
promoting economic progress, wealth building and long-run consumer welfare. This chapter explores how recent EU Microsoft and other cases have, based on efficiency considerations, resulted in protection for rivals by ensuring their incremental follow-on innovation, and questions whether adding the social dimension to competition law is advisable. One of the noted reasons for the query is that the EU has sought to ensure broad-based consumer protection in another specific legal framework directed solely to that, the focus of the discussion in Chapter 9 by Ghidini and Falce. The Commission’s stated aims for the Consumers Rights Directive, as it is called, are clearly those of economic efficiency, competitive marketplace and consumer welfare, and must be seen as having an overlap with the aims of competition law. According to the Commission, the Directive ‘ensures a high level of consumer protection and aims at establishing the real retail internal market, making it easier and less costly for traders to sell cross border and providing consumers with a larger choice and competitive prices.’

This blurring of the lines here and as examined in some of the other chapters only reinforces the likely impossibility and possible undesirability of ringfencing any one body of law from the fuzzier and difficult challenges of setting the balances and benefits in any society to make it fair and just. The social justice issues are not going to go away. We are in a world where accelerating knowledge, innovation and technology with life and societal transfiguring potentials only serve to enhance the divide between the haves and the have-nots; the IP legal framework, therefore, will have to continue to, and better, address this growing imbalance. And also, while the uneasy and yet imprecise relationships between IP and other frameworks acting as external tools to compensate the former’s disequilibria indicate a need to rethink the role of IP laws as a set of rules that goes beyond individual incentives to produce, it is unlikely that the work of meeting the growing calls for greater and fairer access to knowledge and products of knowledge can be left to IP legal frameworks alone. Indeed, such recent developments as emergent human rights’ theory and law suggest that legal frameworks external to IP law will continue to develop and as applied exert an important counterbalance to perceived imbalances set by IP laws between the private and societal interests. The chapters of this book thus continue a dialogue that appears to have begun long ago.