Editorial

Since the second half of the twentieth century, the unrelenting development of new technologies and forms of communication, and the related emergence of new models of production and diffusion of innovation and creativity, have boosted and accelerated, at global, regional and national levels, an unprecedented process of 'fragmentation' of IP's normative framework.

We see evidence of this fragmentation in the multiplication and internal diversification of fundamental categories (just think of the variety of patent, or patent-like models, for protecting technological innovation, or the array of neighbouring rights regimes within copyright law; see also the essay by Johanna Gibson, dealing with the evolving internal complexity of geographical indications) and the 'hybridization' and increasing overlaps among the basic IP paradigms (see the discussion of the multi-layered protection of industrial design by Jens Schovsbo and Thomas Riis), to antitrust's 'interference' in the exercise of (as well as the entitlement to) IPRs. We are confronted by an uncoordinated regulatory *déluge* of rules, principles, precepts and doctrines from domestic, regional and international sources. This fragmentation and flood perhaps suggests that legislatures have failed in their duty to create property rights with certain boundaries, placing an increasing burden on regulatory agencies, especially competition law authorities.

Understanding how the pieces of this puzzle fit together seems all the more a mission impossible given an encompassing broader economic and juridical-political framework heavily characterized by accelerated, increasingly industry-specific legislative actions, despite our relatively poor knowledge of the social and economic effects of these actions. Moreover, these actions or interventions are often based on a short-term (often *ad hoc*) perspective, even though intellectual property systems have a long-term operation once they are established. The struggle with the long-term consequences of this short-term interventionism is largely left to competition law regulators and courts, which have to apply adaptive tools such as the essential facilities doctrine (see the essay by Colangelo and Pardolesi).

Understandably, this overcrowded, almost *labyrintisch* scenario has encouraged many scholars to search for a safe harbour in the form of a strongly 'specialized' line of research (and teaching). This often produces technically sophisticated analyses, but it also often results in the regimes within the paradigm of IP becoming isolated – not just one from the other (hence frequently in reciprocal contradiction), but also from the over-arching regulatory and jurisprudential framework (including the constitutional level) that disciplines the conflicts of interest and values underlying the exercise of intellectual property rights. In short, we face a significant deficit of analysis that adopts a holistic and systemic sensibility.

Moreover, as experience confirms, this cultural lapse of holistic analysis often ends in a tendency to overprotect. And we unfortunately owe to the European Court of Justice itself the last (so far) expression of such an over-protectionist approach: the theory of 'investment function', a systemic nonsense emanating from trade mark law that risks poisoning the whole field of IP law. Throughout IP law the mere act of 'investment' has never been a *legal* constituent, either as object or postulate or condition of the protection afforded. If investment becomes a *Grundnorm* of intellectual property protection – a construction that neither Di Cataldo nor Vivant support in their essays – we will have moved a long way from the traditional justifications for intellectual property. No: *investissement vaut titre* has no right of citizenship in the territory of IP law.

For all the reasons just mentioned, our cultural commitment to IP law analysis (and related reform proposals) takes the form of a search for *normative solutions* to the substantive conflicts of interests and values that are embedded in IP-related issues. This search adopts a long-term perspective that marries 'holistic' with the 'functional' or 'instrumental' (aspects of which are discussed by Michel Vivant in his essay in this volume). Holistic refers to the aforesaid need to analyse IP regimes as part of a broader IP paradigm (including connections/convergences/divergences and the effects of these) under the imperative of non-contradiction. And functional/instrumental means that the evolution of the IP paradigm has to be guided by and not be isolated from the principles of constitutional rank governing the exercise of basic human activities such as learning, producing and communicating knowledge. Of particular importance are the principles which grant, even as human rights, the fundamental freedoms of expression and economic initiative.

This clarified, we emphasize that *Kritika* does not support, no less imposes, any *partito preso*. On the contrary, it encourages – as even this second volume evidences – diversities of representation stemming from serious scholarly effort. This volume of *Kritika*, like the first volume,

gave authors free choice of topic. There is a diversity of topics, but also a unity brought about by reference to foundational themes. The essay by Keith Maskus reveals that for the economist intellectual property exists in a world of complex causal entanglement, one where simple linear relationships generally do not hold. Yet as the essay by Susy Frankel shows, states are behaving as if more intellectual property carrots will produce more innovation. The essay by Ken Shao suggests that the carrots that matter in information technology in China have to do with large consumer markets in which consumers are encouraged to become participants in innovation (the von Hippel model of user innovation).

We hope that *Kritika* will encourage the search, at no discount, of possible contradictions, ultimate adverse societal effects and ambiguities (e.g., the hidden costs of 'free' offers) that might hide in even those evolutionary trends of IP law that we in principle and in general heartily stand for. These range from FRAND access to advanced innovation to the non-lucrative sharing of works of culture and information.

Thus, in sum, we would like to think that over time the choices of *Kritika*'s authors will help to increase the chances of IP law's evolution to eventually cope with the *instrumental*, yes instrumental mission, so often betrayed on the two sides of the Atlantic, and elsewhere, 'to promote the progress of science and the useful arts'.

Gustavo Ghidini, Hanns Ullrich and Peter Drahos