

# DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS

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Intellectual Property (IP) seems to be inherently incompatible with diversity. From the transnational perspective, IP has long been regarded as a tool for promoting international trade. Under the pressure of developed countries, which are also IP exporters, “*minimum standards*” were incorporated into the international IP regime despite the opposition of developing countries, making IP regime more uniform and homogenous than ever before (p.xvii). In regard of the domestic market, IP has been considered as a property right mechanism that allocates exclusive rights to singular persons to maximize the efficiency of exploitation.<sup>1</sup> Except for rare cases, IP law establishes the sovereignty of the IP owners without taking the interests of non-owners into account.<sup>2</sup> IP law seems to ignore the concerns and interests of different stakeholders, whether they are the less developed countries or the less privileged groups (p.xviii). Can a relatively homogeneous and exclusive property regime include diversity as one of its objectives? Or in other words, can, and if yes how, IP norms be used to protect and promote diversity? By collecting the thought-provoking research results of scholars of diverse backgrounds, the editors of *Diversity in Intellectual Property*, Irene Calboli and Srividhya Ragavan, have done an impressive job in bridging the two contradictory themes in a refreshing way.

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<sup>1</sup> See L. Ray Patterson and S.W. Lindberg, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS*, 25 (University of Georgia Press edn., 1991).

<sup>2</sup> See Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 *THEORETICAL INQUIRIES IN LAW* 309, 338 (2011).

This book provides its readers with an assortment of enlightening and groundbreaking research, whose authors themselves come from varied backgrounds and adopt different interdisciplinary methodologies, such as law and economics analysis, comparative cultural and religious study, and the feminist approach. This suggests that an ambitious theme of diversity and IP can be comprehensively addressed from diverse facets, from international IP regimes to national laws, and from legislation making to legal interpretation. A wide spectrum of interests are covered, including those of developed and developing countries, mainstream and underground economies, able-bodied and disabled people, female and male creators, biotech and creative industries, western and Asian religions, modern intellectual property and traditional cultural heritage, as well as the different perspectives of IP holders, transformative users and end users. Thanks to Irene Calboli and Srividhya Ragavan's extraordinary editorship, the 23 chapters are categorized into six appealing sub themes, which makes reading and comprehension much easier.

In addition to the theme-based trajectory provided in the table of contents, this book also follows a problem-solving logic— first, by identifying the areas where the current IP regime undermines diversity and then, finding solutions for the same (p.7). As for the first step, the book argues that the current IP regime does consider some diversity elements, however limited they are, because diversity is a significant concern even from the perspective of promotion of social creation and innovation. For instance, the disparagement clause and functionality doctrine in trademark law work against immorality, scandalousness, disparagement and anti-competition. However, these doctrines can only prohibit the registration but not the use of such trademarks, which strongly limit their efficacy towards promoting diversity-related interests (Chapter 5 & 20). The fair use doctrine and the protection for the disabled in national and international copyright laws have also been mentioned in several chapters as being diversity-related rules. However, the uncertain legal status of fair use and the non-binding nature of the norms on protecting the minorities seriously limit their scope of application (Chapter 2, 14 & 19). For instance, protection for geographical indications and traditional knowledge acknowledged by most national and international IP laws is concerned with cultural distinctiveness and diversity. However, the characteristics of these cultural expressions are incompatible with fundamental IP concepts such as original creation and private property, and thus raise the question about the form of protection that can be extended (Chapter 1, 21, 22 & 23).

Regardless of the areas where diversity-related interests have already been addressed, many ‘minority groups’ such as female authors, indigenous people, and developing countries are still in urgent need of IP protection (Chapter 13, 17 & 23), and this is what diversity in this book is about—the diversity of IP creators and holders who come from diversified backgrounds (p.1). But some authors actually do mention the diversity of subject matters and appeal for heterogeneous protection. For instance, Doris Long points out that consumers’ demands for access to movies and music “*raise distinctly different economic and social justification issues than demands for similar access to computer operating software or smartphone technologies*”, and calls for a rethink of the current one-size-fits-all approach (Chapter 3).

The solutions to the diversity problem, which are scattered in different chapters of the book, justify why diversity should be promoted and *how* it should be protected. The need for addressing diversity-related interests in the IP regime can be mainly attributed to digital technology and the Internet. Digital technology enables the expression of intellectual products to be completely independent of any specific physical carrier, so that intellectual products can be created and distributed at zero marginal cost.<sup>3</sup> Internet significantly reduces the communication costs and creates a large number of decentralized and non-hierarchical communities that have heterogeneous demands for intellectual products. This is what Chris Anderson called “*the long tail market*”.<sup>4</sup> All diversified kinds of intellectual products have their markets, no matter how “*niche*” they are. In addition to creating a decentralized free market, the Internet and digital technologies facilitate IP transactions through more sophisticated and individualized models of compensation. Creators can maximize their producer surplus by using complete price discrimination while consumers can get access to desirable content with the costs being shared by third-party intermediaries such as Internet Service Providers (ISPs) and advertising agencies. Simply put, every deviant demand can be satisfied, which provides the prerequisite of promoting diversity (Chapter 3).

While addressing the root-cause of the ‘diversity problem’, this book identifies that the fundamental reason for the lack of diversity in the current IP regime is that the IP law was traditionally framed from an essentially Romantic aestheticism standpoint. As Carys Craig points out, Romantic aestheticism only recognizes the achievements of an individual male and

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<sup>3</sup> See Jeremy Rifkin, *THE ZERO MARGINAL COST SOCIETY: THE INTERNET OF THINGS, THE COLLABORATIVE COMMONS, AND THE ECLIPSE OF CAPITALISM*, 18 (2014).

<sup>4</sup> See Chris Anderson, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE*, 3 (2006).

therefore is characterized by “*the-man-and-his-work*” (p.282). Various theme-based parts in this book have actually presented imperative inspirations to incorporate diversity-concerned values into IP laws. Different religious doctrines including Christianity, Confucianism, and Hinduism, as well as various theories such as feminism, help to introduce the merit of collaboration and sharing into the Romantic model, thereby, gradually opening the door for recognizing female authors and indigenous people as IP holders.

In addition to the diversity of IP holders, the diversity of IP subject matters is also discussed, one way of which is adopting heterogeneous models of compensation. For instance, medicine for diabetes is more likely subject to compulsory licenses while medicine offering cosmetic enhancements is likely subject to injunctions. Patented software whose owner has already received adequate compensation in the original country is more readily defensible by international exhaustion than patented drugs that still cannot recover the investment. In the area of copyright, operating software and smartphone technology are more likely to be compensated by compulsory licensing while music, films, or video games could be compensated by accurate micropayments and post-production royalty stream (Chapter 3). Pornographic works should receive less economic incentives for creation and distribution than non-pornographic works. In the field of trademark, disparaging trademarks can get out of the list of national trademark law and be protected only by the common law (Chapter 5 & 16).

Heterogeneity raises a deeper question about the limits of what Max Weber termed as “*formal rationality*.”<sup>5</sup> According to Weber, the transformation from substantive rationality to formal rationality signifies the modernization of law since the formally rational law can be calculated and managed by bureaucratic hierarchies in the capitalist society.<sup>6</sup> In other words, formal rationality helps to tailor law to the modern world; a world that aims at increasing efficiency and promoting social production under a standardized criterion. However, with the widening scope of stakeholders with heterogeneous interests, the formally rational rules can no longer be used to accommodate the increasing types of diversified non-monetary values. In this day and age, substantial rational considerations such as diversity, morality, and equity should also be re-incorporated into the IP regimes, which is what this book argues. How can the law remain autonomous and independent while in the meantime also avoid undermining diversified interests? This book argues for the usage of innovative judicial interpretation, to battle this

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<sup>5</sup> See Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, 3 (1978).

<sup>6</sup> *Ibid.*, at 25.

apparent conundrum. Compared to direct legal reforms, judicial interpretation is a more flexible, progressive, and moderate approach “*toward a fuller appreciation and acceptance of diversity*” (p.2). Accordingly, Yogesh Pai suggests changing the IP regime from a rule-based to a principle-based system so as to leave more room for legal interpretation (Chapter 4).

Judicial application of the diversity approach in individual cases is more flexible but may lead to a collision of different principles as well as a conflict between principles and rules. At present, utilitarian theory and Locke’s labor theory are the two most prevailing justifications for government intervention in the free market. IP rights function as incentives for future creation and innovation under the utilitarian approach, and the rewards for intellectual labor under the Lockean theory. Though the editors of this book claim at the very beginning that the diversity approach complements rather than contradict other traditional IP theories, diversification does not always necessarily equate to the maximization of social welfare or the recognition of creators’ intellectual labor. Sometimes the diversity concern may mitigate the net social value or underestimate creator’s contribution because some minority groups are given more benefits than they can get in the marketplace. How to deal with the collisions of diversity theory, utilitarianism theory, labor theory and even the human right to free speech is a question that this book unfortunately overlooks or oversimplifies in its discussion. According to Robert Alexy, a well-established jurist and a legal philosopher, the priority relations between the principles are not absolute but only conditional or relative.<sup>7</sup> Imagine we are facing two conflicting principles, principle 1 (P<sub>1</sub>) and principle 2 (P<sub>2</sub>). The operative facts of case one may satisfy the condition to have P<sub>1</sub> prior to P<sub>2</sub> while case two may have the condition that supports P<sub>2</sub> prior to P<sub>1</sub>.<sup>8</sup> Therefore, no assumption can be made that the diversity principle proposed by this book will overwhelm other IP principles and policies in all cases.

As the current IP rules are mainly founded on utilitarian principles or Locke’s labor theory,<sup>9</sup> collisions may occur not only between different principles but also between principles and rules. Some authors of this book claim that the diversity principle should directly be applied to IP cases and prevail over the written rules. However, the case quoted in support of this argument, *Qualitex Co. v. Jacobson Products Co. Inc.*,<sup>10</sup> where the defendant sued to invalidate the plaintiff’s trademark with the reason of avoiding

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<sup>7</sup> See Robert Alexy, *On the structure of legal principles*, 13 *RATIO JURIS* 294, 297 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> See Peter Drahos, *A PHILOSOPHY OF INTELLECTUAL PROPERTY*, 23 (1996).

<sup>10</sup> 1995 SCC OnLine US SC 28: 131 L Ed 2d 248: 514 US 159 (1995).

anti-competition, took a more moderate stand. The U.S. Supreme Court noted that “*unless there is some special reason that convincingly militates against the use of color alone as a trademark, trademark law would protect Qualitex’s use of the green-gold color on its press pads*” (Chapter 20). In this case, the Supreme Court presented the same opinion as Robert Alexy who argued that strict conditions should be satisfied for a principle to take priority over a rule if collisions were involved. The P<sub>1</sub> not only needs to be measured with the P<sub>2</sub> that supports the rule but also with some “*formal principles*” including the principle that “*the rules established by a proper authority must be observed*” and that “*there is no reason to deviate from the consistent legal practice*”.<sup>11</sup> Sufficient grounds should be provided for the diversity principle to prevail over specific IP rules, which therefore calls for a fact-intensive inquiry.

For instance, in the *Qualitex* case, P<sub>1</sub> is a diversity-related principle of encouraging competition. The conflicting rule is that a distinctive mark can be registered which is supported by P<sub>2</sub>, the principle of private autonomy, that private parties can use any mark they wish to compete in the market as long as it does not violate the prohibitive provisions of law. Thus P<sub>1</sub> does not significantly weigh over P<sub>2</sub>, let alone considering the formal principles. However, the less distinctive the mark is, the less priority the rule and P<sub>2</sub> will have over P<sub>1</sub>. Also, if the mark is functional, in terms that it is essential to the use or purpose of the good, the decision may be less favorable to the trademark holder because P<sub>1</sub> gains weight as the functionality of the mark increases. To estimate the collision between the diversity principle and the conflicting rules is actually a matter of balancing between different factors in individual cases, as in determining the collision between different principles.<sup>12</sup> However, in order to weigh over conflicting rules, the diversity principle should be more sufficiently grounded than to prevail over conflicting principles.

In closing, *Diversity in Intellectual Property* brings a refreshing insight into the jurisprudence of IP by regarding IP as an ongoing and collaborative process that involves multiple stakeholders such as creators, users and intermediaries. It breaks the barrier of the sovereignty built on Romantic authorship and shifts the private property paradigm into a collaborative discourse. In the Internet era where technological and social development enables anyone, whether wealthy or poor, educated or undereducated, able-bodied or disabled, male or female; to create, share and exploit intellectual products,

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<sup>11</sup> See Robert Alexy, *On the structure of legal principles*, 13 *RATIO JURIS* 294, 300 (2000).

<sup>12</sup> See R. Alexy, *Formal Principles: Some Replies to Critics*, 12 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 511, 513 (2014).

diversity is an inevitable trend. In order to secure the merits of diversity and achieve substantive equality between different groups of stakeholders, future research can put more focus on how to deal with the collisions between different IP justifications, and how to make a heterogeneous model that sophisticatedly caters to the requirement of diversified IP beneficiaries and different subject categories.