

One Right System for IP – Vision Impossible?

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Functional and Economic Criteria as a Base for the
Systematization of IP Law?

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Problems in the existing system

- The absence of a consistent utilitarian justification of IP law
- The formal and abstract character of IP law



The absence of a consistent utilitarian justification of IP law

Rhetorical figures dominate IP law → IP law romanticism

Natural rights justification: *“the right to reap what one has sown”*

The utilitarian justification is not absent in the present system:

- **US Constitution Art. 1(8)** :

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

- **TRIPS Agreement Art. 7:**

“... intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”



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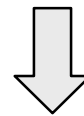
The formal and abstract character of IP law

Concepts such as “a work”, “an invention” and “a design” are abstract concepts that do not refer to anything in the external world.

If it's more important to have a good patent agent than to have a good invention then *formalities are more important than realities*.

Proposition:

The particulars of IP law ought to refer to real phenomena and real effects in the external world.



The common denominator



The legacy of the realists

Early 20th century:

Sociological Jurisprudence and American Legal Realism

Roscoe Pound : “Social engineering”

Benjamin Cardozo (1921):

“I mean that when [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.”

Oliver Wendell Holmes (1897):

“For the rational study of the law, the black letterman may be the man of the present, but the man of the future is the man of statistics and the master of economics.”



Trademark law is (slightly) different

“Distinctiveness” relies on the actual perception of the sign

Trademarks serves an source-identifying function

→ ultimately aim to promote productivity

→ reduce search costs

Infringement:

Source-identifying function → “Likelihood of confusion”

Famous marks → “Dilution”, “takes unfair advantage of,
or is detrimental to, the distinctive character
or the repute of the trademark “



Brookfield Communications v. West Coast Entertainment Corp., 174 F.3d 1062 (9th Cir. 1999)

”Using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading - "West Coast Video: 2 miles ahead at Exit 7" – where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. **Customers are not confused in the narrow sense**: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast. Nevertheless, the fact that there is **only initial consumer confusion** does not alter the fact that Blockbuster would be **misappropriating West Coast's acquired goodwill**”



A utilitarian rationale for IP law

IP law should promote commercial, creative and technological progress.

The balancing of:

Economic incentives for new creations
and
Accessibility of existing creations

Incentives: Legal protection only in cases where something is costly to create and unlikely to arise without legal protection

Accessibility: Special consideration should be taken to the 'basic building blocks' of communication and creation (the "intellectual infrastructure")



Protectable subject matter

"Creations" instead of "*inventions*", "*works*", "*designs*"

- Social valuable creations that would not have been produced in the absence of IP protection.
- The need of protection depends on:
 - How many resources have been invested in the production of the creation?
 - How are the prospects for the creator of appropriating the value of the creation?
 - Alternative means (other than exclusive rights) to appropriate value
 - Can the creation easily be misappropriated by others?

Conditions of protection:

- **Substantial investment** (cf. EC Database Directive)
 - No protection of spin-offs and by-products
- **"Progress contributability"**:
 - Creations out of the ordinary
 - Not likely to be created in the absence of legal protection



IP rights

A three-layer protective regime:

- Layer 1: Protection by exclusive rights against *direct exploitation* (literal copying etc.)
 - resembles neighbouring rights
- Layer 2: Protection by exclusive rights against *indirect exploitation*
 - resembles copyrights
- Layer 3: Protection by exclusive rights of the *functionality* of the creation
 - resembles patent rights

Different degrees of:

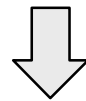
“*substantial investment*”
and
“*progress contributability*”



Exceptions

A number of specific exceptions may be included in order to accommodate special needs.

The central exception:
“fair use”



Free use should be allowed even if it harms the economic interest of the rightholder
but not if it harms the incentive function of IPRs



Enables a more subtle protective regime



Problems

- What about trademark law?
- Legal uncertainty
 - Flexibility in IP law is strongly needed and with flexibility comes legal uncertainty.