

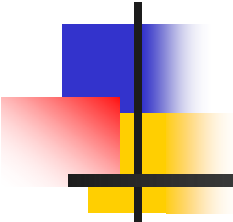
One Right System for IP – Vision Impossible?

1 – 3 October 2008

Hotel Rantapuisto, Vuosaari, Helsinki

Institutional Impediments to a One Right System

© Antonina Bakardjieva



Institutional Impediments to a One Right System

Antonina Bakardjieva Engelbrekt
Stockholm University



Main claim: some bits and pieces of the puzzle are left out of sight

- We discuss mainly:
 - a) What should be protected?
 - b) To what extent it should be protected?
 - c) Why it should be protected?
- We approach only in passing the questions:
 - Who should decide on a) and b)?
 - In what type of decision-making processes?
 - Can we improve these decision-making process?



Institutional perspective

- What is meant by 'institution'?
 - Historical institutionalism (Douglass North)
 - Humanly devised constraints to social and economic behavior which help reduce uncertainty
 - Appear in the form of formal rules, informal constraints and the enforcement characteristics of both
 - Comparative institutional analysis
 - The firm, the market and the government as alternative systems for allocating resources (Coase)
 - "Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects."
Coase, 1960



Extended comparative institutional analysis (Komesar)

- Comparing between
 - Market process
 - Political process
 - Judicial process
 - (Administrative process)seen as aggregate institutional decision-making processes
- Participation-centered approach: basis for comparison: costs and benefits of participation
 - Markets – transactions
 - Political process – political participation: voting and lobbying
 - Administrative agency – lobbying, formal procedure
 - Courts - litigation



Institutional Choice

- Costs
 - Information costs
 - Organization costs
- Benefits
 - Size of stakes – low v high
 - Distribution of stakes
 - Concentrated v dispersed
 - Even v skewed
- The issue at stake
 - Simple and powerful metaphoric
 - Complex and impenetrable, technocratic



The problem with big numbers

- Institutions 'move together'
- Choice between imperfect alternatives
- Specific risks of malfunction may influence institutional choice: e.g. political process
 - Minoritarian bias – high and concentrated stakes v. low and dispersed stakes
 - Majoritarian bias – low and dispersed stakes, but skewed distribution – catalytic sub-group + the issue at hand



Advantages of the approach

- Allows integration of economic, political and legal theory
- Looking at the process instead of the substance
- Structuring the decision-making process
 - Importance of studying actors and interests
 - Importance of procedural and institutional rules
 - Enforcement
- Allows for cross-county comparisons



Economic foundations of IP protection

- Economics of uncertainty
 - Technological uncertainty (exogenous)
 - Market uncertainty (endogenous)
- Economics of information
 - Information asymmetry
 - Analysis of institutions reducing information asymmetry and uncertainty
- Information as public good
 - Non-appropriability
 - Non-excludability
 - Non-divisibility



The market for creative works

- Creative works
 - Information products
 - Degree of tangibility: differential and changing
- Public goods problems
 - Non-rivalrous
 - Non-excludable
- Problems
 - Free riding
 - Underproduction of creative works
- Problems of participation in such markets



The politics of classical IP

- Minimalist intervention on the part of the legislature
 - Time-limited property rights (statutory assignment of entitlements)
 - Public goods aspects are privatized and a market is enabled
 - Note! Value derived from and determined by the market
 - Horizontal approach (irrespective of industry)
- Participation structure of the legislative process
 - Creators
 - Broad and dispersed group
 - Low to medium stakes
 - Users
 - Corporate or private
 - In a horizontal system risk for bias is controlled



Patent and copyright

- Patent

- Protects functionality
- Formality as requirement for protection
- Examination
- Information required by patent applicants
- Concentrated entitlements
- Responds (partly) to technological uncertainty

- Copyright

- Protects expression
- No formality required
- No examination
- No information by copyright holders
- Split entitlements
- Remains within the market uncertainty



Difference for a reason

- Information about the good (Clarisa Long)
- Different groups of observers
 - Avoiders
 - Transactors
 - Builders
- Different characteristics of the paradigmatic patent and copyright goods
- Different characteristics of the paradigmatic observers
- Different distribution of information costs



Different resulting organizations and actors

■ Patents

- Public patent authorities
- Patent examiners
- Patent attorneys
- Patent courts

■ Copyright

- Copyright offices (common law countries)
- Producers and publishers
- Collecting societies
- Copyright tribunals



The changing political landscape of IP

- As a result of developments of new technologies and new industries
- From horizontal to vertical structure of the legislative process
 - New types of protected subject matter
 - Phonograms, Broadcasts, Software, Pharmaceuticals, Biotechnologies;
 - New types of uses
 - Performance, communication to the public
 - New types of exceptions and limitations
 - Specific morality thresholds in patent law; Temporary acts of reproduction of no independent economic significance, decompilation (software), extraction & re-utilization (databases)
- Clear signs of minoritarian bias
 - Overrepresentation and lobbying by big corporate stakeholders
 - Under-representation of large and dispersed user groups



One right system

- The present IP system is a result of ad hoc bargaining rather than based on a set of coherent normative principles
- Reaction to the growing fragmentation, opacity and inconsistency of the system
- Different proposals
 - An even more radical horizontal approach across IP disciplines: one IP right (or unfair competition basis?)
 - Horizontal approach within individual IP disciplines, notably copyright (A. Christie)
 - Unitary grounds of protection
 - Unitary system of exceptions and limitations (users' rights?)



Problems from a comparative institutional perspective

- A 'one right system' presupposes broader concepts and definitions and inevitably needs additional fine-tuning
- One immediate result is that the gravity in decision-making would shift from the political process to alternative decision-making processes, typically the courts



Judicial process

- Courts are a small but important institution
 - Advantages
 - Insulated from political pressure
 - Have time and means to focus on an issue
 - High competence (hopefully)
 - However, in terms of participation
 - High litigation costs
 - High information costs (expertise)
 - Courts do not choose the issues brought to their attention
 - Litigation dominated by right-holders (and by collecting societies)
- Mirroring minoritarian bias of the political process



Regulatory IP

- What role for the administrative process?
 - Copyright
 - e.g. TPM: Commission on TPM (France); Copyright tribunals
 - Patents
 - Regulation (Ikka Rahnasto): but who should monitor and set standards?
 - A government IP Office?
- Administrative process
 - Advantages
 - Expertise
 - Easier access
 - Disadvantages
 - Principle-agent problem
 - Risk for capture



One right system in a multi-level system of IP governance

- Modern IP – multi-level, i.e. co-existent levels of decision-making
 - National
 - Regional (European)
 - International
- A one right system at the international level may imply redistribution of competences between the levels
 - E.g. TRIPS panels
- At what level should the balancing be carried out?



Role of legacies and institutional symbiosis

Example Swedish collective rights management

- Music and sound recordings
 - STIM The Swedish Performing Rights Society
 - Right-owners: Composers and music arrangers; Text writers/songwriters; Music publishers
 - Rights involved: Broadcasting, Public performance; Communication to the public; Mechanical reproduction rights
- Mechanical rights
 - Nordisk Copyright Bureau
 - Cooperation agreement STIM – NCB
 - Mechanical rights to Swedish rights owners



Role of legacies and institutional symbiosis

Example Swedish collective rights management

- Music-related right
 - Performances and phonograms
 - A right to remuneration for broadcasting and public performance
 - Two separate organizations cooperating in collection of royalties
 - SAMI (The Swedish Artists and Musicians Interest Organization) - Music-performers
 - Swedish Group of IFPI – Phonogram producers
- COPYSWEDE
 - Umbrella organisation
 - Collection of the levy – audio and audio-visual (since 1999) on the basis of remuneration on blank media and recording equipment
 - Audio distribution by STIM, SAMI and IFPI
- Any proposal for a unitary system will imply organizational restructuring and may stumble upon serious resistance



Conclusions

- Need for focus on institutional choice and design
- Historical legacies and institutional symbiosis important
- Comparative research needed
- In the international setting
 - Attempts to harmonization should be sensitive to the question of who decides
 - Design of the decision-making process at international level