

Internal and external control mechanisms for intellectual property rights: between a rock and a hard place?

Intellectual property is subject to both internal and external control mechanisms, which limit the scope of relevant rights. The former relate to the very requirements for protection and exceptions/limitations to the rights, while the latter result from that balancing exercise between contrasting rights and freedoms, which has become increasingly critical to undertake.

First, when we speak of internal mechanisms, these encompass, positive requirements for protection. So, in relation to copyright, requirements include the idea/expression dichotomy and originality. Turning to trade marks, in order for a sign to be registered, the requirements of distinctiveness and representation in an appropriate form must be present, and neither absolute nor relative grounds for refusal must subsist. In patent law, protection is available to inventions that are novel, non-obvious, have industrial application, and are not excluded subject matter. Similarly, design protection is subject to the design being novel and possessing individual character.

Second, the scope of protection granted by the relevant rights (once they have arisen or have been granted) is limited internally by the availability of exceptions and limitations, that is the possibility for third parties to do acts restricted by the right at issue without the permission of the relevant rightholder. The underlying rationale of exceptions and limitations is safeguarding third-party freedoms and rights, including freedom of expression, freedom to conduct a business, and the respect of personal and private life.

The concepts of freedom of expression and freedom to conduct a business will promptly lead readers to think of fundamental rights: Articles 11, 16 and 7 of the Charter of Fundamental Rights of the European Union mandate protection of, respectively, freedom of expression, freedom to conduct a business and the respect of personal and private life. And, indeed, fundamental rights operate as an external control mechanism. The Court of Justice of the European Union has increasingly referred to the need of balancing intellectual property protection with third-party fundamental rights, eg in relation to the topic of copyright enforcement (Telekabel, C-314/12).

Reference to internal and external control mechanisms has been recently made also by Advocate General (AG) Szpunar in his Opinion in *Funke Medien*, C-469/17, a case concerning copyright (as tentatively enforced by the German Government in the background national proceedings) in military reports. The AG noted how copyright itself contains internal mechanisms allowing possible conflict between fundamental rights, including freedom of expression, and copyright to be resolved.

These include the idea/expression dichotomy and exceptions and limitations. Copyright is also subject to external limitations, including the respect for fundamental rights:

If it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected and the question of legislative amendment would then arise. However, there may be exceptional cases where copyright, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, must yield to an overriding interest relating to the implementation of a fundamental right or freedom.

The fil rouge of the contributions included in this issue of *Stockholm IP Law Review* is indeed the exploration of control mechanisms inherent to different intellectual property rights. These include the parody exception, the exception known as ‘freedom of panorama’, and the new exceptions mandated under the WIPO Marrakesh Treaty in relation to copyright works; the absolute grounds for refusal for shapes in trade mark law; and the availability of different rights in relation to one’s own overall intellectual property strategy.

Overall, the contributions showcase the potential tension between exclusivity and inclusivity, as well as the need to balance carefully proprietary regimes with third-party rights to access, use, and create new subject matter from existing subject matter. In this sense, intellectual property rights are placed between somewhat of a rock and a hard place: on the one hand, they must safeguard the creative and commercial efforts of those who create works, wish to have distinctive signs protected, and inventions eligible for patent protection; on the other hand, they must ensure that third-party creativity (eg parodies) is not stifled and competitors are not unduly restricted in their activities (eg, when certain shapes are registered as trade marks).

Enjoy this new issue of the Review!



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