Intellectual Property Rights in Transition

Legal Structures and Concepts in Adaptation to Technological Challenges Towards an Intellectual Property System for the 21st Century

A Nordic-European Research Programme

Marianne Levin

Background

The following is a presentation of a research project that will be undertaken over the coming years in co-operation between legal faculties in primarily Denmark, Finland and Sweden, the Netherlands and the Max Planck Institute in Germany. But additional participants from other universities in Europe will soon be invited to participate. The programme has been developed in collaboration with professor *Niklas Bruun*, Helsinki, and Dr. *Annette Kur*, The Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich. The programme aims at investigating the new tendencies in the field of intellectual property and formulate solutions for adapting the system as a whole in the form of a new outward framework, if needed.

The Present Legal Challenges

In Europe and in most parts of the industrialised world, exclusive copyright in works of art and literature, patent rights in innovations, trademarks and trade names, rights in distinguishing signs and design rights in the appearance of industrial products – the salient points of the industrial rights landscape – are a matter for the legislator. Other parts of the world today present at the least the embryo of such rights. National legislation today is to a great extent based on a number of international and wide-ranging treaties or conventions from the closing years of the 19th century. These have since been revised and supplemented by new agreements, most recent among them being the TRIPs (Trade Related Intellectual Property Rights including trade in counterfeit goods), concluded under the auspices of the World Trade Organisation. But the train of thought still belongs to the second half of the 19th century – an analogue world,

quite far removed from the fast, digitised, interactive cyberspace environment of today.

The rapid technical progress of recent decades, consequently, has impacted quite dramatically on intellectual property law as a whole and the various legal modalities in particular. Just as with earlier stages of technical innovation, intellectual property law is directly affected and is playing an important role, but this time it doesn't seem to have worked as well as in the earlier history of the legal system. One reason may be that the technical breakthroughs which have now taken place are near-cataclysmic, transforming the entire social system.

In the wake of the latest technical advances, it is true, successive attempts have been made to adapt the sphere of intellectual property law protection, with its partly new objects of protection and partly new conditions of creativity, marketing and use. But in the legislative sphere, treaties and conventions included, such efforts to come to terms with new conditions have mostly been of the make-do-and-mend variety, preserving the traditional systems and conforming to established modalities. Holistic approaches to intellectual property law have been fewer and further between, and there has been no thoroughgoing analysis of actual changes with reference to the postulates and purposes of the system.

Things are further complicated by intellectual property law being by tradition an international field where much of the legislation is cast in the image of the old international agreements, with the result that even regional attempts at harmonisation, in the form of EC directives and regulations, tend to get bogged down in various fundamental respects. To this is added the normal quasi-deadlock at EU level in the form of conservative compromises between the divergent views of individual states. One of the main obstacles, though, to making legal developments move with the times is the separate treatment accorded to individual legal modalities, even with overarching problems demanding a concerted approach.

New and in many ways revolutionary factors of technological influence today include, of course, digitisation (with the speed, international impact and interactivity this implies) and its opening up of possibilities for global networks – the Internet, for example – which have greatly altered people's ways of obtaining, processing, storage and disseminating information in the broad sense. Digitisation means convergence, the fusion of media, and in the sphere of intellectual property law it has also meant a growing tendency for forms of protection to overlap.

From an intellectual property viewpoint today there is in many situations little difference between a protected trademark, a design, an artistic work or even a patent where computer software is concerned. But the systems hitherto employed for the protection of different rights presuppose little overlap or none at all. The new situation is detrimental, not only in terms of overview and legal security but still more so in terms of excessively far-reaching protection.

Computer programs were quickly incorporated in the sphere of copyright protection. Their legal status has greatly affected the concept of an original work under copyright law. The protection threshold has been successively lowered, and the character of the protectable works has changed completely. But whereas, in the interest of balancing free competition and exclusive rights, software

protection was considered a subject for copyright law rather than patent law, with its more restrictive effects on competition, over the past twenty years developments have reached a stage where computer programs are to a great extent patentable – in Europe, Japan and the USA. As a further development of computer software patentability, there has been much discussion in the USA in recent years of new possibilities of patenting business methods. But development of this kind will require a fundamentally new patent system in order to achieve necessary exclusions from protection. Perhaps the same goes for the untold possibilities of genetic engineering and knowledge concerning the tiniest components of human beings, which are extensively eligible for patent protection. The commercialisation of research findings from the Human Genome Project (HUGO), for example, has triggered reactions at the highest political level (including a joint declaration by the then President Clinton and Prime Minister Blair).

The new means of communication are also leaving a conspicuous imprint, for example, on what are perceived as trademarks, with light, movement, colour and shape as natural components of everyday marketing. Where is the limit to what can be perceived as a distinguishing trademark? The emotional impact is both extensive and expensive, but do such investments enjoy legal protection, and how is that protection to be formulated or assessed? Digital addresses – domain names – do not count as intellectual property rights, but conflicts are not infrequent between domain names and protected trademarks, and have necessitated legislative changes and the creation of mechanisms for dispute settlement both within and outside the traditional law of intellectual property rights.

To these technical developments must also be added such modern behaviours, not least at EU level, as economism and lobbying, which are affecting the traditional ways of lawmaking in new ways and with unexpected consequences. From the protection of particular objects (the work of art or literature, the technical invention, the new and distinctive design, the distinguishing trademark), intellectual property law is becoming more and more of an investment safeguard. And lobbyism is reinforcing the already noticeable tendencies towards overlapping in the form of wider protection, with almost every work and expression today forming the subject of an exclusive intellectual property right; everything is coming to be protected in at least one way, often several. This in turn is creating imbalance in the system for exclusive rights which of necessity has to be balanced in order to justify its existence as an instrument for promoting competition.

As an example of new developments which are reinforcing exclusive rights and which constitute a hybrid of lobbying for stronger protection and a tendency to break with the existing system of protection we can take the installation of technical protection and copyright management systems in European and global copyright, causing it above all to reflect the producers' interests, with less benefit to the real authors. The same goes for the protection, under a right sui generis, of compilations of data representing a substantial investment.

At the same time the courts are intervening more and more often to redress what can be perceived as "unfair" or political/trade-political effects, desirable or unwanted, for example of the new overlaps resulting from the new technology.

This is true, not least, of the European Court of Justice, with its prerogative of Community law interpretation, which is creating a case-law system even in civil-law countries. But this will not necessarily lead to a balancing of the system or of rights, other than in the individual case. Striking the appropriate balance calls for a good deal of specialised knowledge and experience. The courts have acquired, and ought definitely to retain, an important role in these new legal developments, but in countries with civil law systems this kind of change takes time and is impeded by both the premises and the objective tending to be unclear. Meantime exclusive rights as such are being diluted as they are broadened out into what is merely a basis for deciding whether or not competition has been unfair. But this is a departure from the whole idea of intellectual property law as an instrument for promoting competition and an asset to businesses and individuals.

Another pivotal aspect of modern developments demanding consideration is globalisation. Although intellectual property law is international in the above mentioned sense, its territorial limitations are creating special problems in an increasingly borderless and interdependent world where e-commerce is an accomplished fact and corporations are multinational. When rights are infringed on the Internet and expensive patent suits are fought over the same cause in many countries, a global approach is also needed to matters of jurisdiction and choice of law and the mutual recognition of judicial decisions. But viable solutions are lacking. For its international character, intellectual property law is territorially limited, as is drastically expressed by today's many cross-border conflicts even at European level. Added to which, there is no jurisdiction for cyberspace. An innovative example is to be seen, however, in the uniform dispute resolution process (UDRP) for domain names. One thing is clear: a certain degree of rights harmonisation is no longer sufficient.

Finally, it must not be forgotten that, emanating from IT development, there exists today a quite considerable body of opinion against the intellectual property law system, and an unprecedented conflict has also flared up between the individual and the collective, or if you will, between intellectual property law and the protection of privacy. Some critics maintain that intellectual property rights are impeding information interchange and social improvement in a digitised world. This type of criticism forms an unholy alliance with groups of intrinsically quite contrary and very powerful commercial interests, media conglomerates, seeking to divide the digital market between them and to resolve all rights problems by means of contracts and licences for accessing network-based information content under various business models. Further interests which are now at loggerheads with intellectual property law and, not least, with the patent system are indigenous populations demanding both compensation for the raw materials they supply for epoch-making drugs and a share in earnings from patents and technical know-how.

Modern development is tending to checkmate the traditional, statutory intellectual property rights. Superficially, those rights have been supplemented and modified to some extent, but not nearly enough. The system as it now stands is manifestly inchoate, obsolete and partly without legitimacy. The fact of Napster, for example, having 38 million (illegal) users speaks for itself. Meanwhile conflicts are growing, as are global dependence and the need for

effective means of conflict resolution. Without legislation appropriate to the needs and behaviour of the market, the system of exclusive rights is tending to lose shape.

Putting it drastically, this whole system of a close-knit, intricate network of international conventions and national legislation is in danger of succumbing to or being eliminated by a system of unfair competition. This is not a desirable prospect. Among other things it would mean a radical pruning of the accumulated mass of exclusive intellectual property rights, which in the longer term would inhibit the pace of development and willingness to innovate. It would also mean the loss of an important global forum of discussion with other positive effects on human relations besides the pursuit of harmonised, effective intellectual property rights. The "threats" to the system can be summed up as fundamental problems of adjustment to technical progress, including its global implications, a growing legitimacy gap and conflicts in relation to IT law, contract law, competition law and consumer interests.

This gives cause to ponder the type of intellectual property law which is socially desirable for the 21st century, how long we can go on living with a system based on an analogue 19th century society, and whether the inconsistencies of the system and opposition movements are not both threatening to gradually eviscerate exclusive rights, until what remains is of little value and far removed from the effects intended. The problems which have now been outlined prompt the following topics of inquiry, among others:

Factual and legal grounds for the significance of intellectual property rights. For example, is it true that intellectual property law in general is expanding? How important are licensing conditions? Can a direct relation be established between investment and the value of rights?

The division into and allocation of partial or secondary markets with the aid of intellectual property rights. For example, how can this be established? What legal techniques are being used? Are there any overriding considerations?

Is the principle of exclusive rights tenable in present-day society, or is there a "third way" for intellectual property law as well? What protective scope is reasonable for proprietors and third parties – in copyright law, patent law, trademark law etc.?

What areas of conflict exist within different intellectual property rights and between intellectual property law and such neighbouring fields as consumer law, contract law, competition law and IT law; how are these conflicts manifested? Is the tradition division into intellectual property law and trade restraints law still feasible, or is the creation of new "forms of co-operation" conceivable/ necessary? In what situations will it be reasonable to speak of the right of use or right of access?

Where are the boundaries of intellectual property law located – and how are they to be drawn – between commercial and non-commercial interests (freedom of expression)? Can an element of fair use be built into a legally based system, so that every formal encroachment will be illegal? And how is transparency to be preserved?

Also involved are questions such as the following:

The tension between harmonisation and subsidiarity.

The European and the global perspective.

Development and effects of global regulatory mechanisms, e.g. for the Internet.

The challenge to the territoriality principle.

Intellectual property law and international private law (cross-border enforcement).

Questions of method in various fields.

Regulatory and decision-making techniques for multiple economic interests; reconciliation of a multiplicity of rights-holders?

The feasibility of effective licence management, e.g. on the Internet.

Management of rights overlaps.

New limitations needed for the incorporation of new patentable objects such as business methods, genes, plants and animals.

The effects of an increasingly producer-oriented system of copyright law.

The medicine could be a matter of having the courage today to tear down something in order to build something new and complete, meaning a more flexible system better attuned to the rapidity of present-day movements, and a system of globally accepted solutions in a world which recks little of boundaries other than legal ones. This is also a matter of creating predictability for the management of the exclusive rights system, both nationally and internationally. The purpose of such a system, of course, will be the same as before: to promote competition, to encourage creative and innovative initiatives and, to safeguard investments in a balanced relationship with overriding public interests. The last mentioned is no small matter. Exclusive rights cannot be justified by private interests alone.

Purpose of the Project

As has now been made clear, the project is concerned with taking a holistic approach to the present system but also with processing that system at detailed level. Perhaps it could equally well be termed a “rescue bid” in the form of wide-ranging innovation. But any such rescue bid must of necessity be based on wide-ranging research initiatives in the form of hypotheses, analysis and

synthesis. Accordingly, the project (programme) proposed here has a broad canvas including several different research environments, added to which, it has several purposes and will operate on several different levels.

The overriding purpose of the programme can be said to bring together new tendencies in the entire field of intellectual property law, to investigate how those tendencies have impacted on the field qua system and structure, and, in the light of the findings obtained, to try to formulate solutions for adapting the system in the form of a new outward framework (a model for new international agreements on rights structures) with overarching criteria for the modalities included (exclusive rights), with the common aim of sustaining the balance between exclusive right and effective competition in a fruitful, developmental relationship.

This is also a matter, with reference to the individual modalities (patent, copyright, trademark law and designs etc.), of drawing conclusions and making recommendations on the tenable incorporation of modern technical developments within the framework of the overarching systematic solution (at national level). This, as we have now remarked, is ultimately governed by what can be presumed to benefit social development, be it through the introduction of new forms of protection for new phenomena or by leaving the field clear for private use. At this lower level the project will be concerned with collating existing research findings field by field and partly imitating new projects to shed light on information gaps or disparate approaches.

Whereas the overarching level can be said to be concerned with achieving syntheses for the whole field of intellectual property law and finding common features of change which have to be taken into account, on the purely disciplinary level the aim will be both to synthesise and to generate new research. In addition, the general framework will require the introduction of corresponding syntheses from surrounding fields. These may, for example, concern the impact of different legal traditions as expressed through concepts, terms, attitude ad values, but also economic and communicative changes.

Lastly, the programme has two more overriding aims of quite a different kind. The first of these concerns the manner of research in law, and more especially in intellectual property law, which is a field of intensive development. Here we need to get off to relatively quick start, which can only be achieved by co-operating and conducting partly parallel or closely allied studies with reference to previously identified phenomena. This will result – secondly – in the bringing together of research groups and specialists from different parts of Europe to co-operate on issues which, to anyone concerned with intellectual property law, can have a vital bearing on the survival of the system and the endurance of intellectual property rights as corporate capital assets and, accordingly, as a stimulus to competition in a balanced relation to “superior freedoms”.

Thoughts allied to those presented here have been presented as research findings in a variety of contexts by both Niklas Bruun (e.g. in Festskrift till Ulf Bernitz , NIR 2001) and Marianne Levin (e.g. in NIR 1998 pp. 550 ff. and NIR 2000 pp. 514 ff.), as well as in Trade Related Intellectual Property Rights in the Baltic Sea Region, Ministry of Foreign Affairs 2000 pp. 24 ff.).

Importance of the Project

Those of us wishing to undertake this project consider the wide-ranging inquiries and synthesis proposed for the field to by vitally important for intellectual property law, which is finding itself in more and more of a cul-de-sac, owing to the persistence of antiquated concepts and dependencies, poor adaptability to technical challenges, disciplinary territorialism and chauvinism, pressure from groups mindful only of their most immediate (economic) interests, and the naïveté of politicians in this type of connection. The system stands in need of renewal, for its survival and further development above all as a whole and in its component disciplines. The TRIPs agreement has demonstrated the possibility, after all, of moving forward.

If the programme proposed here is successful in its component projects, this will have a thoroughgoing effect on future intellectual property law thinking, primarily in Europe but also with effects on the rest of the world. If it fails, it will have contributed new knowledge and helped to move the discussion forward.

General Structure, Relation to the International Front Line of Research

The hub of the research programme is the IFIM (Institute of Intellectual Property Law and Commercial Law, Stockholm University), the IPR-Center, Helsinki, and the Max Planck Institute, Munich. The structure has evolved through a number of discussions in recent years, also including representatives of researchers at the University of Amsterdam and at Department A of Legal Science, Copenhagen, which will also be joining the project. The research centres joining forces in this project are among the foremost in the field in Europe, with The Max Planck Institute being the world's leading centre for intellectual property law.

The structure of the programme is outlined in App. 1. As will be seen, the inquiry has both vertical and horizontal directions and will also include studies of central importance in other disciplines.

The focus of the proposed inquiries will be on Europe and European developments in the field, the idea being for a highly qualified steering group to define the frames for the collection of input material and at the same time to hold regular bi-monthly meetings in seminar form for the further development the project once underway. Somewhat longer and more frequent contacts of a brainstorming nature will be needed at the initial stage and in the concluding phase as well.

The steering group deliberately comprises specialists who are closely concerned with various modalities of intellectual property law, namely Professor Niklas Bruun (Helsinki), Professor Marianne Levin (Stockholm) and Dr. Annette Kur (The Max Planck Institute). The group also includes Professor Berndt Hugenholz (Amsterdam), Professor Thomas Dreier (Karlsruhe) pofessor Mogens Koktvedgaard (Copenhagen), and Professor Joseph Straus (The Max Planck Institute). Two persons (Marianne Levin and Annette Kur) have an

executive role within the programme – let us call them research leaders. They will be working half time on the programme, while all other members of the steering group are expected to be involved on a 10 to 20 per cent basis while the programme is in progress.

At this level hypotheses will be developed, followed later on by comparison and an overarching analysis and, finally, the formulation of the end results in synthesis form.

The research leaders are responsible for keeping the project moving on various levels, as well as for steering group meeting agendas and for the initiation of research which may be needed on the "outer fringes" of the programme, i.e. relating to other parts of the world (the USA and Japan especially) and also in the fields of economics, political science and the arts, where the Max Planck Institute, among others, can be of assistance.

At the next level there is a further line of discipline specialists in the form of younger researchers, a kind of "middle management". Full complements of this kind are to be provided in Stockholm and Munich, i.e. with one or two persons in charge of each main discipline (patent law, copyright law, trademark law and neighbouring legal fields). These will be supplemented by specialists in specific fields (such as biotechnology, IT and competition law) from other institutions taking part. The "middle management" will have executive responsibility for collecting material with the focuses indicated by the steering group. They are to compile existing research findings and to propose and, following discussions by the steering group, initiate the new research of their own and other people's, as the implementation of the programme demands. The studies on this level will employ a traditional legal dogmatic method and will also include a certain comparative element.

The "middle management" will to some extent attend steering group meetings for discussions and reports on their projects, once quarterly. They are also to be in charge of contacts with researchers in their respective fields and for the conduct of the various sub-projects which they themselves are conducting or outsourcing. They will hold monthly one-day meetings with the research leaders.

Timetabling and Implementation

The executive implementation of the programme is planned to take three years from start-up, following a planning phase of 6-12 months for general structuring and review, final selection of personnel, contacts, scheduling of meetings and seminars and, last but least, the formulation of hypotheses for discussion in the steering group. The length of the preparatory phase will also depend on how quickly researchers can be released for the project. Although the latter does not require the full-time involvement of any participants except the research leaders, the participants, being among the foremost in their respective fields, have numerous commitments and activities.

Months 1-6. Definition of frames, objectives and hypotheses. Inventory of further research needs. An initial framework programme will be drawn up

within the steering group. Timetables. Compilation of a common "philosophy". "Middle management" meetings for initiation and discussions.

Months 6-12 "Middle management" ready with inventory and draw up proposals for projects and their implementation.

Month 12-24 Implementation of outsourced research projects.

Months 24-30 Analysis of the research findings and compilation, both general and by disciplines.

Months 30-36 Framing of syntheses and proposed system model.

Implementation will be followed by a presentation phase. The programme is to be presented in monograph form, also to be made available on the Internet, and at a major international conference. Individual, intra-disciplinary contributions will be published successively in suitable publications.

The intention is for a consultation phase then to ensue, taking into consideration, not least, the interests which are opposed on grounds of freedom of information to the protection of intellectual property rights, and also those maintaining that intellectual property rights are a thing of the past in this digital age and that all market transactions can be resolved by means of "business methods". A revised model plan can, it is hoped, be presented six months later to interested circles and international organisations active in the field.

The International Discourse

All over the world, inquiries are in progress which among other things are shedding light on the impact of technical progress on intellectual property law. One problem about these inquiries, at all events in the perspective adopted for the programme now contemplated, is that they grasp limited segments and are conducted on a disciplinary basis. Yet the development which is going on is universal and is impacting on all fields of intellectual property law, making it increasingly difficult to distinguish between one or the other type of protection as far as the object and subject of protection are concerned. As a result, although we can easily see that legislation and the bounds of international conventions are being exploded by the developments now in progress, no one has yet tried to adopt a holistic approach and, accordingly, indicate models for the system as a whole. Among the more ambitious projects in one such disciplinary field, however, mention can be made of the American study of copyright presented under the title of *The Digital Dilemma* "http://boks.nap.edu/html/digital-dilemma/". Professor Jane Ginsburg et al. have also drafted an international private law convention in an American perspective, see "http://www.wipo.org /pil-forum/en",which can be a source of inspiration for the work outlined here.

Fundings etc

The proposed programme has long been regarded by the above mentioned interests as an urgent necessity and has at last begun to take shape as something concrete. This means that a natural network of researchers is appearing in a number of European countries. Longstanding good relations exist between the Max Planck Institute in Munich and IFIM in Stockholm, but they have never engaged in joint research of the kind now proposed. In addition, there is a Nordic research network involved in IFIM's activities which meets annually. This Nordic co-operation can now also be made to include concrete research tasks, and it seems natural that research exchange between our countries should be intensified.

Last but not least, we feel bound to emphasise that the pressure on legal science, and not least in the dynamic field of intellectual property law, is growing at a pace which will not permit large, slow, one-man projects. Concerted efforts are needed from many people with reference to interconnected themes which can be presented more or less simultaneously so that research in this field can impact on the community at large. The proposed programme, which is partly concerned with legal policy and partly with research policy, will thus be aimed at presenting new forms of research of this kind for the 21st century. A pilot project has been undertaken concerning the domain names process, with assistance from undergraduate and specialist course students in Stockholm, Munich and Karlsruhe, together with a postgraduate from Finland. The preliminary results from that project were presented by Dr. Annette Kur at the ICANN meeting in Stockholm on 1st June 2001.

The Nordic part of the programme is from Sweden supported by the new body The Swedish Research Council (Vetenskapsrådet) and in Finland by the Finnish Academy.

App. 1

PROGRAM PROPOSAL

SEARCHING FOR AN INTELLECTUAL PROPERTY SYSTEM FOR THE 21ST CENTURY

STRUCTURES AND CONCEPTS IN ADAPTATION TO THE TECHNOLOGICAL CHALLENGES

Steering Group
Niklas Bruun, Thomas Dreier, Berndt Hugenholtz, Annete Kur, Mogens Kokvedgaard, Marianne Levin, Josef Straus (& contact persons in USA & Japan)

Research Co-ordinators GENERAL
Marianne Levin – Annette Kur

Horizontal Issues
- Private International Law - Sanctions
- Rules of Procedure including
  Burden of Proof
- Contracts & Licensing
- Antitrust Law

Vertical Issues

Topic Research Co-ordinators

- Investigation & Compilation
- Identification of additional topics for research (in conjunction with the Steering Group)

META LEVEL ISSUES I

Structure
- Individual/collective rights
- Commercial/private sphere
- Convergence (separate/common grounds)
- Global/regional (national, local) rights
- Exclusivity/co-existence

META LEVEL ISSUES II

Methods
- Access/Balancing of interests
(exhaustion, fair use, misuse and abuse etc.)
- Harmonisation (legislature, soft law,
court practice etc.)
- Enforcement (authorities, mechanisms)

THE IMPACT OF DIFFERENT LEGAL TRADITION AND HERITAGE (CONCEPTS, NOTIONS, ATTITUDES, VALUES)

PATENT LAW
- Requirements
- Contents and Scope of Protection
- Exemptions and Exceptions
- Overlaps
- Specific Problems

TRADE MARKS
- Requirements
- Contents and Scope of Protection
- Exemptions and Exceptions
- Overlaps
- Specific Problems

COPYRIGHT
- Requirements
- Contents and Scope of Protection
- Exemptions and Exceptions
- Overlaps
- Specific Problems

DESIGN
- Requirements
- Contents and Scope of Protection
- Exemptions and Exceptions
- Overlaps
- Specific Problems

OTHER PROTECTIVE MEASURES
(Sui generis rights, protection against unfair competition, torts etc.)