An Island of Tranquillity

Peter Drahos, Gustavo Ghidini and Hanns Ullrich (eds), *Kritika : Essays on Intellectual Property - Volume I* (Edward Elgar, 2015) 352 pp

Marc D Mimler
PhD (London) & LL.M. (London); Lecturer in Law, Bournemouth University

Intellectual Property Law is presently perhaps one of the fastest moving fields within law. Its nexus with various fields of society and the ever increasing pace of technological development have had an enormous impact on this field of law. It could even be said that intellectual property law owes its sheer existence to these advances. This ongoing evolution of intellectual property law necessarily impacts on the legal commentary, debate and analysis. The relevant blogs provide daily updates of recent cases and developments and the textbooks in intellectual property law often require frequently updated editions in order to reflect the most recent developments. While an up to date discussion of the current developments is indispensable for academia and practice, it may lead to the loss of time to thoroughly reflect on these developments; to place them within the bigger picture. And this is exactly the aim of this book as one of its editors, Hanns Ullrich, has colourfully described it: To be an Island of Tranquillity.

This aim is a challenging one. But the team of editors, the professors Hanns Ullrich, Peter Drahos and Gustavo Ghidini - all highly esteemed scholars within the field - are more than well equipped for this task. What the editors of this first volume of a series of publications envisage is to provide a collection of timeless contributions on the IP discourse. And indeed, the editors have gathered highly renowned experts and academics within the field of IP law. This review will discuss some of the chapters.

The chapter written by Steven Anderman provides a detailed but concise and informative overview of the IP/Competition law interface within the European Union. Anderman posits that competition law would aid to strike a balance between initial inventors/creators and the interest of those engaged in follow-on and cumulative innovation. The chapter begins by charting internal mechanisms that patent and copyright law provide to

strike such balance. Exceptions and limitations, as well as other mechanisms like the idea-expression dichotomy within copyright law, would stipulate that intellectual property rights themselves already confirm that not necessarily all benefits created by IP rights should be conferred to the original inventor/creator. The following part of the chapter builds on the finding that these internal mechanisms do not suffice to prevent anti-competitive practices by IP right holders. It expertly charts the development of the Competition law scrutiny of practices of IP rights holders and how the Commission and the Courts applied Articles 101 and 102 of the TFEU (and their respective preceding provisions). Anderman, however, mentions the limitations of competition law (e.g. the positive finding of a dominant position) with this regard and states that it cannot be seen as a systemic solution to IP 'problems'.

Carlos Correa's chapter provides a thought-provoking critique of current practices in patent law. The beginning of the chapter emphasises the importance of proper patent examination and suggests that countries that do not have a substantive examination would benefit from introducing one. The latter part of the chapter discusses misapplied fictions within patent law. According to Correa, these misapplications led to an increase of the subject matter that can be patentable and warns of the negative effects, both on innovation as well for society as a whole, through an increased "propertisation" of knowledge. The current tests for inventiveness using the fictitious person skilled in the arts would, for instance, provide an unclear, subjective and unpredictable standard for one of the most important criteria of patentability. Within biotechnology, Correa criticises the patentability of gene sequences which were traditionally considered to be unpatentable discoveries. Additionally, he criticises the practice that enabled the patenting of second medical uses. Correa argues that rejecting such second medical uses would be consistent with basic principles of patent law and would be beneficial from a public health perspective since the practice of "ever greening", often conducted through second medical uses, would not be possible anymore.

The chapter written by Alexander Peukert provides a historical analysis of the evolution of international intellectual property law. The author discusses this history by focussing on three particular transfers that forged current intellectual property law and highlights the shortcomings (or "blind spots" in the words of the author) of these transfers. The first transfer relates to the application of property right principles in relation to tangible goods to intangible goods. This development did not go seamlessly as there was no reference in Roman law foreseeing property in intangibles. Peukert states that this development

occurred over different stages: From the system of privileges, their replacement by statutory laws which created an object of ownership, to the romantic days when the figure of the author took a more central role detached from the concept of the work. While the property reference now seems to have been established, Peukert does mention that especially France and Germany continue to have doctrinal difficulties with this transfer.

The second transfer that Peukert's chapter discusses is the transplantation of the western formulation of IP law throughout the rest of the world. This phenomenon is largely due to the colonisation of world mostly by western European countries and the emergence of international treaties and conventions on intellectual property. The problem with this transfer is that an adoption of a one-size-fits-all system established by this transfer does not take local socio-economic developments into account. The final transfer that Peukert discusses is the subsumption of indigenous creations within the IP rhetoric. Peukert, however, mentions the incompatibilities of the western IP system, such as the notion of individual author and the public domain, as yet another "blind spot" of this transfer.

Marco Ricolfi develops a fascinating approach in his chapter. He suggests a new paradigm for creativity and innovation that would supplement but not replace the traditional IP paradigm of exclusivity. Initially, Ricolfi mentions that in an analogue world the incentive/reward rationale of copyright protection is based on traditional avenues of how creative works are devised, produced, and marketed. Here, the so-called copyright businesses were indispensable to allow the production and dissemination of the work by the original author. The increasing digitisation renders these middle men less relevant since the contact between creators and consumers are now provided via a "short route" that does not depend on intermediaries. Additionally, digitisation would enhance network-driven collaboration such as Wikipedia where the motivation for creation is not necessarily to obtain exclusivity. With regards to technological innovation, Ricolfi argues that the exclusivity paradigm has here eroded to some, albeit lesser extent, and mentions the shift to more liability rules and the aspect of private ordering, as examples for this phenomenon. Additionally, he identifies that exclusive rights are increasingly being granted on upstream invention and this would backfire on innovation. Hence, Ricolfi submits that "[t] he current system is broken down".

Ricolfi, however, does not wish to eradicate the exclusivity model where it still necessary but rather make it coexist with the new model he proposes: This model would

consist of three pillar. Private ordering, increased shift to liability rules and an appropriate infrastructure consisting of net neutrality, adequate competition rules, a secured public domain, and a considerate liability of ISPs. Ricolfi, additionally, provides an enlightening analysis of the transactions that are conducted within the "short route" and elaborates how digital licensing can be applied in an effective way.

Geertrui van Overwalle's chapter provides an instructive investigation of the legal framework for open innovation. The chapter first analyses the adoption of open innovation from a firm centred version and community based open innovation. The declared aim of the chapter is to provide an approach between these two models. The model should follow two presumptions: It should be more open as this would be beneficial for innovation while it should also be technology-orientated. Features of such a model should be able to encompass any motivation for innovating, whether profit-orientated or not, that it should be open (i.e. as to access and use of the innovation) and that it should not entail high costs.

The latter part of the chapter analyses the necessary legal architecture that would assist the promoted model for open innovation. Here, property as well as contract law, "albeit with a different mindset", would be applied. In this context, patents would be the most adequate tool in comparison to a "no-IP" or relying on utility models. With regards to the contractual arrangement of the "property-contract tandem", van Overwalle scrutinises four types of open licensing (license of right, open source licencing Creative Commons licences and Defensive Patent Licensing) as to their suitability for the proposes open innovation model and comes to the finding that generally high costs of acquiring and monitoring patents would be the main obstacle to the proposed vision of open innovation. This deficiency could be resolved by an inclusive patent regime. Such inclusive patent would be provided as an alternative to traditional patents and would entail features of a liability rule. It would be one-sided right which means that it only encompasses the right to include others, rather than the traditional approach of excluding others. Some institutional changes would be required; a registration system of such inclusive patents should be devises rather than current examination systems since this would decrease the costs. Van Overwalle suggests that there are still many questions that would need to be addressed and highlights a thorough economic analysis. Therefore, she invites us all to engage in the debate.

The final chapter of the book relates to an issue which could easily be described as a "hot topic" – namely the proposal of introducing new copyright exceptions. But the author, Peter Yu, delivers far more than an overview of current developments with this regard. Rather, he discusses frequently brought forward arguments of the copyright industry against the introduction of such new exceptions. He identifies and discusses 7 of these arguments. These arguments span from the often heard argument that the current framework of exceptions suffices, a possible conflict with international law (i.e. 3 –Step test in its various formulations in international law) to the fear of financial loss for the industry. Yu, however debunks these statements and provides his reader with convincing arguments to counter them.

To summarise and conclude, one can say that the editors of *Kritika-Volume 1* have not just kept, but rather have exceeded the expectations. The thoughtful and well-written contributions showcase the breadth of current IP scholarship and provide extremely useful summaries of the current debates. And indeed, the reader can pause and is invited to reflect on the core issues in the field of IP law. Hence, this book is a wonderful read for everyone interested in intellectual property and its academic discourse. The last thing to add is that one can only look forward to the 2nd volume of this series which is planned to be published in June 2017 according to the publisher's website. For those too impatient to wait, some consoling words of the German author Lessing who wrote in one of his plays: "[T]o await a pleasure, is itself a pleasure."[1]

[1] Gotthold Ephraim Lessing, *Minna von Barnhelm oder das Soldatenglück* 4th Act, Scene 4