

James Griffin, *The State of Creativity - The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar, 2019) 304 pp

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A monograph by Dr James Griffin, a Senior Lecturer at University of Exeter and Senior Visiting Research Fellow at Queen Mary University of London, discusses the concept of creativity, how its centrality within the legal regulation has shifted, and what the future of a creative State might look like.

Image: Elgar Law, Technology and Society

In the introductory part, Dr Griffin reflects on the history of productive creation and how creativity, in the form of collaboration and conflict, has been an integral part of human history and a necessity of the human condition. Special attention is drawn to the relationship between the creative individual and the State. The author argues that the centrality of a creative endeavour should be considered in the legal regulation of creative works.

The monograph then proceeds to explore to what degree State regulation has begun to depart from the core concerns of creativity and, in doing so, considers how individuals' own creativity is influenced by the creativity of others. Dr Griffin considers the issue of creativity within the individual, which despite lying at the core of the human experience, tends to be limited at the State level to issues of economics and property rights.

The author distinguishes between 'inner creativity' (individual ideas and thoughts), which is shielded from State interference, and 'outer creativity' (physical expression of ideas), which the State can and does seek to affect. The Law seeks to regulate the substance of thought, but ultimately only regulates the output, which does not directly control inner creative thought, but nevertheless may influence subsequent thoughts and acts of expression. New technologies, such as 3D and 4D printing, and augmented reality, presumably allow for a "more nuanced and precise [State] intervention in the thoughts of the individual, by more

closely regulating not just what can be expressed, but also the mechanic processes of creating.”

Griffin reflects on the work of a number of philosophers, notably Plato, Locke, Hume and Nietzsche, as they contemplate creativity while focusing on its different catalysts and the functional relationship of creativity to the State. Against this background, the author concludes that “[i]t is the nature of creativity that binds society together and so it is that we need to analyse and critique if society is to become more ontologically concerned with its core”. The State’s increasing (?) reliance on concepts of property and economy as the lens by which to view the creative process may not only lead to a blurring of the ‘inner’ and ‘outer’ distinction but also serve as a potential suppressor of creativity altogether. Dr Griffin explores whether intellectual property rights provided by law are appropriate in the modern era and proposes specific ways how the traditional statutory focus may be expanded.

The author criticises the current legislative system, whereby the emphasis is placed on protecting right holders from infringement. This is best seen in the author criticism of legislation driven by “unjustified threats”, where the statutory provisions are principally based on a threat of legal action in relation to specific types of rights, but the threat of action is not justified because there is a reduced likelihood of success should the action reaches trial. Instead, he argues, the focus should be placed on the production of knowledge and the necessity of creativity in doing so.

A chapter is dedicated to investigating the concept of reproduction as part of the proprietary discourse. According to Dr Griffin, when it comes to the notion of the reproduction of third party rights, the Law takes a most circumscribed view, resting on the premise of an individual creator, working in isolation without reproducing the thoughts and ideas of others. Such assumptions are no longer credible (if they ever were) and a proper appreciation of technological advance should presuppose one’s ability to share information. Creative sharing (and re-sharing) is contrasted with, in the words of the author, the “mindless enforcement of historic proprietary boundaries”, thus calling for the traditional concepts of property and capitalism to be superseded by merit and entitlement to avoid limiting creative expression.

Chapters 7-9 focus on the proposed systems of regulation and governance of creativity: (1) identifying the processes of creativity; (2) reforming the licensing system and establishing a creativity fund to allow easier access to copyrighted works and to provide financial means for the creators; and (3) introducing a new regulatory body - Digital Copyright Exchange Tribunal, would be a means through which the State could directly interface with creativity. [Merpel has to jump in here - so only a new State bureaucracy can solve the problems of the State's misconduct in facilitating creativity?].

The closing chapter discusses the future of the creative State. Dr Griffin embraces the task of resolving the conflict between State regulation with a capitalistic undertone and the focus on better facilitating creativity. The author calls upon the State to refocus its attention to creativity, contending that the making of a cultural work, specifically a copyrighted work, is a key to the future of the State in the information age. The current disjunction between the creative process and bureaucratic regulation should be reformulated in such a way that it ensures that latter does not materially frustrate the former; instead, there should be an engagement between them.

Thus, legal rules should encourage creation of new works rather than preserving the “prescriptive bureaucratic acceptance of rigid property boundaries”, because the technology is removing the need for such boundaries. Centrality of creativity could potentially lead to further creativity and subsequently to the generation of new property and capital.

This book will be particularly useful to scholars and students interested in pondering how the relation between creativity and legal regulation will play out in the face of emerging technologies. Regulators and policy makers may also find it helpful in considering legal reforms that are aimed at better shaping the creative State.

Intellectual property law has increasingly acquired a more and more international dimension. And indeed, international intellectual property law has come a long way since the Paris and Berne conventions were devised in the late 19<sup>th</sup> century. While intellectual property law is not the only field of law that has become increasingly international, it is yet a particularly interesting field for analysis. This is due to its nexus with so many various and divergent fields of society, which have been increasingly internationalised and globalised over the years themselves. This nexus with other fields of law is central to this timely

publication and its aim is quite ambitious: Dr Grosse Ruse-Khan's book wishes to provide a holistic view of intellectual property law within the wider framework of international law.

This aim necessarily requires a wide scope of analysis of intellectual property law, its position within international law, its relationship to other fields of law and importantly how these various fields may impact on each other. With regards to this analysis, Grosse Ruse-Khan offers both a broad as well as a narrow approach to international law in relation to intellectual property: Broad, since he goes to analyse the usual international laws that are traditionally associated to intellectual property. Narrow to the extent that it does not cover such international law deriving from global civil society and enforced by private means, often coined as transnational law.

Starting point for the analysis of publication is an apparent conflict among the different sets of legal systems relating to the protection of intellectual property. And globalisation is at the core of this conflict: On the one hand, it is believed to have had an accelerating effect on the internationalisation of law. On other hand, globalisation also accelerated the differentiation of the legal system into fragmented and specialised areas of law. These specialised areas of law would often follow their own rationality and would lead to conflicts between competing regimes of law. This system theoretical analysis of the globalisation of law can be traced back to the great German sociologist (and lawyer) Niklas Luhmann.<sup>1</sup> This analysis has been further developed by Andreas Fischer-Lescano and Gunther Teubner whose work focusses on uncovering the true nature of these conflicts.<sup>2</sup> For instance, the much discussed and analysed conflict between patent rights and access to medicine can be reconstructed into a conflict between the societal fields of the economy (represented by safeguarding the investment in creating medicine) and that of health. The conflict would be reproduced within the legal subsystems of health law and IP protection.<sup>3</sup> Grosse Ruse-Khan expertly uses this system theoretical approach to provide for a fresh approach to analysing international IP law.

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<sup>1</sup> Luhmann himself provided a rather negative account of the differentiation of societal fields when he said: "The sin of differentiation can never be undone. Paradise is lost." - Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Suhrkamp 1994) 344.

<sup>2</sup> See for instance - Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The vain Search for legal Unity in the fragmentation of Global Law' [2004] Michigan Journal of International Law 999; Andreas Fischer-Lescano and Gunther Teubner, *Regimekollisionen* (Suhrkamp 2006).

<sup>3</sup> See Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The vain Search for legal Unity in the fragmentation of Global Law' [2004] Michigan Journal of International Law 999, pp. 1024-1032.

The book discusses the conflicts arising between these various regimes, their effect on intellectual property law and how such conflicts can eventually be accommodated. Initially, he discusses how legal conflicts have traditionally been treated by law. Conflict should be understood broadly in this context and “which is able to cover all cases where rules ‘point in different directions’.”<sup>4</sup> A discussion of “conflict of norms” and “conflict of laws”-approaches, as well as substantive law methods, provides a useful base to get to the core of how to address the conflicting regimes impacting on international intellectual property law. Grosse Ruse-Khan proposes a manner of how to accommodate conflicting regimes through a meta rule of integration.<sup>5</sup> By this, the regime that would apply to the conflict at hand which would be most suitable for integrating the rules of the conflicting system.<sup>6</sup> The chapter then suggests a tool box which provides for principles from conflict of norms, conflict of laws as well as substantive law methods. The toolbox, as the author notes may suggest some arbitrariness and consequently states that it should not provide an authoritative metric for determining which norms should prevail.<sup>7</sup>

This toolbox of how to resolve conflicting rules is applied within the following chapters of the book. The conflicting relationships that the author wishes to analyse are firstly those *within* the international IP system (i.e. the TRIPS Agreement and the provisions within FTAs), then those *between* the international IP system and alternative protection system (such as investment or human rights law) and finally those relationship between international IP rules and those rules system that would follow another objective (i.e. laws safeguarding biological diversity or the environment). Hence, linkages of intellectual property with WTO law, the very pertinent issue relating around investment treaties, human rights and environmental law are established and scrutinised as their possible overlaps and conflicts. Grosse Ruse-Khan, for instance, comes to the very interesting finding that a cross-fertilisation of how conflicting rules are accommodated can be applied to other fields of law: Investment law which would lack considerations for competitors of IP right holders, could integrate rules

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<sup>4</sup> Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 38.

<sup>5</sup> *ibid* 54.

<sup>6</sup> *ibid* 54 – 55.

<sup>7</sup> *ibid* 65.

of conflict resolution from ‘outside’ its ambit, e.g. the balancing rules within human rights laws.<sup>8</sup>

Overall, this is a very welcome publication that provides a refreshing approach on how to look on international intellectual property law. It bundles many threads of contemporary research in this great and authoritative tome. The structure and content of this book will provide an important addition to the state of the art on the international dimension of intellectual property law and may serve as a blueprint for further, exciting research within the field.

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<sup>8</sup> Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 266.