

Hanken School of Economics, Helsinki

Workshop: Unfair competition within (and beyond) IP

A conduct-based approach to IP

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Intro: The doctrinal point of view

- How is this topic related to the project of introducing unfair competition principles *in* IP?
- My *legal-doctrinal* position differs (cf. [Güterzuordnung als Rechtsprinzip, 2008](#)):
 - There is categorical difference between transferrable exclusive property rights in objects (IPR) and the regulation of commercial activities through unfair competition law (“Verhaltensunrecht”)
 - For institutional reasons: The competence to create
 - new exclusive property rights (IPRs) – the legislature
 - new tort/delict claims – the courts
 - Contra A. Kur et al: sliding scale, danger of hollow principles (“Begriffsjurisprudenz”)

The ontological point of view

- My *ontological* project regarding the IP subject matter
 - Is it an abstract object independent from exemplars in which “it” is only embodied?
 - Or is this a metaphysical fiction that obscures that IP law regulates nothing but the use of artifacts (e.g. a packaging with a sign affixed to it) that are sufficiently similar to certain master artifacts (e.g. a registered TM)?
 - Scandinavian legal realism et al (A. Ross, P. Drahos)
- *This* project is indeed connected to and supportive of the “fair IP” approach:
 - Explains the adequacy of focusing on actors and conduct instead of abstract objects and their boundaries
 - Supports the call for a precise justification why certain conduct ought to be subject to prior authorization

Ontological critique

- Flaws of the idealistic ontology of the abstract IP object:
 - The IP creation paradox
 - The IP destruction paradox
 - The manifestation paradox
 - The identity paradox
- A realistic ontology: John R. Searle's social ontology
 - There is only one world (realism): brute/naked facts and institutional facts (language).
 - The IP subject matter only exists in our language. It is a purely “linguistic institutional fact”.
 - As such, it is real and exhibits strong symbolic power. Thus, it matters normatively whether we speak and think of in terms of ownership in abstract objects or whether we ask why the use of an artifact should be considered unfair.

Confirmation: The regulatory structure of IPRs

- IPRs are exclusive rights to authorize or prohibit certain conduct in relation to certain artifacts
 - Trade marks: use in the course of trade of identical or similar signs for identical or similar goods or services
 - Patents: make, use etc. products, use processes and products obtained directly by these process
 - Copyright: reproduce, distribute and communicate to the public the original or reproductions
 - Designs: make, sell, import articles bearing or “embodying” a design

Confirmation: Historicising abstraction

- A genealogical/historical approach reveals the social construction and contingency of the currently dominant episteme
- (1) The genealogy of common denominators of similar artifacts (abstraction level 1)
 - First mental/physical manifestation
 - Declaration of a name
 - Declaration of a master artifact
 - Labelling similar artifacts with the name of the master artifact.
 - But note: This common denominator signifies concrete artifacts (brute facts) – medium level abstraction

Confirmation: Historicising abstraction

- (2) The history of the concept of the abstract IP object
 - How common denominators for artifacts acquired the secondary meaning of an abstract object (abstraction level 2)
 - Patents and copyrights
 - Privileges to copy books/work machines etc.
 - The emergence of the abstract IP object in the 18th century
 - Its first codification in the French patent and copyright acts
 - Trade mark law
 - Was part of unfair competition/tort law
 - Propertisation only in the late 20th century: exclusive rights in the sign as such, irrespective of confusion and damage
 - But still based in part on competition law concepts (guarantee undistorted competition)
 - Thus the prime example for a recalibration in view of unfair competition law

Intermediate results

- In summary, IP *and* unfair competition law regulate activities:
 - IP rights regulate the use of certain artifacts
 - Unfair competition law regulates all “acts of competition”
- The remaining ontological/structural difference is:
 - Like all property rights, IPRs are inherently object-related (O.-A. Rognstad), namely related to artifacts resembling a master artifact.
 - Unfair competition law is not necessarily object-related (cf. misrepresentation/deceit).

Consequences with a view to the project “Fair IP”

- Analytical usefulness of an artifact/conduct-based understanding of IPRs for the triadic structure of honest practices:
 - Misrepresentation: overlap with traditional TM law, but difference to the rest of IP (cf. ECJ Beele)
 - Misappropriation: overlap with IP except for traditional TM law
 - The difficulties to establish impairment/damage in IP cases
 - Infringers use their own resources. Their activity cannot be entered in the balance sheet of the rightholder. Therefore, the calculation of damages in IP cases is always fictitious.
 - Starting small and scaling up: object talk as a precondition and driver of propertisation

Consequences with a view to the project “Fair IP”

- Normative usefulness of an artifact/conduct-based understanding of IPRs
 - Stricter justification: Is there a need to prohibit third party conduct? Why is this conduct “contrary to honest commercial practices”?
 - Focus on actors and conduct better aligns with the primary purpose of IPRs:
 - Incentivise investment, creativity, innovativeness, entrepreneurship, competition

Consequences with a view to the project “Fair IP”

- However, the legal-doctrinal distinction between transferrable IPRs and unfair competition remains valid as a matter of law and policy
 - Institutional brake upon propertisation trends
 - Deconstruct the subject matter, not the legal structure!