KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY

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VOLUME I

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Volume 1

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Kritika: Essays on Intellectual Property

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Series Editors: Peter Drahos, *Australian National University* and *Queen Mary, University of London, UK,* Gustavo Ghidini, *University of Milan* and *University LUISS Guido Carli, Rome, Italy* and Hanns Ullrich, professor emeritus, Munich, Germany

The fields of intellectual property have broadened and deepened in so many ways that commentators struggle to keep up with the ceaseless rush of developments and hot topics. *Kritika: Essays on Intellectual Property* is a series that is designed to help authors escape this rush. It creates a forum for authors who wish to question, investigate and reflect more deeply upon the evolving themes and principles of the discipline. The scholars participating in *Kritika* choose their own topic, style and length of essay and through their choices set in train a process of emergent critical scholarship around the principles, assumptions and goals of intellectual property systems. This emergent process unites the diversity of content to be found in the volumes of *Kritika*.

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Advisory Board

Editorial

Projects are sometimes born of serendipitous events and chance meetings. So it was with *Kritika*. In November of 2011 Peter Drahos was based at the European University Institute (EUI) for six months as a Braudel Fellow in the Department of Political and Social Sciences. Hanns Ullrich, who had been based at the EUI in the Department of Law, was a frequent visitor to the EUI, as was Gustavo Ghidini. Ghidini and Ullrich were already in conversation about the idea of creating a long-running publication that would serve in the manner of, as Ullrich was later to put it, 'an island of tranquillity' for the analysis of intellectual property. Drahos and Ghidini met at a seminar held at the EUI and at a subsequent dinner Ghidini and Drahos discussed the merits of the idea. At another dinner Ullrich assured Drahos that creating such a publication would be a tranquil experience. Julie Ayling, who has Drahos for a husband, later remarked how odd it was that Drahos had so readily agreed to become involved given his constant complaints about the project deadlines in his life. Drahos pleaded Ghidini and Ullrich's charm as his defence.

In any case under Ghidini's animating influence *Kritika* entered a phase of concrete planning. The details of how *Kritika* would make its distinctive contribution were put in place through email conversations and the occasional meeting.

The idea behind *Kritika* is to create a publication space that maximizes the freedom of contributing authors to engage analytically and contextually with the principles, assumptions, axioms, and goals of intellectual property systems. Authors are invited to choose their own topic and given a wide range of word length within which to work. As this first volume demonstrates authors have exercised this freedom in very different ways.

Our thinking behind this experimental editorship was to avoid a detailed thematic steering and instead set in train a process of emergent critical scholarship. What are the crucial issues and problems raised by the operation of intellectual property systems that require closer inquiry? The field of intellectual property has broadened and deepened in so many ways that no one person can possibly answer this question. Leibniz, who died in 1716, a time in which intellectual property systems were

rudimentary and still geographically-contained infants, is sometimes described as the last universal genius. The age in which polymaths like him could bestride the disciplines has well and truly passed. We live not just in the age of specialist knowledge, but micro-specialization.

One way in which to break down the barriers of specialization is to work cooperatively and synthetically across the disciplines and sub-disciplines. A form of such cooperation is for editors to select themes and organize authors accordingly. But in taking this approach we would have steered *Kritika* in the direction of our own theoretical pre-occupations. We would not have, as Miranda Forsyth does in this volume, thought about the role of magic in intellectual property in the context of Melanesia, or the analogical processes of transfer identified by Alexander Peukert as being crucial to our understanding of intellectual property's globalization.

Our approach to overcoming the barriers of specialization has been to devolve decision-making about *Kritika's* direction to what we hope will be, in part through the auspices of our international board, an ever-widening community of scholars. Over time the choices made by *Kritika's* various contributors will provide a collective and emerging analysis of those problems that are seen by them as being the important ones to address.

We end with two important notes of thanks. Luke Adams from Edward Elgar has been a very supportive, constructive and patient commissioning editor. In Linda Briceño Moraia, Ghidini, Ullrich and Drahos found their d'Artagnan. Her help in bringing the editorial process to a conclusion was simply invaluable.

Gustavo Ghidini, Hanns Ullrich and Peter Drahos

Contents in brief

Extended contents

1. Frederick M. Abbott

Rethinking patents: From 'intellectual property' to 'private taxation scheme'

Monopolies must be recognized for what they are and should not be allowed to shelter under the inaccurate description of 'intellectual property'

Lord Sydney Templeman[1]

I. PATENTS AS PRIVATE MONOPOLY TAXATION

Tracing back to the Venetian patent law of the 1400s the motivation underlying the grant of the patent was to encourage inventorship and contribution to society.[2] Today patents have become a financial commodity treated much as any other asset of a business. Patents are judged by their capacity to generate financial returns, typically for a large industrial or post-industrial organization. The individual inventor or creator plays a role in the large organization, but from a macro-economic standpoint it is the exceptional case in which the individual inventor executes an idea that plays a material role in the marketplace. Despite the evolution of the social construct in which ideas become financial assets, the public narrative of intellectual property (IP) and patents remains focused on the concept of the individual inventor and the encouragement of creative activity. The narrative is a valuable one from the standpoint of large industrial and post-industrial organizations. If an individual expends his or her effort in generating a new idea, he or she should reap suitable rewards for the contribution to society.

[1] Lord Sydney Templeman, 'Intellectual Property', 1 *Journal of International Economic Law*, 603 (1998).

[2] Copyright largely evolved in the sixteenth and seventeenth centuries as a way to allow publishers to profit from the works of authors without interference from 'pirates'. Trademarks were used in early days to prevent passing off imitations as goods from the original source.

From a macro-economic standpoint, today's world of patents is not the province of the individual inventor. It is the world of Apple, Google, Microsoft, Pfizer, Gilead, Novartis, Disney, Comcast and Siemens. Experts involved in the field of patents understand that they work in an area dominated by mega-enterprises. Government regulators certainly understand that their efforts are not directed toward individual garage tinkerers. But, the intellectual discourse surrounding IP remains largely that of the nineteenth century. As the default principle, government should not interfere with the 'right' of the individual to exploit his or her own intellectual creation or invention.

A patent generally gives its owner the right to prevent third parties from exploiting that same invention or creation. As a reward or encouragement, it empowers the patent owner to secure a 'producer surplus' above that which would be provided in a purely competitive environment. The producer surplus in favor of the patent owner reduces the funds in the hands of consumers, and consumer expenditures in favor of other producers. The patent owner benefits from a government-mandated right to exclude. Patents are, in essence, a private right to tax, although a tax that is dependent (in most cases) on the willingness of consumers to pay it.[3]

There is a fundamental question regarding the allocation of a monopolistic private tax to large industrial and post-industrial organizations: that is, does the power to collect a monopoly tax entail public responsibilities? The underlying theme of public discourse is 'no'. That is, the financial asset (i.e. patent) is regarded as freely alienable property that may be used as the owner deems fit, subject only to the general restrictions on uses of property. So, for example, there is no apparent limitation on the level of private tax that may be collected, and no concept of progressive taxation such as might ordinarily be adopted by a government taxing authority. Moreover, there is no restriction on what uses may be made of the tax. Unlike a government that is typically constrained concerning the areas in which it might make expenditure, the recipient of the private monopoly patent tax is free to make whatever use of it is deemed appropriate.

Property ownership more generally can be thought of as a government authorization to collect private rent or taxes. When the government establishes a system of enforceable land ownership rights (a 'mini-monopoly') it accords the landowner the right either to occupy or

[3] It is questionable whether a patient purchasing a unique drug for an otherwise untreatable disease is exercising 'free will'.