

Edited by
JAN ROSÉN



Individualism and Collectiveness in Intellectual Property Law



ATRIP Intellectual Property



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Jan Rosén

*Professor of Private Law, Stockholm University, Sweden and
ATRIP President*



ATRIP INTELLECTUAL PROPERTY

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Preface

The programme of the 29th ATRIP Congress, held in Stockholm 24–26 May 2010, worked under a chapeau of *Individualism and Collectiveness in Intellectual Property Law*. This heading allowed an extraordinary advanced academic gathering – some fifty prominent law professors were on the podium during the congress – to embrace fundamental, eternal and yet very contemporary elements in IP Law that they deal with in teaching and research. The emphasis was put on classic IP Law values embedded in the protection of human efforts and the creativeness of individuals, and at the same time the speakers were deploying the intrinsic phenomena of our times that lie in the enhancement of individual creativeness in a collective setting as well as the tendencies to build national, regional or global monopolies based on IP Rights. The respect for original ownership, the occasional need for collective management of IP Rights, the idiosyncrasies of co-ownership of rights and the ever-present tension to be found in encounters between exploitation of IP Rights and Competition Law were all dealt with in the arena of the scientific programme of the 2010 ATRIP Congress. This book reflects the centre field of the many aspects brought to the audience.

Opening remarks to the 2010 ATRIP Congress

The opening remarks to the 2010 ATRIP Congress by Magnus Graner, the Secretary of State at the Swedish Ministry of Justice:

First of all I would like to thank ATRIP and its President, Professor Jan Rosén, for inviting me to give this welcoming address.

The International Association for the Advancement for Teaching and Research in Intellectual Property – that is indeed an impressive name and it indicates an important goal. Rightly so, and I am more than pleased to see that the association assembles scholars and professors from all areas of Intellectual Property Law and from many countries around the whole globe. It is my understanding and hope that you share common goals in a time of increasing demands on the system of intellectual property rights.

The overall topic, or approach, of this congress – individualism and collectiveness in Intellectual Property Law – is really excellent and brings many thoughts to my mind. That is a perfect starting position.

I'll start off by making a very general remark, but still, in my mind, necessary to state. We are all aware of the importance of intellectual property rights for the development of our economies. This importance is based on societal progress. Modern economy is largely based on knowledge-based industry. This puts great demands on the system of intellectual property rights. We need to maintain the incentive to create and invest in intangible assets. But we must also take into account the interests of users and the society at large.

This could be the most important – and difficult – question related to intellectual property rights today.

Technological development and societal advancement alters the underlying conditions for creative processes, as well as the possibility to exploit intangible goods and services on the market. We need to take this into account when developing the intellectual property system. Traditionally, the intellectual property rights system is based on an individualistic point

of view – it focuses on one author or one inventor at a time. Especially, copyright has traditionally been very individualistic. The moral rights are the ultimate example of this approach.

One important aspect is the exploitation of rights on the market. Traditionally, it has been difficult for copyright-holders to manage their rights individually. The advancement of new forms of mass-communication and exploitation – for example the Internet – once again puts the individualistic stance into question. To give one example: a recently published investigation, initiated by the current Swedish government and headed by the ATRIP President, Professor Jan Rosén, has proposed the introduction of a general provision on an extended collective license. This investigation is now circulated for comments among interested stakeholders. The concept of such a general provision is interesting. It is good to know that related issues will be discussed during this congress.

Another aspect is the increased collectiveness of the creative processes. Many creative goods and services are the result of collective efforts: a single product may have several rights holders, or there may be co-ownership of rights. This is especially true regarding audiovisual and multimedia products. It is important to strike a fair balance between the interests of the individual primary right holders and the interests of the exploiter to bring the creative goods onto the market.

Times change and the intellectual property rights system needs to keep up. Underlying principles must be upheld, however, maybe in an altered manner. The question is *how* we achieve a balance between legal, technological and societal demands.

Lawmakers need thorough information about the demands brought on the intellectual property rights system by the current developments of technology and society. Legal research has an important and necessary role to play in this process. I am confident that the discussions at this ATRIP conference will contribute to future policymaking.

I would like to draw attention to one aspect which doesn't always get the attention it deserves. As the system of intellectual property is under increasing criticism, I think there is a great demand for, as well as genuine need for valid information and education in this field of law. Respect for intellectual property can be established in many ways. Enforcement is one way. But the system of intellectual property rights needs legitimacy within society, among people! Information and education play a vital part in creating and sustaining this legitimacy. Therefore, you scholars and scientists have a very important role to play!

I wish you all an interesting as well as thought-provoking congress – the program, the context and yourselves are guaranteeing this.

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PART I

IP rights and competition law

1. Individual, multiple and collective ownership: what impact on competition?

Reto M. Hilty*

Dealing with different forms of ownership is an appealing challenge today. In fact, awareness seems to be growing that “property” – leading to ownership – is not a predetermined concept. The content of “property” does not ensue by nature, but must be defined by law. “Property” can notably be limited in time and scope in order to pursue specific objectives in the public interest. For “property” as an institution should undoubtedly not solely realise the individual purposes of its owner (or owners); ownership, in whatever form, must ultimately take into account the social momentousness of the institution “property”.¹

This insight per se, however, does not provide a clear legal framework; instead, a great number of related issues can be grouped under the heading “ownership”. And the discussion on what ownership – or property – shall encompass is, of course, also not new; on the contrary, substantial research in this area has already been accomplished.² If we want to narrow

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¹ In this sense *Jefferson*: “[. . .] the exclusive right as given not of natural right, but for the benefit of society [. . .]”, Thomas Jefferson to Isaac McPherson, 13 August 1883, in: *Lipscomb/Bergh* (eds.), *The Writings of Thomas Jefferson*, Vol. XIII, Washington 1905, at 326–38.

² See inter alia *Peukert* (2008), *Güterzuordnung als Rechtsprinzip*, Tübingen, 2008, at 100 et seq.; *Demsetz* (1967), ‘Toward a Theory of Property Right’s, *The American Economic Review* [Vol. 57], at 347 et seq.; *Shavell* (2003), ‘Economic Analysis of Property Law’, Harvard Law and Economics Discussion Paper No. 399, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=370029 (accessed 03 February 2011); *Alston/Mueller* (2005), ‘Property Rights and the State’, in: *Ménard/Shirley* (eds.), *Handbook of New Institutional Economics*,