

37th Annual Congress, 5-8 August 2018

Call for Paper Proposals

Fairness, Morality and *Ordre Public* in Intellectual Property

The 2018 ATRIP Congress will examine the role of fairness, morality and *ordre public* in Intellectual Property (IP) law and policy.

Fairness may be defined as the quality of treating people equally or in a way that is right or reasonable. The notion of fairness is used in IP law in at least two different ways, namely, first, to restrict abusive and anti-competitive conduct; second, to protect inventors, creators, trademark owners and others against certain forms of free-riding. Fairness can infuse the protection of the “fruits of intellectual labour” with a degree of proportionality and thus constitute one of the justificatory theories of many forms of IP. Perhaps fairness’ most well-known role in the IP realm, however, is animating fair use and fair dealing limitations on copyright rights in the laws of common law jurisdictions. Fair use is also applicable— though with different contours—to trade-marks.

Morality and *ordre public* play a direct role in international IP law & policy. Some see morality reflected— semantically at least—in the ‘moral right’ in art 6*bis* of the Berne Convention, although this is debatable. In patent law, the notions of ‘*ordre public* or morality’ are used in TRIPS article 27.3, which allows WTO Members to limit patentable subject matter. *Ordre public*—not to be confused with notion of “international public order”—was originally a notion used in domestic law of civil law countries to protect the basic values of the forum law (an equivalent notion is known as public policy in common law countries). Morality is relevant in several ways, including in unfair competition regulation and confidential information law such as the EU Unfair Commercial Practices Directive and TRIPS Article 39.3, both of which incorporate the notion of ‘honest commercial practices’. Morality is a factor in trademark law, for example in Article 6*quinquies* of the Paris Convention (*telle-quelle* principle). Morality was invoked in a recent EFTA Court case out of Norway (*Vigeland*). In contrast, a recent US Supreme Court case (*Tam*) limited the governments’ ability to decide whether a trademark was obscene for purposes of registration. One could mention in this context the immoral nature of counterfeiting activities used to fund criminal organizations.

Morality and fairness have also been invoked in debates about a ‘value gap’ in the online exploitation of authors’ rights. As part of a broader theoretical morality can thus inform analyses of the distributive effects of IP rights.

Definitions of fairness, morality and *ordre public* may differ among various WTO Members. As for many other elements of IP law, their source is usually the *lex fori* and defining those notions may thus give rise to private international law (conflicts) issues.

International intellectual property rules actually reflect the fact that IP can sometimes be used unfairly or lead to unfair (or even immoral) outcomes, both in terms of allowing each person to develop his or her own potential and in terms of access. Most rules in this area take the form of limitations and exceptions. For example:

- Strong non-discrimination rules, such as national treatment obligations, that aim to prevent unfair treatment of non-nationals;
- The Appendix to the Berne Convention for the Protection of Literary and Artistic Works, which provides a means for developing countries to issue compulsory licenses to improve access to copyright material;
- The Paris Convention, which provides mechanisms to remedy failures to make patented articles available;
- The TRIPS Agreement, which provides mechanisms for limits on rights (Articles 13, 17, 26.2, 30 and 31);



- The Doha Declaration and subsequent TRIPS amendment (Article 31*bis*, which entered into force in January 2017), which provide a means for least-developed nations to access medicines from generic manufacturers;
- The Marrakech Treaty, which provides an exception to remedy the unavailability of copyright material for print-disabled users; and
- TRIPS Articles 8 and 40, concerning competition (antitrust) law.

Obviously, as noted above, the various ways in which IP rights emerge and are used and applied raise questions of fairness, morality and *ordre public* well beyond their role that those notions play as justification for limitations and exceptions.

Stating that some uses of IP are unfair or that they can lead to unfair or immoral outcomes begs at least two questions: (a) what uses and outcomes can be defined as fair (or moral)—and then fair to whom; and (b) according to which criteria should one decide which uses and outcomes are fair. A related question is who (court, legislature, etc.) is best placed to decide.

At the international level, if morality and *ordre public* do have a role to play, what are the criteria according to which the fairness or morality of a particular intellectual property norm should be judged? Is economic analysis a good tool to measure fair outcomes? If so, what are the proper metrics? What (other) normative tools that should inform the analysis of fairness, morality and *ordre public*?

ATRIP members are invited to submit paper proposals on these questions including:

- How are fairness, morality and *ordre public* relevant considerations in determining the scope and application of intellectual property rights, limitations and exceptions?
- Can and should fairness, morality and *ordre public* be defined or assessed as global norms?
- Is the process for negotiating international intellectual property norms fair (the prominent role of secret discussions; shift to regional and bilateral fora);
- Does economic analysis offer good/the best tool(s) to measure fairness and morality in the use of intellectual property and outcomes created by such use?
- Do fair use (of copyright and trademarks) and fair dealing (of copyright works) provide models that can and should be used globally?
- Are current morality and *ordre public* limits on patentable subject matter adequate?
- Should fairness (and unfairness), morality and *ordre public* be defined and/or measured differently in the case of developing and least-developed countries, especially in terms of developmental objectives.

Paper proposals are welcome in all areas of intellectual property. *On behalf of the Executive Committee, I invite you to submit a paper proposal, including an abstract **not exceeding 300 words**, the author's name, title and affiliation. You need not send a CV. As ATRIP is an international organization we welcome the submission of proposals from around the world and care will be taken in the selection process to achieve global diversity as well as academic quality. Scholars of all levels of experience are invited to submit proposals.*

Proposals received from ATRIP Members with no outstanding membership fee payment will be reviewed first.

*Proposals should be sent no later than **27 January 2018** to ATRIP's President, Professor Daniel Gervais, at the following address: president@atrip.org. Notification of the outcome of the selection process will be sent in April 2018.*

Prof. Daniel Gervais, PhD MAE
President, ATRIP, 2017-2019