
Editorial

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1 Introduction

This special issue of the *IJIPM* is the result of a first initiative of the editors to congregate scholars from several research institutes and universities overseas in order to discuss some topics relating to the complex and contentious interface between the paradigms of international intellectual property law, creative industries and cultural expressions. In fact, this debate is not novel amongst international IP lawyers. Rather, it refers to old issues that are revisited in new notions suggesting the importance of the global dimension of intellectual property rights, the limits of privatisation of public goods, incentives to national innovation systems and access to knowledge and other commons.

In any case, a primary desirable approach for the debate concerning creative industries, creative goods and intellectual property rights is centred in a critical review of

basic policies and economics associated to traditional pillars of the international intellectual property regime shaped by the classical Berne and Paris Conventions, as well as the implications of developmental-related WTO/TRIPS provisions. Creative industries are related to markets centred on the creation and exploitation of 'IP-creative goods', which may consist of truly 'original symbolic products' incorporating diverse cultural expressions and customary traditions from local and regional communities. Indeed one of the main issues in this connection is to determine the limits of appropriation of public goods by intellectual property rights as a ground for justifying the creative process. Copyright issues, for instance, play an enormous role in the context of the legal management of the outcomes of creative industries. However in view of the necessity of a normative development of enhanced users' rights, copyright tools must fit new demands of a global knowledge society, where the interests of science and education must be ensured at international and domestic level.

The universe of creative industries is considerably broad since it covers a wide range of potential field of business, such as in advertising (including business-to-business creative services), design (architectural, communication and designer fashion), film, video and photography, fine art illustration, game development, handicraft (including antiques restoration market), phonogram industry, performing arts, and publishing; software, computer games and electronic publishing; and radio and TV (including cable transmission, broadcasting, webcasting and podcasting). In all these cases, a constant analysis of the intersections of creative industries with intellectual property rights is required, particularly in view of the enforcement of international and domestic norms endorsing such interactions. From the results of sequential and derivative activities, creative goods can be designed, developed and marketed by creators and artists, who will be constantly claiming an even more strengthened protection for their creations. In this context, significant externalities may be evidenced by the irreversible trend of appropriation of knowledge goods by intellectual property owners.

It is important to recall that several factors can be identified in the context of intellectual property and creative industries, varying in approach and magnitude. The emergence of new technologies and advent of internet had substantially changed the ways 'creative products and services' are distributed in global markets. Developing countries are still struggling with WTO/TRIPS standards of intellectual property protection in order to change their domestic practices and institutions and explore all the flexibilities provided by the agreement. In all those aspects, the exhaustion and consequent obsolescence of certain proprietary models lead to a debate concerning the urgent adjustment of international norms. This seems to address some specificities of creative industries' management, since this field has become undisputedly a growing part of the global economy.

With those objectives and in mind, this special issue conceived the idea to provide a forum for discussion and presentation of overall issues on intellectual property and creative industries, revisiting traditional institutions and recommending some policy insights for helping to resolve some of the contentious issues. Not surprisingly, most of the articles which are herein offered to the scholarly community are dedicated to the emerging issues of intellectual property-related aspects to copyright, cultural expressions, traditional knowledge and freedom of expression.

From that standpoint, the completion of this issue of *IJIPM* sought to be based on critical and policy-oriented contributions varying from different legal, economic and societal perspectives. The interface between the international intellectual property system

and creative industries must also inevitably revisit basic principles of innovation law, contract law and competition law, particularly in those fields where trends on privatisation of knowledge goods and appropriation of cultural expressions are in spotlight.

In addition, many topics dealing with the legal debate concerning incentives to production and dissemination of creative goods and development in creative industries are still open and can be subjected to scholarly analysis in the future:

- creativity standards and IP protection – access requirements for protection and creative industries
- economics of creative industries and intellectual property law
- creative potential of developing countries, economic aspects of creative activities, trends on the access to ‘creative goods’; benefit sharing in creative industries
- transnational code of principles of technology sharing, open source and interface with creative industries (legal or entrepreneurial aspects)
- expansion of public domain; competition standards alternatives in the field of creative industries
- cross-subsidies and R&D in creative industries; business models and new technologies
- relation between media and creative industries; effects of copyright protection and expanded protection through bilateral and free trade agreements
- distinctions between cultural industries and creative industries – their contours and common fields, such as dissemination of arts (museums and libraries), cultural tourism and heritage, sports and outdoor activities; societal dimensions of cultural industries and non-appropriation of cultural goods by creative industries
- survey issues and evidence of the relation between IP protection, incentives or non-incentives and creative industries (e.g., distinct approaches of OECD, World Bank and WIPO)
- new media and the creative industries; effects of IP protection and competition law
- key questions related to the balance of interests of rights holders and the public; limitation of time and scope of protection of IP rights and incentives to the dissemination of knowledge and creativity
- costs of expanding IP protection in developing countries in those cases related to creative industries (e.g., music and arts industries as platforms of diversification of domestic markets, access to global markets, flow of ‘creative goods’ in international trade, strengthening of cultural solidarity, etc.)
- effectiveness of intellectual property protection in indigenous creativity in developing countries (survey issues, appropriation of cultural goods and traditional knowledge within creative industries).

Those topics reveal distinct dimensions and approaches related to IP-related policies and practices at domestic and international level. How are intellectual property rights

changing the notions of time and space in cultural diversity and multiculturalism? How are they appropriating cultural goods and insulating them in fields of exclusivity in the so called 'creative industries'? Which are the benefits and the harmful effects of intellectual property protection related to creative goods, particularly in respect of copyright and new media?

2 Overview of papers in the special issue

To some of those issues, the special issue of *IJIPM* proposes an analysis of constant paradoxes of a new rebuilding information society and its interactions with intellectual property rights. It is expected that the contributors' articles serve as a critical platform to heighten awareness and further research into the relevance of creative industries. In this sense, intellectual property rights must be seen in its profound and inherent relation with knowledge, culture, education and innovation. Particularly after the emergence of TRIPS Agreement, the international legal system is called to offer the normative base for a global IP order concerned with the protection of broader interests and the distribution of common goods.

José de Oliveira Ascensão opens this special edition with an article proposing the analysis of a current debate on the interface between freedom of expression, information society and copyright, especially with respect to the right to access and use of works in digital environment. Amongst the main issues, he recalls the importance of the constitutional origins of the right of expression and copyright protection (such as the establishment of the intellectual property clause in US Constitution and its counterpart in the Portuguese Constitution of 1976) and the evolving constraints to the right to access in digital environment, which are fundamentally based on the enforcement of technological devices for protection of copyright, 'sui generic rights' over database content and further developments of the exclusive granted to the right holders. According to the author's view, copyright appears to have become a Malthusian instrument, clearly liquidating the potential for dissemination of information and culture in the digital age.

In his article, *Denis Borges Barbosa* draws concrete examples and manifestations of cultural expressions and emerging issues relating to the ability of intellectual property rights to respond to social and economic demands, particularly with respect to the reproductive model of production in the field of creative industries. According to the author, technology has been an expensive factor, even for second-comers who did not take the cost of expression and the risks of consumer rejection. In this sense, exclusive rights are monopoly-like tools and just function in a competition environment. During a considerable time in copyright history, consumers of expressive goods were not able to copy works in such a way as to effectively compete with the mediator's in its market. In this sense, their ability to violate exclusive copy statutes is apparently low.

The relation between information and knowledge economy is further analysed by *Christophe Geiger*, to whom intellectual property rights can be revisited under a perspective of the flexibilities and emerging issues concerning the centrality of information and its counterparts in the modern intellectual property system. In copyright law, for instance, basic principles have progressively fallen from view and the subject has experienced a deep mutation. Originally designed to protect the author and to provide incentives for him to create, thus in benefit of the society, copyright has been used by right holders as a mechanism to protect investment, without any consideration of the

impact of exclusivity rights on future creative activity. In addition, the change of legal paradigm has had a certain influence over the free use of information, which has been called into question in many regards. Geiger's article seeks first to briefly trace back this evolution, recognising the trend towards the privatisation of information through copyright (understood here in an extended sense, including neighbouring and sui generis rights) and attempts to propose some remedies.

In his article, *Christophe Germann* contends that excessive standards of intellectual property protection for cultural goods and services (under many sectors of 'cultural industries') run against the main objectives of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. In this context, the author highlights the debate on the 'strength of the WTO and the weakness of the UNESCO' in connection with the protection and promotion of diversity of cultural expressions. Germann also observes the eventual link between the lack of legal actions against the alleged perpetration of cultural genocide emerging from China's repression in Tibet and the stringent legal action against the tolerance of piracy in China, particularly in view of the recent claim brought by USA before WTO Dispute Settlement Body. Those are interesting cases where the intersection between cultural expression and privatisation appears more in spotlight.

Relevant issues on intellectual property and cultural expressions are equally analysed by *Lilian R. Hanania*, who highlights the contours of the technological gap dividing cultural producers and consumers of foreign works at international level. An unbalance of cultural exchanges would suggest, in her view, a persistent feature within the international IP system, particularly with regard to copyright law. Furthermore, Hanania inquires to what extent current copyright protection in digital environment could foster creativity and disseminate diverse opinions and cultures. A proper adjustment of the intellectual property system to digital networks would be one of the main tools for promoting richer and more balanced cultural exchanges. In this context, expansionist approaches of copyright protection would result in challenges of the system legitimacy, putting the whole international IP system under pressure.

The debate on the recent initiatives of WIPO with respect to creative industries and forms of intellectual property rights is proposed by *Fabrizio Polido* in his article, which offers a brief description on the analysis of the concepts embodied in the expressions 'creative industries' and 'creative goods'. In this sense, the author establishes a link between the current matters related to the expansion of creative industries and deployment of intellectual property mechanisms, particularly with regard to copyright law, as response to the constant claims of international community on access to knowledge and cultural goods. His contribution approaches the current debate on 'creative clusters', the limits for copyright protection and the balance of proprietary and public interests in the interface of intellectual property and creative industries. Those issues must be inherently linked to the development of institutions in the international intellectual property system and shall serve as instigating topic for a new research agenda.