LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

Prof. Dr. Ansgar Ohly, LL.M. (Cambridge)

Lehrstuhl für Bürgerliches Recht, Recht des Geistigen Eigentums und Wettbewerbsrecht

A fairness-based approach to economic rights: five theses

Reconstructing Rights Symposium

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A continuum of propertisation

UC rules on misleading practices

UC protection of goodwill

trade secrets

trade marks

some neighbouring rights

patents, copyright

→ propertisation

mere rules of conduct

legal hybrids

full property logic (protected subject matter – scope – exceptions)

1. A bipolar perspective distinguishing between intellectual property and conduct-related tort law is inaccurate both desciptively and normatively. In modern legislation there is a trend towards "legal hybrids" (*Reichman*). Rather than criticising property-based approaches, the way forward seems to be a flexibilisation within intellectual property law, which is already underway in several areas.

Market-sensitive approaches elsewhere

Unfair competition law

- Challenge: reconciling flexibility with legal certainty
- Solution: three-level approach
  - black list
  - medium-level rules with market-effects clause
  - general clause
- And how do courts apply market-sensitive tests?

Trade mark law

- Emancipation and extension
- “absolute” protection in cases of double identity tempered by function-based approach
- Likelihood of confusion category backed up by strong economic evidence
- Extended protection against dilution and misappropriation under flexible standards

2. Trade mark law and unfair competition law are market sensitive. They distinguish between per se rules in clear cases and more flexible rules when market effects are less evident. However, it is probably fair to say that unfair competition courts rely on simple heuristics rather than on sophisticated market analyses.

And copyright law?

- Formalism:
  - wide definition of subject-matter
  - broad economic rights
  - inflexible catalogue of exceptions in the EU (↔ US law!)
- Economic rights mirror reality of late 19th century
- Changed significance of reproduction
  - from production of marketable product
  - to condition of most internet uses
- CJEU case-law on communication to the public
  - hovers between formalism (*BestWater*) and creativity (*GS Media*)
  - can partly be seen as an attempt to reform the law judicially.

3. If the purpose of an IP right both justifies and delimits it, copyright law compares unfavourably to trade mark and unfair competition law. The concept of economic rights is formalist. The reproduction right mirrors the economic reality of the analogue world. The CJEU tries to apply a substantive approach to communication to the public, but it is erratic and lacks a clear statutory foundation.

Towards a fairness-based approach

- Fairness as market sensitivity
- Towards a purpose-oriented approach – BUT: what is the purpose of copyright law?
- Distinction between:
  - Interference with right owner‘s market by providing a substitutable product → prima facie case of infringement
  - Use which significantly benefits from creative power of work without interfering with right owner‘s market → balancing exercise

4.The scope of a purpose-oriented approach depends on one‘s vision of copyright. Under a fairness-based approach economic rights are not restricted by an incentive theory in the strict sense. But there should be a distinction: when a use has a negative impact on the right owner‘s market, it should be prima facie prohibited. When a use only takes advantage of a work without interfering with the right owner‘s market, the law should provide for a more open-ended test.

A three-layer model:

Level 1

- List of core infringements = acts prohibited per se (subject to exceptions) → offer of an evidently substitutable product
- e.g. making available a full, identical copy of the work for download or for reception

Level 2

- Resembles present economic rights
- Combined with cognisable harm / unjust enrichment test
- e.g.: reproduction which has independent economic significance

Level 3

- General clause
- Use conflicting with normal exploitation of work
- And which unreasonably prejudices the interests of the right owner

5. The three-level approach suggested here aims at reconciling legal certainty in clear cases with a more open assessment in cases where even the prima facie entitlement requires an economic justification. Harms caused to the right owner's market or an economic advantage derived by the user can be balanced against pro-competitive aspects or against the weight of the user's own creative contribution.