



MAX-PLANCK-GESELLSCHAFT

Differentiated Approach Based on Unitary Ground – A Feasible Approach?

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A differentiated approach...

- **As the overall coverage of IP rights broadens, each legal field in itself becomes increasingly compartmentalized:**
 - **pharma patents have little in common with patents in classical fields such as machinery, or in the software industry;**
 - **copyright in (classical) music has little to do with copyright in scientific articles.**
- **In order to attain and keep expert status on a particular subject, a high degree of specialization must be achieved, which may typically hinder a full view of IP as one coherent legal field.**
- **It is a basically sound assumption that , as a matter of principle, the rules applying to IP protection should better reflect the conditions of the markets to which they apply, instead of claiming „universal“ applicability**



...on unitary ground?

- At least at the “fringes“, the originally quite fundamental differences between the individual fields tend to lessen or even vanish, leading to increasing frequency of overlaps.
- From a market perspective, the effect of all IP rights is basically the same – “goods are goods“
- The motivations for creation of new or extension of existing rights tend to converge:
 - encouraging and protecting investment;
 - preventing others from deriving profit from achievements made by the original right holder (irrespective of whether recoupment of investment is jeopardized thereby or not)



Where are we heading?

- If the present tendency continues to amend (and mostly: extend) the IP system on an ad hoc basis, it will presumably lead to an augmentation of inconsistencies and overlaps between the different fields.
- Instead, the One Right System undertakes to re-think the IP system from a holistic perspective, trying to identify the commonalities regarding its foundations, but also regarding its (existing and desirable) limitations.
- Eventually, this might lead to drawing up a “charter of legitimate modes of use“ (more pointedly: a “charter of users‘ rights“), cutting through all types of IP rights.



Topics for consideration if a One Right Approach is chosen

- Foundations

- How far does “protection of investment“ actually carry? At which juncture do the foundations of individual rights still diverge to an extent that makes them incomparable?
- What, if any, are the societal and/or economic benefits of protection extending beyond recoupment of investment?

Limitations

- Is it possible to draw general conclusions from the example of exhaustion, which – at least in the national context – applies to all kinds of rights alike?
- Would “transformative use“ be a candidate for such a general type of limitations?



Possible results

- In the most ambitious scenario, the quest for a **One Right System** would lead to the identification of a **core IP right**, extending from an unconditional exclusionary right over various forms and degrees of attenuation to full freedom of use for everyone.
- On the other side of the spectrum, the search for commonalities might have to settle for a somewhat elevated form of an **IP codex**, by formulating common rules e.g. with regard to (administrative procedures), sanctions, and – where possible – licences and transfer of rights, etc.



More on the „ambitious“ scenario – how to ensure differentiation where it is needed?

- Efforts tending towards a more ambitious approach must specifically focus on the instruments needed for fine-tuning,
either
 - by drawing up a common catalogue of limitations,and/or
 - by identifying evaluation factors interacting with each other in a flexible system of comparative criteria.
- No matter which of those methods is chosen, it can only provide for a general framework that must be filled out by more detailed provisions being tailor-made for their specific field(s) of operation.



A “Vision Impossible“?

- Depending on the details of implementation, a One Right System might allow for an optimum degree of differentiation, while protection in each individual case would have to respond to the common objectives on which all rights are founded.
- One obvious drawback of such a system would be (inter alia) that it reduces legal certainty and foreseeability, and that it would pose a very high burden on those who are responsible for its application.
- Also, legislative techniques traditionally employed would have to be revisited and, where necessary, adapted to the new system.



A „Distant and Problematic Vision“ certainly, but....

- **Even in case that the development of IP law carries on as of to-date, legal security will not be guaranteed**
 - **increasing dynamism of technical development and frequency of overlaps will call for „creative interpretation“ of the law in any case**
 - **if IP laws because of their rigidity prove unable to address those needs, legal practice will more often resort to “external“ correction tools, likew competition and constitutional norms**
- **Likewise, the methods of legislation must be reconsidered in any case – how conclusive can, and how flexible must, legislation be in the future in order to cope with the pertinent challenges?**



...finally...

- **Last but not least, conceiving of a One Right System is a valuable exercise in legal thinking and analysis, and may lead to new insights**
- **That's exactly what we're here for!**