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Kritika: Essays on Intellectual Property

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KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY

Series Editors: Peter Drahos, European University Institute, Florence, Italy; Gustavo Ghidini, University of Milan and University LUISS Guido Carli, Rome, Italy; and Hanns Ullrich, Professor Emeritus, Munich, Germany.

The fields of intellectual property have broadened and deepened in so many ways that commentators struggle to keep up with the ceaseless rush of developments and hot topics. *Kritika: Essays on Intellectual Property* is a series that is designed to help authors escape this rush. It creates a forum for authors who wish to question, investigate and reflect more deeply upon the evolving themes and principles of the discipline. The scholars participating in *Kritika* choose their own topic, style and length of essay and through their choices set in train a process of emergent critical scholarship around the principles, assumptions and goals of intellectual property systems. This emergent process unites the diversity of content to be found in the volumes of *Kritika*.

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Kritika: Essays on Intellectual Property

Volume 4

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Editorial

Volume 4 of *Kritika* sees our authors set a broad canvas. Rochelle Dreyfuss looks at the multilevel complexity of today's intellectual property systems to see if they contain signals about their future evolution. Hans Micklitz embarks on a sweeping analysis of the transformative journey of private law from a once seeming universality of codes and principles to a future of differentiation in which capital and capitalist states regulate the legal subject, contract and property using many tools and systems. Private law becomes part of a world of particularistic sub-systems, consumer law, labour law, copyright law, patent law, database law, etc. As Frauke Henning-Bodewig shows in her essay on unfair competition law a settled sense of purpose that might have been true of an earlier era of private law fades as new actors (consumers) and different purposes (consumer protection) become the target of regulation. The process of regulatory differentiation, like capitalism itself, never stops. So, for example, distributed systems of energy supply and exchange have given rise to the category of prosumer.

Mark Findlay, drawing, on among others, Durkheim and Polanyi, mounts the normative case for law to shift away from processes of commodification to communal resource creation and rights of inclusion. The diminishing marginal costs of information generation and distribution in the digital world changes the incentives around property and possession. The real tragedy for him is not the tragedy of the commons but the tragedy of commodification and exclusion. Denis Barbosa would likely say that the normative link between intellectual property and social purpose for which Findlay argues has some support in Brazil's constitution. But the reality of intellectual property dealing on Brazil's legal streets is, he would argue, utterly different. He provides the reader with a glimpse into a world where the publicly enacted rules of exclusion are constantly bent to serve the goal of extending the exclusive rights of intellectual property owners. The practices he discusses such as the use of trademark law to avoid the effects of copyright's public domain rules, the use of patents to strengthen exclusivity where plant variety rights might grant access, or quick-fix solutions to patent office backlogs have been documented in other jurisdictions. But in Brazil it seems there is

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even less inclination than usual on the part of the government to investigate the private rent-seeking world of intellectual property. Séverine Dussollier, like Mark Findlay, mounts a normative case for the potential of intellectual property to better serve distributive goals. Combining the 'bundle of rights' concept with Hohfeld's inference theorems for rights, she argues that this opens the door to a re-cognition of the public interests that are elided by a legal theorem that infers an entitlement of exclusivity to anything that falls into the category of property. The absoluteness of *dominium* over the objects of intellectual property should, on this line of argument, give way to the compromises of *civitas*, if *civitas* is not to be overwhelmed by private power. In the final essay, Valeria Falce deals with one of the core economic issues of our time, the protection of data. One of the things her essay reveals is that the more the system differentiates into specialist silos, such as the European Union's *sui generis* approach to database protection, the more indeterminacy and therefore uncertainty this generates.

We have said enough to make good our claim that our authors have set a big canvas. Do their essays create a bigger picture for us or at least hint at a bigger picture? It would be surprising if seven authors in seven contributions could bring into focus all the multilevel complexity of intellectual property systems, especially their relationship with technological and social development in the context of world capitalism. But there is a methodological theme in the essays, one that is both articulated and performed. Hans Micklitz articulates it when he pleads for a holistic approach to intellectual property, one in which scholars climb the walls of their silos to talk to the other silo builders rather than making those silos ever deeper and darker. Similarly, Rochelle Dreyfuss articulates a research agenda that moves across the areas of intellectual property. All of our authors are, in different ways, moving across subsystems of differentiation identifying the patterns that move us in the direction of the bigger picture and away from intellectual property as daubs of paint.

We three editors are, through the *Kritika* project, endeavouring to make a small contribution to the grand holistic project identified by Hans Micklitz. Our hope was and is that some sort of bigger picture about intellectual property would emerge from the choices made by the contributors to *Kritika*, the only constraints on them being to be critical and to speak in a more personal voice than they might normally use. It is too early to say whether we have been successful. But some of the contributions from our earlier volumes do raise a troubling counterpoint to the case for holism. We can state it as a question: which actor or actors have the synoptic capacity to carry out the cross-cutting synthesis of law's specialisms to forge them into a set of principles capable of

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universal application in an age of deep digitization of social relations and networks of production? Keith Maskus in volume 2 of *Kritika* suggested that economics was a long way from an understanding of intellectual property's causal impacts. All that we can safely say is that simple linear models of the kind that A (and more of A) causes B (more of B) are likely to be false most of the time when applied to the use of intellectual property rights. At a deeper level, it is not even clear that we can get agreement on conceptualizations of fundamental categories such as information and data. Thomas Hoeren's essay in volume 3 points in this direction. One does not have to spend too much time on the internet to find many different definitions of data.

The direction in which we should perhaps be heading is to locate intellectual property in the context of world capitalism. In a nutshell, capitalist states with different ideologies and structures of authority compete for investment and in innovation under conditions of world capitalism. Much has changed about capitalism since Marx delivered his prognosis of its future in terms of the contradictions he identified at the time of his analysis. But, arguably, one insight remains. The beginning of capital lies in commodification. The basic logic of the system is to integrate the use value of public domains or the commons into varieties of innovation that lead to higher levels of consumption. This is one way to explain the rise of different forms of innovation such as open innovation, networked innovation and user innovation. The latest target in this march of commodification is data. Data for a short time formed an invisible commons generated by consumers. Digitization and electrification have made the invisible visible, easily traceable and collectable. Cryptographical elites like Alphabet, Facebook, and Amazon are gathering this data and applying the tools of mathematics to decrypt patterns of future consumption in smart cities where most of the world's wealthy urban population lives or will live. Intellectual property will be stretched in the direction of data protection and ownership with trade secret protection, which has always been important, continuing its rise in importance. Of course, the details of this commodification will not go uncontested and states will respond with regulation. The European Union's General Data Protection Regulation is a case in point. But a lot of this regulation will be piecemeal or piecemeal in effect, an outcome of contests in policy networks in which more often than not cryptographical elites will be over-represented and consumers under-represented. States will worry more about technological leadership, innovation races and investment than consumer or citizen sovereignty. Even if we could find Justinian's heirs to take on the epistemic and normative challenges of using law to help fulfil the purpose of values such as sustainability and

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equality in the context of technological innovation, the chances are that the political economy of capitalism would not give them the job.

Finally, we note with great sadness the passing of one of our Advisory Board Members and contributors to *Kritika*, Professor Shamnad Basheer. Through his scholarship he made important contributions to a broad range of key intellectual property issues. He led initiatives such as SpicyIP and was a great mentor to junior academics. His critical and constructive voice will be missed.

We conclude with a word of warm thanks to Francesco Banterle who joined us as Editorial Assistant of Volume 3 but had to leave for new professional duties.

Peter Drahos, Gustavo Ghidini and Hanns Ullrich

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