IP and *de facto* powers in an algorithmic environment

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Outline

• IP lawyers should shift the focus of their inquiry from matters of “configuration” of the essential features or predicates of IP rights (access requirements, scope, L&E etc.) to (IP related) questions of contract and tort law (& civil procedure: collective action)

• the reason for this shift of focus, it may be argued, is that in the last two decades control over informational resources has moved from exclusive de jure rights to de facto powers;

• This transformation:
  • in part is accepted wisdom
  • in part requires covering novel ground (better: cover well trodden ground from a fresh perspective)

• The implications: the new roles of contract, tort and collective action to rebalance IP
I. Control over informational resources: from exclusive *de jure* rights to *de facto* powers

- *de facto* control and power of holders of informational resources as a consequence of digital enclosure in its many forms: stored away in the cloud, technical segregation of Big Data, intransparency of ML and algorithms;

- Why the novel situation means the end of the balancing characteristic of IP: when control of the resource was based on exclusivity, balancing=the requirements and scope of IP were set by the legal system also in the interests of users and competitors; now, on the contrary, the owner of the resource is legislator unto itself;
I. Control over informational resources: from exclusive *de jure* rights to *de facto* powers

- Tentative remedies against unbalancing (or asymmetries): *ex post* and external, like antitrust, interop, transparency; inadequacy of these remedies;

- before looking beyond in search for better remedies, an inventory and exploration of other (well known, but) apparently unrelated metamorphoses;
II.A) Creating exclusivity via contract: Ryanair

• The first view: creating new IPRs (and eroding the public domain) via (pseudo-) contracts; Ryanair (C-30/14) as a case study;
  • is click-wrap a contract under the circumstances?
  • And is browse-wrap?

• But here the relevant question is: in which way is this a de facto power?
II.A) Creating exclusivity via contract: Ryanair

• The unfortunate consequences of the ECJ Ryanair holding:
  • The website operator may retain *de facto* control over content made available through a website via an (allegedly) contractual limitation, even though such content is not protected as a data base (or otherwise);
  • the (allegedly) contractual limitation is not subject to the mandatory provisions of Artts 6 (exception for access and normal user of lawful users) and 8 (extraction and re-use of insubstantial parts);
  • As a necessary implication, the *de facto* power (not based on an exclusive right) may be enforced technologically by disabling access

• let us notice in passing that it is difficult to deal with the issue by tinkering with the structure of the IP right; a more promising route may be found in contract law (see below);
II.B) «smart» devices: extending seller’s *de facto* powers

- The erosion of ownership in smart devices (tractors, smartphones, agricultural tractors); & the self-enforcing feature

- here i. a service contract and a license run in parallel to the sale (which in itself is ok); ii. except that, in order to function in conformity to the parallel contracts, the thing sold is fitted with sensors and actuators; iii. Thereby, in the event of non-compliance by purchaser the actuators phase off the thing: self-enforcing feature, again *de facto* powers
II.C) Upload filters as *de facto* power

- copyright has shown the way indicating that in the event of mass infringement judicial intervention (and proportionality assessment) may well be dispensed with (NTD);
- Art. 17 and (the inevitable) upload filters show that enforcement may be automated
- except that
  - a two-step approach is possible; and
  - the ECJ leaves the door open: paras 78, 85, 90
Common features of I and II.A)-C)

- What is the added value we obtain by having a comprehensive look at this proliferation of *de facto* powers?

- We visualize common features:
  - **structural** (multiple erosions: of public domain, of owners’ prerogatives, and of balancing); and
  - **functional** (the players: platforms v users; asymmetries of power; the tools: software meets digital networks);
Common features of I and II.A)-C)

- Where do we look for remedies which factor in the functional feature?
  - Not only rules; but also
  - interests
- The tools: contract, tort and collective action, rather than reshaping IP rights
The way forward: contract law, tort law and collective action

• 1) browse-wrap: the threshold question
• 2) click-wrap: rebalancing
• Including via control of unfair or abusive clauses:
  • Dir. 93/12
  • Distilling fiduciary duties from the panoply of directives and regulation; or
  • Art. 54 CFR
• 3) effectiveness: jurisdiction, torts;
The way forward: contract law, tort law and collective action

• 4) IoT
  • Adequate notice before pulling the plug?
  • Antitrust exemption for farmers?

• 5) collective action Directive 2020/1818
  • Damages?
  • Only consumers?
  • Cross-border

• 6) upload filters:
  • Two step design;
  • Trusted flaggers;
  • Tort
Caveats and difficulties

• Fora?
• The overwhelming power of information giants;
• Yes, but opposing interest groups may find a common ground (Mançur Olsen)
CONCLUSION

• Grazie!

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