Today's Utopia Is Tomorrow's Reality

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Since the mid-1990s, when I was a student discovering IP law, both the world and IP law have evolved enormously – globalisation and digitisation come straight to mind. I now tell Generation Z students that when I was their age, I witnessed the very birth of the mobile phone, the Internet and email. Back then, IP was a little known topic, sometimes not even taught as a separate course. Now IP is a compulsory course for undergraduate students in my alma mater, for instance. There has been a boom in specialised IP masters. In the last 25 years, we have witnessed the adoption of TRIPs, the WIPO Internet treaties, the Beijing and Marrakesh treaties and quasi all EU IP directives and regulations. FTAs including IP provisions have also mushroomed. While decisions of the EU courts in IP cases were relatively rare, now there is at least such a decision every day. Last but not least, IP has become increasingly important to economies.

It is not only the IP legislative and judicial landscape which has changed, it is also IP scholarship. Inter-, pluri-, cross- and multidisciplinarity as well as empirical research have grown within IP scholarship. Before the 1990s, it is fair to say that interdisciplinarity in the IP field consisted in the main in scholarship involving philosophy and economics. Empirical research was scarce and mainly qualitative. Now academics' perspectives on IP are wide-ranging: history, political science, sociology, gender studies, linguistics, art, anthropology, marketing, psychology, to name just a few, all inform IP scholarship, and more and more empirical research is being conducted. This movement is both individual and collective: associations such as the Society for Economic Research on Copyright Issues (SERCI), the European Policy for Intellectual Property (EPIP) and the International Society for the History and Theory of Intellectual Property (ISHTIP) were respectively founded in 2002, 2003 and 2008. Recently the Max Planck Institute for Innovation and

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Competition has also started to finance interdisciplinary and experimental research including doctoral scholarships for such projects and a lab to conduct experiments.¹ All this research leads to more refined, more scientifically robust IP policy and law.

In addition to academics, the legislature has also started to pay more attention to hard data (among others applications, registrations, instances of infringement and of fair use). In the UK, the Hargreaves Review² advocated that IP policy should be based on evidence, and the UK Intellectual Property Office's Research Team thereafter produced a "Guide to evidence for policy"³ which the UKIPO applies – at least in theory⁴ – when introducing new legislation. In addition to stating the reasons for the proposed legislation, the European Commission now drafts very detailed explanatory memoranda to directives and regulations and includes discussion of the consistency of its proposals with other EU policies and provisions, assesses budgetary implications, the legal basis and choice of instrument for the proposal, reviews the subsidiarity and proportionality principles and summarises and takes into account stakeholder consultations.⁵

This is excellent news and we should keep this momentum going for several reasons. First, what has become the mainstream way of thinking about IP, namely through the lens of theoretical economics and generally a narrow version of it (the Chicago School of law and economics), is challenged. Even if IP is about economic incentives, it should not always be the main focus. These new perspectives on IP open up the traditional binary notions of "moral and economic interests of the author" and the "public's interest". Second, IP policy is no longer based on speculative or purely theoretical considerations.

But do these new ways of envisaging IP policy and law not sound too good to be true? While the legislatures' efforts must definitely be recognised and applauded, they are still in many cases window-dressing. And even if the legislatures may initially be well intended, lobbyists working for right holders still seem more able to convince, be it because they have deeper pockets or more political connections or

¹ See also T. Koutmeridis, K. Erickson and M. Kretschmer (eds.), *The Copyright Evidence Wiki: Empirical Evidence for Copyright Policy*, CREATE Centre, University of Glasgow, 2015 available at http://www.copyrightevidence.org/evidence-wiki/index.php/Copyright_Evidence (accessed 18 November 2016).

² I. Hargreaves, *Digital Opportunity: A review of Intellectual Property and Growth*, London: IPO, 201, pp. 18–19 in particular, available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf> (accessed 18 November 2016).

³ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510985/Guide_to_evidence_for_policy.pdf (accessed 18 November 2016).

⁴ This was for instance not the case in relation to the repeal of Sec. 52 of the UK copyright act.

⁵ See e.g. Proposal for a directive of the European Parliament and of the Council on copyright in digital single market, Brussels, 14.09.2016, COM(2016) 593 final; Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, Brussels, 25.5.2016, COM(2016) 289 final; Proposal for a Regulation of the European Parliament and of the Council on ensuring cross-border portability cross-border portability of online content services in the internal market, Brussels, 9.12.2015, COM (2015) 627.

both.⁶ Often it can feel like a David against Goliath fight. Although academics may sometimes underestimate their role, they have more influence than they think. First, while we may think it illusory, we must not stop being utopian. Today's utopia is tomorrow's reality. If anything, compared to judges, legislators and practitioners, we have the luxury of time to reflect and propose changes. We can write directly to specific audiences with purpose not only through our academic articles and books but also via press interviews and opinions addressed to the legislature or judiciary.⁷ Second, we are those who train the young bright students who will become the lawyers of the future, the next attorneys, civil servants, in-house lawyers, lobbyists, judges and academics. We have a moral duty to enthuse them to be utopian too (this does not mean that we should not clearly explain what the – sometimes bleak – reality is). Third, we can influence the shape of our curricula; for instance, undergraduate law students should also be trained in quantitative and qualitative research methods or at least have the option to do so and have this training recognised as part of their law degree.⁸

To quote Martin Luther King, we should never stop dreaming. Never stop dreaming we can make IP laws, or any law for that matter, more just, more inclusive, more solidly based on scientific evidence. To do this we need to initiate, carry on and increase the critical yet constructive dialogue with the legislature, the judges, the general public, academics of other disciplines and our students. As Margaret Mead famously said: “never doubt that a small group of thoughtful, committed citizens can change the world; indeed it is the only thing that ever has”. Now let's roll up our sleeves and get to work!

⁶ See e.g. Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1 and the reports and debates surrounding its adoption. For commentary, see e.g. N. Helberger, N. Dufft, S. van Gompel and B. Hugenholtz, “Never Forever: Why extending the term of protection for sound recordings is a bad idea” (2008) EIPR p. 174.

⁷ See e.g. in the EU, the work of the Wittem group (<http://copyrightcode.eu>), of the European Copyright Society (<https://europeancopyrightsociety.org>) and of IVIR's “Reconstructing Rights: Rethinking copyright's economic rights in a time of highly dynamic technological and economic change” (<http://www.ivir.nl/projects/reconstructing-rights-rethinking-copyrights-economic-rights-in-a-time-of-highly-dynamic-technological-and-economic-change>) (accessed 18 November 2016) and in the US, the Copyright Principles Project (see e.g. P. Samuelson, “The Copyright Principles Project: Directions for reform” (2010) 25 Berk. Tech. L.J. p. 1175) and the numerous amici curiae briefs drafted by IP academics.

⁸ This has started in the UK thanks to the Nuffield Foundation's Q-Step programme <http://www.nuffieldfoundation.org/q-step> (accessed 18 November 2016).