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Is intellectual property a lex specialis? : the conference report from the atrip 2013 congress, Oxford

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IS INTELLECTUAL PROPERTY A LEX SPECIALIS? THE CONFERENCE REPORT FROM THE ATRIP 2013 CONGRESS, OXFORD

The 32nd Annual Congress of the International Association for the Advancement of Teaching and Research in Intellectual Property took place on 23–26 June 2013 in Oxford, UK. The conference was attended by delegates from over 40 countries (and over 100 universities): mainly by doctors and professors teaching IP at their universities who wanted to discuss the degree to which IP is a lex specialis. Given the number of delegates willing to take the floor, the debates ran from dawn to dusk. The sessions took place within the distinctive walls of Pembroke College at Oxford University, which defines itself as "a college of poets and scientists, thinkers and players who want to make a difference to the world." While it is not possible to talk at length on every speaker, I would like to highlight a few core points made at the conference.

The participants were greeted by Prof. Graeme Dinwoodie (Oxford University, the former President of ATRIP), Prof. Stefan Vogenauer (Oxford University) and Carlotta Graffigna (WIPO). Ms Graffigna opened the congress by making the point that, in order to develop we first need to develop "IP culture".

The first session was chaired by Prof. Bill Cornish (Cambridge University) and was dedicated to general rules in IP Law. Prof. Robert Burrell (University of Western Australia) and dr. Emily Hudson (Oxford University) discussed the doctrine of abandonment, using the example of *Fisher vs. Brooker & Others* [2009, UKHL 41]. The case concerned Brooker and Onward, who had relied on the equitable doctrines of laches, estoppel and acquiescence to argue that the passage of time since the song was written precluded Fisher from now claiming a portion of the copyright. As stated in the judgment, "there is no statutory equivalent in intellectual property matters similar to the doctrine of adverse possession in relation to real property."[19]The speakers referred to the common law principle of *nemo dat quod non habet* as well as by the example of *Robot Arenas Ltd & Anor v Waterfield & Anor* [2010, EWHC 115] asked to what extent doctrines from chattel property must be changed to apply to intellectual property. Their finding was that abandonment in IP law might pave the way for compliance.

Dr. Dev Gangjee (LSE) referred to public domain and open access movement, asserting that people think that public domain is *res commune,* but in fact it is more like *res nullius*.

Prof. Ansgar Ohly (University of Munich) shed some light on the first sale doctrine and its territorial range, taking the example of *Kirtsaeng v. John Wiley & Sons, Inc.* of 29 Oct. 2012 [654 F. 3d 210]. He discussed the doctrine of exhaustion where the data

[19] Cf. http://www.leeandthompson.com/2009/09/24/fisher-%E2%80%93v-brooker-others-2009-ukhl-41/, as of 27 Dec. 2013.

carrier is dematerialised, and touching on new ways of transferring data and using the cloud. He asked when law is exhausted and referred to the case *UsedSoft GmbH v. Oracle International Corp*. (CJEU, case C-128-11).

Prof. Alain Strowel (St. Louis University, Brussels) also discussed the doctrine of exhaustion and doctrine of first sale by example of software. With reference to Articles 4(1), 4(2) of Directive 2009/24, he depicted his concerns with a recent case, *Capitol Records, LLC v ReDigi Inc.* of 30 March 2013 [No. 12 Civ. 95 (RJS)].

Concerning the relation between intellectual property and contract law, Dr. Caroline Ncube (University of Cape Town) discussed the contractual regulation of copyright licensing contracts in South Africa, using the example of *Prism Holding Ltd. And Another v. Liversage and Others* [2004 (2) SA 478 (W)] and the Consumer Protection Act of 2008.

The next speaker, Prof. Pina D'Agostino (Osgoode Hall Law School), asserted that contract law trumps copyright law and made reference to some case law too (*Robertson v Thomson corp*, 2006, SCC; *Leuthold v Canadian Broadcasting Corp*. 2012).

Prof. Charles McManis (Washington University, St. Louis) raised the topic of mass market licensing in e-Commerce and social networking 2.0 era. He cited the cases *ProCD v Zeidenberg* [86 F.3d 1447, 39 U.S.P.Q.2d 1161, 1 ILRD 634 (7th Cir. 1996)] and *Assessment Technologies of WI LLC v. Wiredata, Inc.*, [350 F.3d 640 (7th Cir. 2003)] and referred to the ALI Principles of the Law of Software Contracts and Uniform computer Information Transactions Act (UCITA).

During the session chaired by Prof. Christian Le Stanc (University of Monpellier), the idea was proposed that countries need IP divisions in courts (e.g. at county level). As an example, reference was made to IP courts in Tokyo and Osaka in Japan, as well as 32 IP divisions in the high peoples' courts in China.

Dr. Orit Fischman Afori (The Haim Striks School of Law, Israel) noticed that a careful use of remedies can reshape the contours of copyright law, and that there is a tight linkage between rights and remedies. In her opinion, the courts should have more judicial discretion along with a new independent framework of remedies in copyright law. Dr. Anna Tischner (Jagiellonian University) asked whether there is an accumulation of IPR and remedies, and whether we need a lex specialis in this area.

Prof. Lionel Bently (Cambridge University) referred to "Report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights" (COM(2010)779 final) of 22 Dec 2010 and Proposal for a Regulation of the European Parliament and of the Council concerning the customs enforcement of intellectual property rights (COM(2011)0285 final). More than that he discussed cases *Phillips v Mulcaire* [2012, UKSC 28] and Judgment of the Court (Third Chamber) of 15 November 2012 (Case C-180/11).

Dr. Lior Zemer (Radzyner School of Law) wondered whether we have come to the end of users' rights in Israel. He gave interesting examples of cases disputed in Israel: *Muzafi v Kabali*, *Ziso v Petach, Shapiro v Regen, Premier league v Israeli Sports Betting Board* [2010] and *Weinberg v Wieshof* 2012.

The last session, most awaited by your scholars, was devoted to Quality Control and Ranking of Specialised IP Journals The topic was discussed by Prof. Margo Bagley (University of Virginia School of Law), Prof. Martin Senftleben (Amsterdam Free University), Prof. Geetrui Van Overwalle (KU Leuven) and dr. Giorgio Spedicato (University of Bologna) under the chair of Prof. Reto Hilthy (Max Planck Institute for Intellectual Property). They considered that there are an incredibly low number of IP journals

that are granted many points. More than that, they assumed that one of the conditions of publication in international journals is the style of the language, making it impossible for many non-native authors to get published.

The next congress will be held in July 2014 in Montpellier.

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