NOVA IPSI
Booklet 2023

INTELLECTUAL
PROPERTY AND
SUSTAINABLE INNOVATION

BALANCE

This Booklet is a product of the study and work carried out by researchers of NOVA IPSI – NOVA Knowledge Centre on Intellectual Property and Sustainable Innovation.

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Who we are

Launched in September 2022, NOVA IPSI is a Knowledge Centre on Intellectual Property and Sustainable Innovation, based at the NOVA School of Law in Lisbon. Currently, we are a group of 22 legal researchers, coming from different countries and backgrounds, with a commonpassion forIP law and sustainability.

In a world seeking to improve itself, we at NOVA IPSI gathered to study and research the legal meanings, evolutions, and impacts of IP across society and societies. We are particularly interested in regulatory aspects on innovation and creativity, access to information and education, virtuous industrial practices and incentive mechanisms to respond to the diverse needs in our communities. Our current research work focuses on

- **copyrights & creativity**
- **patents & green technologies**
- **trademarks & branding strategies**
- **design protection & cultural policies**

Feel encouraged to contact us if you would like to know more or participate in our activities:

- **IPSI Talks:** focus sessions on IPSI researchers' work
- **IPSI Desk:** legal clinic on IP management
- **IPSI Trainings:** introductory, advanced, and ad hoc courses on IP law topics
- **IPSI Publications:** scientific publications and expert legal opinions
- **IPSI Events:** academic events open to the public

Introduction: One year of NOVA IPSI

by Giulia Priora and Aline Arenque

NOVA IPSI launched its activities in 2022 with the aim to crystalize and support the rise of a group dimension around legal questions and research on IP and sustainability at the NOVA School of Law of Lisbon, Portugal. Inspired by several academic centers of expertise and human collaboration scattered across Europe and beyond, we embarked on a journey of, first of all, collective study.

Understanding IP law does not prove an easy task, especially in countries where the discipline has only recently found its place inside academic curricula, legal training offerings and law firms departments. Placing IP law in real life scenarios becomes even more challenging, due to the divide between academia and legal practice and, even more so, the factual complexity of IP questions and problems faced by the members of society every day. As a last essential step, critically assessing and helping improve the role and impact of IP law in our societies is what we aim to achieve as legal researchers - a task that, out of historical and institutional contexts, we gladly decided to embrace as a group.

Sooner than expected, some common research lines emerged from our own individual legal inquiries. We let these common threads serve as our guiding focuses throughout our first year of activity: despite heterogeneous, these reflect the problems that are dearest or closest to us and our motivation to come up with scientific support to solve them. We studied, heard, and discussed how, empirically, green technologies are produced and how they "move" around the globe to perform their environmental functions; what IP could learn from data protection law in the evolving digital world; how the principle of morality behaves throughout IP sectors; to what extent the policy goals of inclusivity and sustainability in our access to information, media, education, and health corresponds to real changes inside IP legal frameworks.

During our discussions on these diverse topics, a recurring word often emerging to surface was the notion of **balance**. This theme served as our fil rouge across our multifaceted debates: it heated our discussions but also unveiled a sense of unity across the different presentations on complex legal questions.

We therefore decided to dedicate this first NOVA IPSI Booklet to the concept of balance and its intricate connotations. Beyond the selection of thoughts you will find in the following pages, during the past year we have been discussing also the empirical dimension of balance in IP - from public benches to ghostwriters -

It became evident that the quest for an equilibrium - whether in the sense of economic systems, ecological sustainability, or social structures - occupied a central position in our research works.

We therefore decided to dedicate this first NOVA IPSI Booklet to the concept of balance and its intricate connotations. Beyond the selection of thoughts you will find in the following pages, during the past year we have been discussing also the empirical dimension of balance in IP - from public benches to ghostwriters - and newly emerging doctrinal angles to it, such as its applications within circular economy, upcycling, collective innovation, and cultural appropriation scenarios.

It is in light of this first year of our academic journey inside the notions of Intellectual Property and Sustainable Innovation that we are particularly pleased to share with you some of our thoughts and comments on studies and doctrinal opinions that inspired our legal work and discussions.

We hope you will enjoy.

Giulia Priora

Aline G. Arenque

Balance in IP theory

Júlia Veiga on
"The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance"
by Carla Hesse in *Daedalus* (2002) 131(2) pp.26–45

Carla Hesse provides an historical perspective to IP law and reminds us that the notion of IP has transformed itself significantly over time, particularly during the Enlightenment, a pivotal era marked by a shift in the perception of knowledge. Before this historical watershed, knowledge was regarded as a divine revelation or a byproduct derived from ancient texts, and individuals were seen as mere vessels for transmitting such sacred truths. This perspective shifted towards the idea that they could generate original ideas, which could be owned and protected through legal means.

However, as she examines the great civilisations of the pre-modern world, such as the Chinese, Islamic, Jewish, and Christian cultures, her study reveals a distinct absence of the notion of human ownership over ideas. In Ancient China, Confucianism emphasised the transmission and reverence of ancient wisdom rather than promoting individual innovation. The adoption of printing technology was delayed in Islamic countries, as spoken communication was preferred over writing.

Carla Hesse, in her article, builds upon several interpretations of the notion of IP. She refers to George Bancroft and his view, according to which creative ideas and works could not be exclusively owned by individuals but had rather represented a universal property, connecting people across geographical and cultural boundaries. She goes back to the dawn of the European middle-class flourishment, when reading was an essential part of life and writing started to be seen as an honourable activity. By retracing this evolution in the European society, Hesse explains the debates that this transformation generated on the nature of ideas and the regulation of knowledge, featuring thinkers of the caliber of Immanuel Kant, John Locke, Johann Fichte, Nicolas de Condorcet, Edward Young.

Hesse reconstructs the origins of IP and, in particular, copyright not only alongside with its philosophical debates, but also its first historical experiences inside Parliaments and Courts. Importantly, she demonstrates and highlights how all doctrinal, parliamentary and judicial debates about IP and copyright in 18th century Europe addressed the tensions - and thus the attempts of **balancing** - between authors' rights and the public interest.

Throughout the article, the most interesting focus revolves around this **balancing** exercise and the consensus that it attracted in several societies across history, up until flowing into international legislation on IP and modern national legal frameworks.

Amanda Costa Novaes on
"Moral Limitations in IP Theory"
by Ned Snow in *Intellectual Property and Immorality* (OUP 2022) pp.7–30

In the second chapter of his monograph dedicated to the concept of immorality in IP law, Ned Snow analyzes to what extent moral judgments limit the scope of the subject matter of IP rights. The author does not seek to ascertain which specific moral systems should determine the rightness or wrongness of an IP-relevant action to assess its (im)morality. Nor does he analyze specific issues of application of IP rights. Rather, he scrutinizes the three main IP justification theories and their implied moral values.

First, Snow analyzes the utilitarian approach, under which, on morality grounds, IP rights are considered necessary to bring a useful result to society. They are expected to generate economic incentives for creators to produce and distribute their works for public consumption, to avoid market failures. In this light, the author demonstrates how, when an intellectual work is immoral or harmful to society, it does not have enough beneficial effects to justify IP protection under the utilitarian theory, thus the law should not encourage it. Second, the labor-desert theory is taken into consideration, reminding that IP is justified because the person who has put intellectual efforts to create something deserves exclusive rights over that. On morality grounds, this theory has two premises: (i) everyone ought not to harm anyone else, and (ii) everyone must act for the preservation of society. Snow suggests that a moral limitation to IP protection is justified when the work put into an intellectual creation harms society or any of its members. The third theory is the one on autonomy-personality. The relevance of morality emerges from the fact that this theory focuses on the person who created the work and their autonomous choices. The subsequent moral limitation is that IP should not be recognized when the creation inhibits the autonomy of others. Snow also develops practical considerations of what he convincingly demonstrated being the moral limitations in the justification of IP law. He suggests that these can apply while assessing whether a creation is harmful to society, although the amount of harm or inhibition of autonomy necessary to beconsidered immoral is debatable.

Snow's recognition of moral limitations inside the IP system seems to be very valuable to generate more **balance** between one's right to be rewarded, incentivized, and protected in one's own work, and the idea of a fair society, where none of its components is harmed.

Aline Arenque on
"Breaking Barriers: The Relation Between Contract and Intellectual Property Law"

by Raymond T. Nimmer in *Berkeley Technology Law Journal* (1998) 13(3) pp.827–889

As the title already suggests, in this article Nimmer explores the connection and the **balance** between the fields of IP law and contract law, within the context of the early Internet era. The author divides the article into two main blocks. In the first section, he demonstrates that it is through their exploitation in the market that IP rights achieve their legal functions. Contract law serves the fundamental purpose of enabling such commercialization. However, Nimmers reminds us that, in absence of valid IP legal entitlements, it is the market logic, not IP law, guiding the value and the bargaining over intellectual goods.

In the second section of the article, Nimmer explores the legislative boundaries of both the IP and contract law fields. He goes through fundamental concepts such as unconscionability clauses, restatement rule, and public policy - and he demonstrates meaningful parallels between the definition and application of legal principles of IP and contract law, especially vis-à-vis the misuse and abuse of IP rights, and, more specifically, the fair use and the first sale doctrines. The author concludes that none of what he calls "points of tension" between IP and contract law should preempt the parties to contract nor should be applied as a general rule, thus favoring case-by-case assessments as the legal solution to prevent abuses and misuse of IP rights in contracts.

By reading the article, it is possible to acknowledge the author's underlying view of IP seems inclined towards the conception of it as a property right. He emphasizes a utilitarian justification to it which prioritizes the individual freedom to contract over other public interest goals. Very interestingly, the notion of balance that he puts forward is between IP law and another legal discipline, which proves essential for IP rights to exist and perform their functions - and which legislation and policymaking processes should preserve.

Amanda Costa Novaes on
"The Tragedy of the Anticommons: A Concise Introduction and Lexicon"
by Michael Heller in *The Modern Law Review* (2013) 76(1) pp.6–25

In this article, Michael Heller introduces the concept of the tragedy of the nticommons. He begins with a case involving a pharmaceutical company that discovered a potential treatment to the Alzheimer disease. However, they were unable to proceed with development of the drug due to the need to secure access to dozens of patents. The underlying take is that, while private ownership generates wealth, excessive ownership can have a counterproductive outcome, leading to underutilization. Heller labels this phenomenon as 'anticommons', a counterpart to the well-known tragedy of the commons, proposed by Garret Hardin.

Hardin's theory also explains how communal ownership can result in overuse. This has influenced several scientific fields and practices, regulations, and privatization solutions. However, Heller's perspective emphasizes that, while privatizing a common resource may address the problem of wasteful overuse, it also triggers a new issue where multiple parties impede each other's access to the resource. Subsequently, the once-overused commons become underused within the context of anticommons.

Heller further delves into the notion of equilibrium between two extremes: overuse and underuse. He designates this **balance** as the 'optimal use' point. In his analysis, he underscores the significance of group property, where a limited number of commoners can exclude outsiders but not each other. This approach deviates from the extremes of unrestricted access or complete exclusion. Economically, Heller refers to the ideas put forth by James Buchanan and Yong Yoon, asserting that the highest total value derived from a resource emerges when a single decision-maker controls its usage. With this assessment in mind, Heller revisits the earlier example of drug patents, underscoring the loss of potential medications due to anticommons ownership. He points out that over the past three decades, although pharmaceutical research and development have increased, the discovery of significant new drug classes has dwindled. Heller attributes this 'new drug discovery gap' to the prevalence of patent-related anticommons.

Heller's approach highlights a crucial concern in IP law. By focusing on underutilization stemming from multiple owners — different from the common single monopoly owner issue — his concept underscores the need for a balanced system to provide for an optimal level of innovation in society.

Balance in patent law

Aline Bratti on
"Weighing intellectual property: Can we balance the social costs and benefits of patenting?"

by Mario Biagioli in *History of Science* (2019) 57(1) pp.140-163

Mario Biagioli's article discusses the complexities of IP rights, demonstrating how they, beyond safeguarding inventor's interests, also have social costs. The author argues that the **balance** and fairness discourses are rhetorical devices to support IP legal protection, while posing thought-provoking questions: should IP be regarded as an instrument? Can it perform the **balancing** act that the law mandates? Can we reconcile social costs and benefits? Biagioli addresses these points by questioning whether the act of **balancing** is possible in patent law.

His article consists of six blocks. First, Biagioli examines the concept of **balance** within IP law, stressing the need for more precise definitions of the costs and benefits of IP for inventors and society. He also points out that **balance** is not equal to justice and advocates for reframing the discussions around social justice and public responsibility in patent law.

Second, Biagioli discusses empirical evidence concerning the societal benefits of patenting. While demonstrating how numerous studies have produced inconclusive results, an exception is found in a study related to electronics and health-related industries. Biagioli poses an interesting distinction between the role of patents in incentivising invention and their function as strategic tools in business, noting how the value of a patent is often assessed on its worth as an asset rather than on its potential contribution to societal progress.

Third, Biagioli explores the empirical evidence of the social costs associated with patenting, especially vis-à-vis the short-term impact of patenting in the early stages of the R&D process. Taking the cue from the tragedy of anticommons, he argues that the proliferation of IP rights in biomedical research can lead to the underutilisation of critical resources.

In the last three sections of his article, Biagioli unveils the dynamic nature of patents, reflecting on how their impacts and values change over time. Here, the author moves the focus on the long-term impact of patents in environmental settings. He notes that the costs associated with patents are far more challenging to quantify than environmental harm.

The conclusion highlights the impossibility of finding a **balance** in the patent system. Biagioli suggests that the one-size-fits-all model is inappropriate for patent law, since different industries have unique that require specific legal considerations and policies. Thus, he advocates for a shift in perspective. Rather than focusing on the need for **balancing** acts, it may be more beneficial to acknowledge our inability to predict the long-term effects of patents and the complexities of public interests.

Teresa Brito e Faro on
"The Interface between Patent Rights and the Right to Health under International Human Rights Law"

by Emmanuel K Oke in *Patents, Human Rights, and Access to Medicines* (CUP 2022) pp.69-103

In chapter 3 of his latest monograph, Emmanuel Oke aims to decipher whether developing countries can incorporate a model of human rights into their national patent laws, allowing for a more **balanced** interplay between the rights of inventors and the right to health.

The author starts by unveiling the right to health under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and highlighting its four components: availability, accessibility, acceptability, and quality. He clarifies what the obligations of States to respect, protect, and fulfill this right entail, and how they impact on the design, implementation, interpretation, and enforcement of national patent laws.

Oke explains why IP rights are different from the moral and material interests of authors, and therefore not human rights. The author also examines the three main approaches identified by Richard Gold to conceptualize the relationship between patent rights and human rights: the subjugation approach, the integrated approach, and the coexistence approach. Oke elects subjugation as the best way to relate, and balance, human rights and patent rights: patent rights will naturally conflict with human rights and should subjugate to their superior hierarchical stance.

On this premise, Oke proposes that States adopt a model of human rights in the implementation of the TRIPS Agreement and other international and supranational IP conventions. He advises States should make the most of the flexibilities of the TRIPS Agreement to facilitate access to medicines. Even though Oke concludes that the use of flexibilities is not prohibited by the TRIPS Agreement, he also notes that, on the international legal playing field, this use might be challenged as incompatible with the Agreement's obligations. Against this scenario, the right to health obligations of a State may provide an additional normative defence and therefore prove to be a useful tool in assuring the **balance** of the international intellectual property legal framework.

Pedro Soares on
"Adapting the ordre public and morality exclusion of European patent law to accommodate emerging technologies"

by Justine Pila in *Nature Biotechnology* 38 (2020) pp.555–557

In this short article, Justine Pila argues that the ways in which emerging technologies are being developed has brought about difficulties in the normal functioning of patent application systems. This is because, in abstract, emerging technologies are good contenders for patents as they are usually inventive and industrially applicable, but their uncertainty seems to require more than a formal analysis of the current criteria for patentability.

To strike **balance** and appropriately evaluate patent applications, the European Patent Office (EPO) has started to consider the concept of "plausibility" as a equirement to fulfill: it must be demonstrated that the invention must solve the problem it was created for. However, in the author's perspective, this is an incorrect interpretation and application of the current legal framework set by the European Patent Convention (EPC).

Article 53(a) of the EPC determines that a patent cannot be contrary to ordre public nor morality, even though this provision does not imply the need for any statements regarding the actual value of the invention in the positive sense. In Pila's view, this undermines the application of this article, restricting the ways in which third parties can invoke this provision. It would be crucial to understand more adequately the concepts of morality and ordre public in an adaptive way, allowing for a more comprehensive inclusion of emerging technologies within the assessments of the EPO.

One of Pila's suggestions is the creation of a triage system that considers emerging technologies as a separate patent class, thus allowing for a specific risk assessment on the potential scientific or moral ambiguity of presented inventions. This would lead to a more diversified process of evaluations mostly regarding the foreseeable or hypothetical commercializations of the invention. At the same time, because this policy option will lead to results where social and political considerations have been deliberated prior to the decision, the application of Article 53(a) EPC would occur before the patent is granted, unlike the current system where patent holders are mostly only expected not to go against morality and public order ex post.

The author concludes by shedding light on the problems that arise from the possibly wrongful application of Article 53(a) EPC, such as the growing concerns on commercial malpractices by pharmaceutical companies during the Covid-19 pandemic. This idea stresses the need for **balance**, not only in the ambiguity vs plausibility debate, but also in the deliberation of the process of granting a patent, considering the utility of the invention but without forgetting about the processes of its production and commercialization. According to Pila, the suggestions would democratize the patent system. While this is understandable, and the advocacy for change is needed, emerging technologies remain largely undefined, in a gray area where one applicant for a patent could argue the very "emergence" of the technology itself. The foundation for this new system would need its own new criteria and regulatory changes, some of them harder to conceive.

Júlia Veiga on
"The Influence of the Andean Intellectual Property Regime on Access to Medicines in Latin America"

by Laurence R. Helfer and Karen J. Alter in *Dreyfuss/Rodríguez-Garavito (eds), Balancing Wealth and Health* (OUP 2014) pp. 247/262

This chapter examines the pivotal role of regional legal institutions in **balancing** health and innovation. It delves into the interaction between IP agencies and the Andean Tribunal of Justice (ATJ), which has fostered the rule of law across the Andean territories and reinforced inclusive and consumer-oriented interpretations of patent and trademark regulations. The chapter analyses how ATJ judges and agency officials have empowered Andean governments to resist pressure from the US and its pharmaceutical industry sector, preventing the extension of patent rights beyond the defined limits of Andean IP regulations. The chapter assesses the success of the Andean Community in striking an equitable **balance** between the interests of IP right holders and consumers, with significant implications regarding access to medicines in Latin America.

The Andean model of adjudication on IP rights disputes is a remarkable example of regional integration. The ATJ's collaboration with agency officials has been crucial in landmark cases challenging national IP laws that disfavour the value set by the Andean community. Helfer and Alter, among others, recall how, in the early 1990s, the US pressured for more robust IP protection as the Andean countries sought to align regional IP rules with the global directions evolving around the project of the TRIPS Agreement. For instance, Ecuador's legal regime granting pipeline patent protection was challenged, resulting in the ATJ's ruling against Ecuador's violation of Andean IP law. The Andean experience also involves a ban on second-use patents, which clashed with Pfizer's attempt to patent Viagra's unintended use and numerous similar examples of advancement and protection of public interest claims in the definition of IP rights. In the same vein, unlike other Latin American countries, the Andean community incorporated the flexibilities set by the TRIPS Agreements as mandatory features in their national IP laws.

By and large, the chapter highlights how the Andean experience offers a lesson on the intersection of IP and access to medicines and public health goals in Latin America, emphasising the delicate process of incorporating international IP norms into national laws and the often overlooked role of regional and administrative agencies in **balancing** the interests at stake.

Balance in copyright and design law

Margarida Morgado on
"The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information"

by Christophe Geiger in *Report for the Committee on Culture, Science and Education* (Parliamentary Assembly, Council of Europe 2009)

Christophe Geiger explores how technological advancements have impacted IP law and how these have disrupted the fair **balance** between copyright protection and access to information. Tracing back to the roots of copyright, the report emphasizes the importance of fair **balance** as one of its founding principles. In doing so, he clearly explains that copyright protection and access to information are complementary, rather than incompatible.

Geiger questions the fact that, with the advent of technology, efforts were put in place to strengthen the authors' exclusive rights. However, no effective measures were taken to safeguard the right to access knowledge and information by adapting copyright exceptions and limitations to the digital reality. This suggests a clear tilt of the scales in detriment of users' interests. Against this backdrop, Geiger identifies some key factors to take into account when revising copyright legislation both at EU and national levels. Among others, he points out that mandatory collective management of copyrights and contractual mechanisms, such as Creative Commons licensing, could help facilitate and improve access to information. Throughout the analysis, Geiger emphasizes that granting access to information does not mean that it should be provided without payment and he reiterates the idea that right holders ought to receive fair and equitable remuneration for the uses of their works in some cases. In this vein, he calls for a distinction between those copyright exceptions that are essential to safeguard freedom of expression and information from those that are not, suggesting that priority should be given to ensuring that the former have an effective, harmonized application.

By and large, Geiger encourages the debate and further reflection on the evolution of the copyright legal system vis-à-vis the digital environment, with a particular emphasis on ensuring flexibility to make this system immune to technological and socioeconomic im**balance**d developments. Geiger thus offers **balance**d, interdisciplinary, and innovative recommendations that deserve consideration by legislators, judicial interpreters, and academics in the context of copyright modernization and reform.

Oumaima Derfoufi on
"Copyright and Human Rights: The Quest for a Fair Balance"

by Vandana Mahalwar in M K Sinha/V Mahalwar, *Copyright Law in the Digital World: Challenges and Opportunities* (Springer 2017) pp.151-175

Vandana Mahalwar advocates for finding a common ground between copyright law and human rights, promoting policies that foster creativity, innovation, and access to information. The chapter underlines the need for thoughtful consideration of both creators' and users' interests to achieve a fair, equitable, and **balanced** copyright system that would uphold human rights principles.

Tracing back the history of copyright law and its role as an "engine of free expression", the author explains that copyright statutes were traditionally established to affirm and protect authors' freedom of expression. Mahalwar states that copyright serves this purpose in three ways: (i) providing economic incentives to foster creativity, (ii) supporting authors who seek financial independence from governmental influence, and (iii) reinforcing the significance of authors' contributions to the public sphere. Copyright law safeguards the author's rights while preventing unauthorized utilization of his/her work by others. The main "clash" - to echo Mahalwar's words - occurs when an author has to seek permission to use another author's work. For this reason, Mahalwar argues that it is essential to acknowledge that the respect for freedom of expression cannot sustain without the respect for an author's contribution as a basic human right.

The author puts in parallel two articles: Article 27(2) of the Universal Declaration of Human Rights and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, the latter described by Mahalwar as the "soul and language" of the former. Both articles protect the moral and material rights and interests of authors. In this vein, Mahalwar claims that IP law and human rights law are not in direct conflict with each other. Nonetheless, internal conflicts may occur in their applications.

In her quest for a fair **balance** between copyright law and human rights, Mahalwar scrutinises three approaches: (1) The Fair Remuneration Approach, (2) The Core Minimum Approach, and (3) The Progressive Realisation Approach. The first approach grants the public the right to use creative works by providing the author with

appropriate compensation. The second approach, as the name implies, provides a minimum threshold of legal protection that States shall provide to fulfill their human rights legal obligations. Lastly, the third approach explores how States can leverage supplementary resources to improve the standard of human rights protection.The most noteworthy aspect of the chapter is Mahalwar's legal historical and systematic examination of the origins of the conflict between copyright protection and human rights obligations broadly intended. The analysis convincingly calls for **balanced** legal norms capable of strengthening both the rights of individuals and the well-being of society.

Amanda Costa Novaes on
"Striking a Fair Balance in EU Copyright Law"

by Daniël Jongsma in *"Creating EU Copyright Law: Striking a Fair Balance"* (Hanken School of Economics 2019) pp.156-194

In the fifth chapter of his dissertation, Jongsma identifies copyright's underpinnings and their respective weight in a **balancing** legal exercise. The author begins by examining copyright in light of the European Convention on Human Rights and the EU Charter of Fundamental Rights. According to Jongsma, a fundamental shift has occurred over time moving copyright further away from the idea of property.

The author proceeds to evaluate the purpose of EU copyright law in order to ascertain its potential. This involves a thorough examination of how copyright is construed across EU legislative texts, leading to the identification of three primary objectives. First, copyright seeks to ensure the independence and dignity of authors and performers by providing them with a means of reward for their creative endeavors. Second, it aims to foster the development of authorial works and related rights subject matter. Third, copyright intends to stimulate job creation and investments within related industries.

Nevertheless, Jongsma stresses that there is empirical uncertainty regarding the extent to which copyright fulfills its role as an economic incentive. Despite the Court of Justice of the European Union's recurrent references to an "appropriate reward", the legislation itself does not offer a clear definition of the level of protection required to achieve this specific objective. Consequently, it becomes insufficient to merely assert that copyright's objective is to afford authors a high level of protection that corresponds to a suitable reward. On the contrary, the determination of whether such robust protection leads to a proper reward is the outcome of the **balancing** exercise.

Jongsma tackles the notion of **balance** considering the potential harm that the absence of exclusive entitlements could possibly cause to authors. Nonetheless, this inherent uncertainty can result in a scenario where the author's interest does not outweigh conflicting rights. With this meticulous assessment, the author lays the foundation for a comprehensive and innovative exploration into the quest for a new **balance** within copyright law in the EU.

Aline Arenque on

"End-User Flexibilities in Digital Copyright Law: An Empirical Analysis of End-user License Agreements"

by Péter Mezei and István Harkai in *Interactive Entertainment Law Review* 5(1) (2022) pp.2-21

In this article, Mezei and Harkai analyze End User License Agreements (EULAs) of several online platforms in light of their impact on the utilization of legal flexibilities concerning the use of copyright-protected content. By legal flexibilities the authors mean all possible claims end-users may rely on, stemming from law, such as copyright limitations and exceptions, specific mechanisms such as notice-and-action mechanisms, and legal principles on freedom to contract.

The authors' findings unveil several criticisms. They observe how several online platforms allow their users to have degrees of flexibility that vary significantly. Taking into account the different market sectors where the examined platforms operate, Mezei and Harkai note that end-users' flexibilities are also affected by the specific regulatory scenario surrounding each platform - the so-called regulatory lock-in effect - and by the level of competition among platforms in each sector - which they name business flexibility effect.

By and large, EULAs can be misleading, silent and have a very strict interpretation when it comes to applying copyright limitations and exceptions provided by law, freedom of expression, notice-and-action mechanisms, and the use of technological barriers such as bans and geographical limitations. One of the most interesting findings shows how social media platforms tend to permit more flexibility when it comes to copyright flexibilities than streaming platforms.

Even though the article does not explicitly tackle the notion of **balance**, the analysis deeply engages with it. As the authors argue, the copyright protection legal regime originally stems from times where everything was tangible and the timing of market deals used to be way longer than a click. The role of EULAs and other private ordering mechanisms as a solution to overcome or prevent copyright im**balance**s seems to easily go beyond established copyright legal norms and impose technological interpretations thereof, which might not align with the objectives and principles of the legal systems.

Margarida Morgado on
"The right to research as a guarantor for sustainability, innovation and justice in EU copyright law"

by Christophe Geiger and Bernd J Jütte, forthcoming in Pihlajarinne et al (eds), *Intellectual Property Rights in the Post Pandemic World* (Edward Elgar 2023)

In this chapter, Geiger and Jütte highlight the vital importance of research in fostering innovation and sustainable development, as well as the paradoxical barriers that EU copyright law erects against it.

The authors begin by identifying the close links between copyright and research. On the one hand, research outcomes may be protected by copyright, whether in published or database form. On the other hand, research can only be conducted by building on and, thus, accessing and utilizing previous research or data. The authors continue by demonstrating that research plays a prominent role in EU law and policy, with a notable key role being played by Artt.179-190 of the Treaty on the Functioning of the EU.

However, as Geiger and Jütte criticize, EU copyright policies have mostly neglected research. Even though setting forth some optional research-related copyright exceptions, the EU copyright acquis is characterized by a systematic im**balance** that tends to favor right holders' broad exclusive rights rather than the right to access knowledge and information. Geiger and Jütte identify three main barriers to research activities: i) the narrow scope of the research exceptions, ii) the narrow scope of the text and data mining exceptions, and iii) the EU sui generis right for non-original databases.

In light of the above, Geiger and Jütte propose the introduction of a right to research in the Charter of Fundamental Rights of the EU (CFREU). This right would be anchored on European human rights instruments and EU Treaties, as it would find its basis in the rights to freedom of expression, freedom of arts and sciences, and education. It would also have two dimensions: firstly, it would entail the right to conduct research, by accessing, collecting, and analyzing information included in subject matter protected by copyright; secondly, it would entail the right to disseminate research results by the producer of the relevant information and respective expression.

The authors suggest that a right to research could help remove copyright barriers by acting as an express limitation to IP - thereby, serving as an effective counter**balance** to stringent copyright policies. It is in this light that Geiger and Jütte advocate for a sustainable copyright legal framework, one that incentivizes and rewards creative activities while allowing innovation, without hindering access to research works. Their proposal to add a right to the EU Charter is consistent with the long ongoing process of constitutionalisation of EU copyright law.

Oumaima Derfoufi on "Re-evaluating the art practice of 'appropriation' from a copyright law perspective"

by Marina Markellou in I Stamatoudi, *Research Handbook on Intellectual Property and Cultural Appropriation* (Edward Elgar 2022) pp.154-169

In this chapter, Markellou discusses the challenges that may arise from the use and re-use of pre-existing artworks and cultural contents, and the relevant implications on indigenous communities. It explores the impact of the notion of (cultural) appropriation within the copyright context by way of underlining its contemporary importance and decrypting its legal interpretability.

In the first part of her contribution, Markellou explores the contrast between the legitimacy of appropriation as an artistic practice and the challenges it constitutes on a copyright legal level. The author discusses several examples involving real-life artistic scenarios and case law, analyzing cases of (i) incorporation of one's artwork into another, (ii) appropriation and use of a art objects, (iii) adoption of another skills and style, and finally (iv) the public's involvement in creating art through dynamic and interactive methods.

In her analysis, Markellou draws a line between 'cultural appreciation' and 'cultural misappropriation', arguing that not all appropriations are harmful to indigenous communities, as long as this practice remains fair and respectful.

The second part of the chapter examines more closely the intersection of appropriation art and copyright law, demonstrating that the former does not always necessarily constitute an infringement of copyright exclusive rights. Building on the US cases The Carpet's and John Bulun Bulun v. T and T Textiles, the author underlines the complexity of the issue and the difference in legal interpretations from one court to another.

In her concluding remarks, the author foregrounds the idea of combining the copyright regime with a paying public domain model to ensure the **balance** between "reusing creatively" and compensating indigenous communities. A doctrinal idea that is not only solidly researched, but also useful for policymakers and judicial interpreters dealing with the art sector.

Hande Özkayagan Prändl on
"From Flexible Balancing Tool to Quasi-Constitutional Straitjacket: How the EU Cultivates the Constraining Function of the Three-Step Test"

by Martin Senftleben in J Griffiths/T Mylly, *Global Intellectual Property Protection and New Constitutionalism* (OUP 2021) pp.83-105

In this chapter, Martin Senftleben discusses the consolidation of restrictive interpretation of copyright exceptions and limitations under the current EU legal framework. He argues that, over time and with the increasingly influential role of the CJEU, the so-called three-step test has shifted from being an instrument aiming to fairly **balance** the interests of users against the ones of rights holders towards a control mechanism essentially depriving E&Ls of their purpose and effectiveness. He defends that this broken EU approach has even influenced copyright law at international level, examining the implementation of the test under the most recent Marrakesh Treaty.

Senftleben initially reminds us of the test's dual nature: on the one side, its enabling function as a basis for the adoption of E&Ls at national level, and, on the other side, its constraining function preventing national copyright legal systems from adopting excessively broad use privileges. This constraining function evidently prevails, according to Senftleben, as the uses permitted under Article 5 of the EU Infosoc Directive are still open to challenge for non-compliance with the criteria of the three-step test, even when they satisfy the narrow specific requirements of each E&L.

The author argues against the approach of the CJEU in its case law, and specifically in the Pelham case, where it supported the test's appropriateness as a mechanism to effectively **balance** the competing fundamental rights involved. According to Senftleben, this particular interpretation causes the **balancing** exercise to take place only within the internal statutory construct of E&Ls and the boundaries set by the three-step test. These, in his view, are biased towards safeguarding the rights holders' interests and do not offer an appropriate breathing space for users' freedoms, even when they concern values significant to the advancement of society.

He thus reaches the conclusion that the dual function and the flexibility of the test are unfortunately forgotten under EU copyright law, and that the test has become a "quasi-constitutional straitjacket" hampering the consideration of evolving use privileges, fortifying the power of rights holders instead.

The chapter can be interpreted as a wake up call to reconfigure the test´s interpretation and application in a manner respecting the hierarchy of norms when copyright protection clashes with fundamental rights of users, by aligning the criteria of the three-step test to the analysis formally applied in human rights cases. Senftleben emphasizes the need to bring the test back to its roots and restore its enabling function. Otherwise, the persistence of a dysfunctional three-step test as the internal **balancing** mechanism and the reluctance of the CJEU to enforce fundamental rights to externally **balance** the competing interests, the EU copyright system runs the risk of further eroding existing use privileges and preventing the emergence of new ones that are indispensable for the society to flourish.

Inês Miguel on
"Copyright vs Data Protection: Case studies"

by Federica Giovanella in *Copyright and Information Privacy: Conflicting rights in balance* (Edward Elgar 2017) pp.210-295

This chapter aims to examine the **balance** between copyright and data protection in the online environment through case-study analysis. Giovanella chose to dissect how lower courts **balance** these two fundamental rights, i.e. the user's right to privacy and the copyright holders' right to seek enforcement, across the US, Canadian and Italian jurisdictions.

Among the main cases presented, Giovannella examined the US case law seeing the Recording Industry Association of America suing individual users who were illicitly facilitating the sharing of copyrighted material in MP3 file format through peer-to-peer networks. Here, the data requested to enforcement the copyright claims were names, addresses, and Internet Protocol (IP) addresses.

By analysing such case law and comparing the three selected legal systems, Giovannella concludes that, whereas the US and Canada applied specific tests in order to find which right prevailed in a case-by-case analysis, Italy did not apply any standardized test. Moreover, even though decisions still vary, most US cases tend to favour the copyright holder, in detriment of the users' right to privacy. On the contrary, both Canada and Italy tend to take into closer account, if not favour, privacy.

Giovanella raises an interesting point: in all the jurisdictions examined, judges are given a lot of space of manoeuvre to reach their decisions, and this undermines legal certainty. She also argues that, with technology advancing faster than laws, this legal certainty is doomed to decrease, as laws become obsolete and judges have to rely even more in their discernment.

Towards the final part of her analysis, Giovannella dedicates a section to the relevant doctrinal critique. By and large, her analysis is a solid and timely reminder of the need to strike a **balance** not only institutionally but also interpretatively. She calls for a nuanced and responsive approach that respects the rights of both creators and users while recognising the ever-changing technological landscape.

Amanda Costa Novaes on

"Lost in communication: a few thoughts on the object and purpose of the EU design protection"

by Anna Tischner in S Frankel, *The Object and Purpose of Intellectual Property* (Edward Elgar 2019) pp.154-181

Reading Anna Tischner, it becomes very clear that, in a time where IP rights are expanding, it is ever more important to address the problem of defining the "object" of EU design protection. She argues that uncertainty in this aspect is raising mistrust in the design industry. The ultimate goal would be to set a **balanced** system of legal protection, capable of rewarding investment efforts and stimulating creativity.

Design protection in the EU focuses solely on the output, namely the external aspect of a product as an opportunity for a differential advantage in the market. It can cover one feature or a combination of several of them, and it can be more or less related to the message they convey within a certain market context. In other words, the subjective intentions of the designer are only relevant if expressed in the graphic or otherwise perceivable features embedded in the object.

In this sense, visual information is the most common vehicle for communicating a design, also in light of the EU Community Design Regulation. However, the missing requirement of a verbal or otherwise explained description of the design by those seeking this type of IP protection may raise some issues. For instance, the graphical representation of a design element in an object can be highly ambiguous. Another problem is how to take context into account while assessing a design application.

According to Tischner, this can create a confusion between the objective identification of the subject matter and the subjective interpretation of aesthetic impression of a particular design. She stresses that verbal information could majorly support the understanding of images in design applications. She also proposes introducing categories of design, similarly to the categories that facilitate trademark application processes. Tischner does not overlook the even deeper problem of identifying the "object" of unregistered designs.

The main point argued by Tischner is that graphic representation alone creates difficulties in defining and interpreting the object of design protection. This, in her view, needs to be solved to increase trust in the design industry by way of moving towards a more **balanced** design system, also in the practical sense of enhancing application procedures.

Insights from our IPSI talks

One year of NOVA IPSI also means one year of meaningful peer discussions on IP and sustainability.

In the vibrant tapestry of NOVA IPSI's first year journey, our weekly IPSI Talks served as a stage for 23 researchers to showcase their ongoing research. A stage that hosted a spectrum of intellectual performances, ranging from the birth of nascent ideas to the delivery of latest research findings. A stage that nurtured the growth of each of us individually, but also the collective expertise of our Center. Also, a stage that acted as an empowerment catalyst for every IPSI member to build confidence in their work.

Today, as we take a step forward into our second year, we remain committed to maintaining this tradition of open dialogue and mutual support. But before that, in a slightly nostalgic vein, let us commemorate our past successful IPSI Talks with our main takeaways.

Oumaima Derfoufi

Justyna Pałczyńska

"Unleashing the potential of data for the EU data economy should go hand-in-hand with the undamental right to data protection, while ensuring that trade secrets do not hinder adoption of transparent algorithmic decision-makingprocesses."

➡ SDG 10: Reduced inequalities

Aleksandra Iugunian

"Whistleblowing, as a means of promoting social justice, aims to create a transparent and inclusive environment for accessing information, and the protection of trade secrets should not impede such disclosure when it serves the public interest."

➡ SDG 8: Decent work and economic growth

Inês Miguel

"Intellectual property rights should encourage the emergence of transparent and accountable algorithms to prevent their negative impact on media pluralism, in particular by creation of filter bubbles."

➞ SDG 16: Peace, justice and strong institutions

Monyca Motta

"Social media have brought a new wave of legal challenges related to celebrities' image misappropriation that requires a holistic approach to both protection of data and copyright."

➞ SDG 10: Reduced inequalities

Júlia Veiga

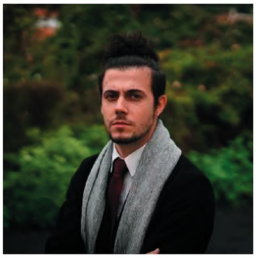
"International legal constraints and exceptions related to green technology transfer should prioritise climate change mitigation and play a significant role in shaping new public policies aimed at fostering innovation and facilitating the transfer of green technology."

➞ SDG 13: Climate action

Raquel Carvalho

"We should take an intra-systemic and comparative approach focusing on how to most effectively protect software through intellectual property rights for the benefit of the society."

➞ SDG 9: Industry, innovation and infrastructure



Rúben Ferreira

"In the effort to transfer clean energy technologies to developing countries, a crucial challenge lies in striking a balance between enabling compulsory licensing for technology access and promoting the adoption of renewable energy solutions to effectively mitigate climate change."

➞ SDG 7: Affordable and clean energy

Margarida Morgado

"Fair balance should be upheld between copyright in the EU and respect for freedom of expression and information enshrined in the Charter of Fundamental Rights of the EU."

➞ SDG 16: Peace, justice and strong Institutions

Margarida Mingote

"In the EU, legal protection of designs should actively foster the advancement of sustainable, eco-conscious and enduring fashion, thereby concretely contributing to environmental preservation and well-being in order to support the environment."

➞ SDG 12: Responsible consumption and production

Francisco Gomes

"To foster a stronger and more stable relationship between content creators and users, it is essential to empower the disadvantaged party in contractual relationships, thereby maintaining a fair balance between both parties' interests."

➞ SDG 10: Reduced inequalities

Amanda Novaes

"It is imperative to create a framework for sustainable copyright protection for eBooks that both ensure fair compensation for authors and increase access to and availability of digital books in secondary markets."

➞ SDG 4: Quality education

Diogo Brandão

"It is pivotal to ensure that the legal instrument that protects know-how associated with algorithms does not forgo relevant concerns regarding how said algorithms affect transparency of personal data processing."

➞ SDG 9: Industry, innovation and infrastructure

Aline Bratti

"The legal framework for patents can effectively promote the development and deployment of accessible AI technologies in healthcare, but only if it balances the free spread of innovation with the protection of fundamental rights and freedoms."

➞ SDG 3: Good health and well-being

Dimitrius Costa, Aline Arenque and Amanda Novaes

"Protection of hostile design adversely affects the universal access to urban public spaces and should not be incentivized by intellectual property laws, as it does not align with its public interests objectives."

➞ SDG 11: Sustainable cities and communities

Dimitrius Costa

"The lack of harmonization of ghostwriters' moral rights can lead to their indirect suppression, which in turn can lead to unfair practices and hinder sustainable development in the copyright markets, especially concerning employment and economic sustainability, as well as how contracts are effectively preventing their access to justice".

➞ SDG 8: Decent work and economic growth

➞ SG 16: Peace, justice and strong institutions

Duarte Manso

"Emerging technologies should not be used to exploit and manipulate a well-established patent system in an attempt to disruptively defeat the patentability of future inventions."

➞ SDG 9: Industry, innovation and infrastructure

Aline Arenque

"With the increasing popularity of video game streaming, it is crucial to ensure that all involved parties benefit from their works, in particular through adoption of fair, non-discriminatory, and proportionate licensing agreements."

➞ SDG 9: Industry, innovation and infrastructure

Oumaima Derfoufi

"With the right balance between IP and cultural heritage, intellectual property rights can play a social justice role in safeguarding cultural heritage to ensure future generations understand the cultural roots of their communities."

➞ SDG 11: Sustainable cities and communities

Eduardo Santos

"The role of IP in achieving UN's SDGs should not be reduced to its economic incentives for innovation and creativity; a real commitment to Sustainability requires reframing IP policies in light of the SDGs."

➞ SDG 9: Industry, innovation and infrastructure

➞ SDG 10: Reduced inequalities

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