



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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