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Introduction: A Look at Twenty Years of IP Protection and What the Future Holds

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Introduction: A Look at Twenty Years of IP Protection and What the Future Holds*

Hugh C. Hansen**

Around 1992, when the Fordham IP Conference was just a gleam in its founder's eye, some now-common aspects of the world were different—or, rather, absent. By today's standards, there was no digital presence. Nothing was online. Google, Yahoo, e-Bay, Amazon.com and Facebook did not exist. Many people did not own a personal computer, and those that existed were of limited use. Digital natives would have found it a difficult existence.

All of this was fine with those involved in intellectual property law who showed little or no interest in things digital. Those practicing or teaching IP were involved largely because of an interest in what the law protected, e.g., inventions, novels, music, whether that interest emanated from science¹ or the liberal arts. IP was considered a “boutique” area of the law both by the bar and academia. Few, if any, were interested in the international aspects of IP, which were largely left to government attorneys and those working for multinational companies.

* I want to thank the editorial boards of Volumes XXII and XXIII of the Fordham Intellectual Property, Media and Entertainment Law Journal for agreeing to provide a book dedicated to these articles and for all the hard work associated with producing this collection. Thanks in particular to Ryan Fox, the current Editor-in-Chief, and Jacqueline McMahon, the preceding Editor-in-Chief. I also want to thank Nicholas Bartelt of the IP Institute for his assistance on this article and book, and Sandra Sherman of the IP Institute for her assistance on the article.

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¹ Computer science was not yet considered a proper science.

As for software and computers, the predominant view was that the best mode of protection for computer programs was copyright law. It is probably not surprising that traditional, non-science-trained copyright attorneys had no interest in software protection,² but it might be surprising that traditional patent attorneys had no interest either. Both left software protection to generalists who had no knowledge of IP or computers. Because judges and their clerks also had no such knowledge, the blind were leading the blind in the early software copyright cases. Under the circumstances, it is a credit to both bench and bar that the early cases turned as well as they did, which does not mean that they necessarily turned out well.

Recalling this history makes me feel almost like a grandparent telling his grandchildren about the old days. And like the proverbial grandparent, I am to some extent nostalgic: the old days were a simpler time. “Good” and “bad” were tied to traditional norms and could actually be used to describe infringements. Though like proverbial grandchildren, most people do not care about this history, it still helps put things in perspective. It certainly makes us realize how much has changed.

Thanks to the digital revolution, the world is moving at such a rate that “generational” change takes place in a matter of years. Moreover, not only does change come faster but it is more unpredictable and can have more extreme consequences. Who can say what things will be like ten years from now, or even five? Large segments of the populace as well as private and governmental institutions may be left behind, trapped in digital tar pits. Reversals of fortunes are no longer rare either for individuals or corporations. “The last shall be first, and the first last” could have emanated from the digital Mecca, Silicon Valley. IP law is a part of this change and also in flux. Whereas once IP was a stabilizing economic force, today its future and role are uncertain.

What is certain is that IP has moved from “boutique” to center stage. It has even moved beyond legal practice into popular discourse. Thus while IP has always stimulated intellectual

² More than a few said with pride that they could not even boot up a computer. (Memory, on internal, non-digital file with the author.)

interest among the few, that interest now extends beyond the committed to general practice law firms, general counsel, almost every federal judge, and the media in all forms including emerging voices on the Internet. It is certified as “hot.”

Now this is where our noted authors come in. Their task during the Twentieth Anniversary IP Conference was to explore IP’s past and look into the future which they now do in this volume commemorating that anniversary. However, beyond assuming a generally historical perspective, they were not asked any specific questions, and were given *carte blanche* as to how to approach their tasks. The fact is that they knew the questions to address, and the results are outstanding. Their articles show once again that, while there may be some in the IP world as good as our contributors, there are none better.

Below follows a brief introduction to each of the articles that address the issue, posed over and over at the Twentieth Anniversary Conference: “Where Has IP Been? Where Is It Going?”

JANE GINSBURG

Jane Ginsburg, the Morton L. Janklow Professor of Literary and Artistic Property Law at the Columbia Law School, is an important voice in the IP world. Here she presents a comprehensive, authoritative analysis of the effects of digital media on U.S. Copyright Law over the past twenty years. Jane includes a careful look at §106 rights in the Copyright Act, the DMCA, fair use doctrine, and ISP immunity. As for the future, she is able to find some hope but no assurance for copyright protection in an unfriendly digital age. Her conclusion includes an insightful analogy to J. K. Rowling and the Harry Potter series.

P. BERNT HUGENHOLTZ

P. Bernt Hugenholtz, Professor of Intellectual Property Law and Director of the Institute for Information Law of the University of Amsterdam, carefully documents EU copyright law developments over the past twenty years. As an important

copyright-law expert and observer in the EU, Bernt provides insightful commentary on the effectiveness of legislative harmonization to date, and the de facto harmonizing role of the Court of Justice of the European Union. He ends with his arguments for the need for an EU Copyright Code, an ambitious endeavor that has supporters and opponents and that faces the inherent difficulties of all large-scale IP legislative proposals.

JOHN R. THOMAS

John R. Thomas, Professor of Law at Georgetown University Law Center. Jay first spoke at Fordham as an associate in a law firm. Today, he is rightly considered one of the leading people in IP and in patent law in particular. In his article, he examines the fundamental changes to the U.S. patent system since the first Fordham IP conference. These changes have affected the courts, Congress, the bar and “new voices” outside the patent arena that are now trying to influence it. He enumerates a number of defining moments that have marked the patent system’s transition from “a perhaps overbold Golden Age to a Silver Age of greater maturity, nuance, and at times doubt.” Despite numerous challenges in the future, Jay thinks that its current configuration better suits the global technology community. He also credits U.S. patent law with sustaining and nurturing a range of technologies that could scarcely have been imagined twenty years ago.

HON. PAULINE NEWMAN

Hon. Pauline Newman has been a judge on the United States Court of Appeals for the Federal Circuit for twenty-eight years. No one is more qualified to assess its history, which is entwined with that of patent law itself. Accordingly, Judge Newman focuses on the development of key areas of patent law over the life of the Court. Her longstanding tenure as a judge gives her a unique view of the Court’s past; her insights provide us with a view of its future and, more specifically, of what problems confront both the Court and patent law. In a world now quick to criticize patents, Judge Newman notes that we should not “lose sight of the commercial

and societal and philosophical foundations of patent law,” and the fact that “the immense flowering of [technological] entrepreneurial energy” was due in part to patents and the court created in 1982.

JUSTIN WATTS & TOM ALKIN

Justin Watts, partner, Freshfields Bruckhaus Deringer LLP, and Tom Alkin, barrister, 11 South Square, provide a comprehensive view of patent law developments in the U.K. over the last twenty years. Writing from a litigator’s perspective, they focus on a number of key developments. They note that early on that European patent law had a negligible effect on the UK patent law and judiciary. They then focus on seven key decisions that detail the later development of UK patent law and the growing influence of European Patent Office (EPO) decisions. They also consider the crucial issue of the impending European Patents Court’s effect on what has come to be a delicate balance between national courts and the EPO, and the development of Europe’s patent law. Finally, they look at how litigation practice has changed over the last two decades and what the coming decades may hold. In short, they provide an astute analysis of what has been and what might come to be in one of the most important national patent jurisdictions in the world as well as Europe as a whole.

BRADFORD L. SMITH

Brad Smith is the General Counsel, Executive Vice-President for Legal and Corporate Affairs and corporate Secretary for Microsoft, Inc. Brad has for many years been a leading figure in the IP world and, in my view, a reliable voice of reason. His article asks whether the pace of technological advances and the development of intellectual property law are out of sync, and if so whether there is hope for the future. Interestingly, his answer to both questions is “yes.” Through an historical analysis, Brad demonstrates that major advances in technology often result in tension and conflict—initially between the inventor and follow-on competitors, though these are often also cast as a battle between innovators and consumers. These conflicts, he says, lead to

sometimes difficult and protracted processes that, in fits and starts, incrementally result in beneficial legislative or judicial changes that maintain a healthy balance between the interests of inventors and creators, their competitors, consumers, and society at large.

WILLIAM E. KOVACIC

William E. Kovacic, the Global Competition Professor of Law and Policy and Director of the Competition Law Center at The George Washington University Law School, draws on his years of experience inside and outside government, including a term as Chairman of the FTC, to appraise and evaluate the past and current interplay between IP and antitrust domains in the U.S. and EU. Bill sets forth five developments that have altered the relationships between these two domains, including the de facto ascent of the EU over the US as the main governmental player in competition law. He also comments on the very recent FTC investigation into Google's practices involving Internet searches, and two settlements concerning efforts by Google and Robert Bosch to seek injunctions to enforce standard essential patents. Few have Bill's experience or insights, and many of the latter included in this piece will not be found elsewhere.

MARSHALL LEAFFER

Marshall Leaffer is the Distinguished Scholar in Intellectual Property Law and University Fellow, Indiana University Maurer School of Law. The author of a number of IP books and many articles, he has been a speaker at all twenty of the Fordham IP conferences. In this article, Marshall chooses ten cases as an interesting way to closely examine developments over the past twenty years regarding globalization and the Internet in U.S. Trademark Law. Some of these cases he praises and some he criticizes, even harshly. While there have been "plenty of judicial bumps in road," especially with regard to dilution and functionality issues, Marshall concludes that overall there has been "laudatory adaption."

PAUL MAIER

Paul Maier is the Director of the Observatory, Office of Harmonization for the Internal Market (“OHIM”), and also has had other important positions in OHIM, including President of the Boards of Appeal, and the European Commission. He is one of the most seasoned and knowledgeable EU IP observers. In this piece he has produced a definitive review and history of OHIM. He also identifies the key substantive and administrative issues that OHIM and national trademarks offices will have to address individually and collectively in the future. Finally, he introduces the Observatory, the new and exciting think-tank addition to OHIM which has the challenging task of identifying and proposing solutions for infringement-related problems in all aspects of IP in a world where there is little agreement about problems or solutions.

WILLIAM ROBINSON, GILES PRATT & RUTH KELLY

William Robinson, partner, Giles Pratt, senior associate and Ruth Kelly, associate, Freshfields Bruckhaus Deringer LLP. William and his colleagues Giles and Ruth undertake an ambitious and detailed look at EU Trademark Law. They consider three mainstays of trademark law and practice. First, they examine the extent to which the EU has successfully harmonized the substantive principles of trademark law. Second, they consider what they view as rather lackluster attempts to harmonize certain EU trademark evidence and enforcement rules which are important to making the Community Trademark a true unitary right across the EU. Third, they assess the effect of the growing IP caseload of OHIM, the General Court and the Court of Justice, and consider what steps might be necessary to ensure that these forums are capable of providing a coherent trademark law and guidance.

What these articles demonstrate is that since the founding of the Fordham IP Conference there has been a rich history of interesting and important IP law developments. They also demonstrate that the future looks just as interesting and could be significantly more challenging. Finally, they demonstrate that we

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are very fortunate to have the authors as our historical chroniclers
and guides for the future.