Balance of Intellectual Property

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Balancing IP Problems

- Incommensurability—non-equivalent values such as economics versus civil society
- Technology: fluid, not fixed

Leads to contextual, contingent balance for individual case, not prescriptive rule

Balance is the site of debate
Balancing Necessity

- Tracks perceptions—despite legal differences, novelty of doctrine: powerful support for moral rights

- Tracks policy determinations—must mitigate social costs of protection: users’ rights
What are We Balancing?

• Stakeholders—creators vs. users

• Global Distribution—Developed vs. Underdeveloped

• Private Rent Seeking vs. Public Regarding
Stakeholders

Status Differentiation

- Inventor seeking patent
- Inventor without patent—US American Inventors Protection Act 1991
- Employee—Japanese law reasonable fee doctrine
- Licensor
- Experimenter—Hatch-Waxman experimental use exception to create generic equivalent
- Commercial purchaser/end user

*Stakeholder pluralism requires recalibration of incentives*

*Informal vs. formal content*
Stakeholders

- Crowd-source creator
- Large/small TM holders—Article 15 CTM Genuine Use Requirement

Define market: single country, substantial use—size of market, regional distribution, linguistic media for zone of reputation
Global Distribution

- BioPiracy—Sorghum SbMate Patent

- Traditional Knowledge

Redistribution, Sustainable growth, Rewarding custodians—Genetic erosion
Private vs. Public

- TRIPS Article 8(a) Proposed: private economic interests:
  - rent seekers, 3\textsuperscript{rd} parties, social goals
  
  IPR, health, economic growth
Other Public Concerns

- State Security
  
  Chap. 6 (Israel Patent Law)
  US Invention Security Act of 1951
  
- State stake in PT
  
  PTO as core state function vs. outsourcing
Approaches/Levers (4) for Balancing I

• Inherent Balancing: limitations of scope (© idea/expression dichotomy), exemptions (© fair use)

• Direction to Courts: Article 69 EPC approach to DOE—neither strict literalism or overly broad
Approaches/Levers for Balancing II

- Competing Doctrines: employment contract vs. copyright
  - Greenman

- Recognition of Double Identities: TM vs. expressive interest of key word advertising
  - Senftleben
Approaches/Levers for Balancing III

- Competing Rights—users’ rights

Trumping power

Enforce through injunctive or monetary relief
Final Observations

• The old commonplaces are gone:
  Against Policy Coherence
  Against Harmonization

• The ultimate balancing: discretion/known rules (fair notice)

Israel © Act, §53: no injunctive relief