

Editors' Pick

In this new column, which from now on shall appear at regular intervals, the editors of JIPITEC would like to present to their readers monographs that in their mind are either outstanding or are worth being men-

tioned and recommended to the interested reader. Each individual editor is responsible for his or her own choice and each text reflects personal interests and preferences rather than an editorial policy.

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- 1 To open this new format, *Thomas Dreier** would like to draw attention to a monograph by

Zech, Herbert: *Information als Schutzgegenstand*. Series "JusPriv" No. 166. Mohr Siebeck. Tübingen 2012. XXV, 488 pp.

- 2 After having written his habilitation at the University of Bayreuth within the framework of the university's graduate school, "Geistiges Eigentum und Gemeinfreiheit," Prof. Zech has joined the law faculty of the University of Basel in Switzerland, where he now teaches civil law and IP law, with a focus on intellectual property in life sciences. Writing a second academic monograph after a dissertation in order to qualify for the career path of tenured professorship at a law faculty is still a particular feature of German academic tradition. Working on a habilitation may be a long and, at times, tedious exercise, but it has resulted in quite a number of books that go well beyond a more or less superficial analysis of isolated legal issues.

- 3 Of course, Zech is not the first author in Germany to devote his attention to the analysis of the legal protection of information. Rather, with regards to German legal literature in the area of civil law, Zech can tie in with earlier works by Wiebe, Dreier, Haedicke, Peukert and others. In Switzerland and Austria the works by Druey and, more recently, by Mayer-Schönberger can be mentioned. Following in the tradition of Wiebe – from whom Zech has borrowed the title of his work and who already in 1995 undertook the first attempt to characterize information as an "object of protection" – Zech now widens the view and also discusses exclusive protection schemes for information other than through intellectual property rights. Thus, personality rights, the protection of trade secrets,

rules against unfair competition (in particular, the protection against unfair product imitation) and property legislation governing rights with regard to the physical embodiment of information likewise come into focus. By this approach, it becomes clear that even in continental European law tradition, rights with regard to information – including intellectual property rights – can much better be described as a bundle of different rights vis-à-vis third persons, rather than one solitary right of property with regard to a particular object. In this respect, the term "allocation" ("Zuordnung") of exclusive rights or even goods likewise becomes less monolithic and more flexible or fluid than it has been traditionally been understood in German legal literature. Of course, on the one hand, the approach chosen to examine the exclusivity of rights with regard to information only indirectly focuses on the communicative aspect of information. However, on the other hand, the notion of information is understood by Zech in a broad sense to cover all information goods such as news, images, gene sequences or stored data.

- 4 In an introductory part, the book provides an excellent overview of the state of discussion in German legal literature regarding property and/or exclusive rights concerning information. Then, borrowing from Benkler and Lessig, who distinguish content layer, code layer and physical layer of information, as his central thesis Zech proposes to classify the legal protection schemes for information according to information's characteristics as semantic, syntactic and structural. Whereas semantic information is characterized by its inherent meaning, syntactic information can be described as the signs representing semantic information. Ultimately, structural information is information in its physical embodiment. This differentiation

allows Zech to describe in a new way, for example, the difference between, on the one hand exclusive protection by patent law and on the other hand, by copyright law. From an intellectual property rights perspective, both inventions and works may appear as public goods in need of artificially created exclusivity in order to provide incentives to innovate and create. From Zech's point of view, however, it becomes clear that patent law protects semantic information whereas copyright law only protects syntactic information. Also, the difference between copyright in works and neighboring rights in, for example, phonograms becomes much clearer since the latter protect structural information. This distinction in semantic, syntactic and structural information, including its overlaps in complex information products and services, allows for a rather detailed analysis of existing exclusive protection with regard to its legal commonalities as well as its anomalies.

- 5 Also, the reasoning behind granting full or partial exclusivity over access to or re-use of information becomes apparent. Examining, in the second part of his book, in great detail both these reasons for protection as well as the different legal protection schemes currently in existence with regard to semantic, syntactic and structural information, Zech reflects upon rights granted to entities as varied as persons, business secrets, inventions, news, images, genetic sequences, image and sound recordings and stored data. Here, for example, Zech demonstrates that the greatest restriction results from the allocation of exclusivity to semantic information, whereas the amount of restriction decreases from the allocation of exclusivity to syntactic information to the allocation of exclusivity to structural information. Also, he objects to granting neighboring rights protection for semantic information, and he refuses to recognize a right to the immaterial outer appearance of a physical object against being photographed since this would amount to exclusivity for syntactic information based on property law protecting material objects. Besides this, there is much more to discover on information in this book. In sum, Zech's aim is to systematize the existing exclusive rights granted on various legal grounds to information, rather than to create new rights.
- 6 Following, *Lucie Guibault* would like to draw the reader's attention to a monograph by:

Elkin-Koren, Niva, and Salzberger, Eli M.: *The Law and Economics of Intellectual Property in the Digital Age – The limits of analysis*. Routledge Research in Intellectual Property. London and New York 2013. 286 pp.
- 7 It took almost a decade for the authors to write this book from the moment that the Netherlands Organisation for Scientific Research (NWO) funded the research. But the waiting has paid off: the book takes a refreshing, in-depth, but non-conventional and critical look at the law and economics of intellectual property. For any skeptic of law and economics, it is a joy to read about the "limits of analysis" and to explore with the authors how the traditional analytical framework finds application – or not – in the digital age. The book is built on the premise that while "law and economics discourse has become dominant in intellectual property policy-making, causing policy-makers to focus exclusively on the economic ramifications of intellectual property," this narrow economic perspective leaves out many aspects of creativity and innovation. The authors refer more specifically to the sociology of arts and science or the complexity of human motivation that could be crucial to policy-making in this area. Elkin-Koren and Salzberger's book offer a reconstruction of existing scholarship and methodologies in law and economics so as to address fundamental issues that are traditionally left outside the scope of inquiry. From this perspective, it is probably a good thing that the book was not published ten years ago. Ten years are an eternity in digital terms! The analysis would, therefore, not have been as rich without taking into account such significant socio-economic phenomena as the unstoppable flow of peer-to-peer file sharing, the rise and fall of digital rights management, or the increased popularity of the open content movement, to name but three.
- 8 The book is actually quite entertaining as the authors debunk all major tenets of mainstream law and economics analysis, ranging from the assumption of wealth maximization as a basis for positive and normative analysis (leading to an inner incoherence between the two, since the "positive analysis cannot predict the adoption of its normative recommendations"), to the assumption of rationality and exogenous preferences (which "ignores the deficiencies of the shift from assuming self-maximization of utility to assuming self-maximization of wealth"), and to the assumption that the state of technology is fixed (which "overlooks the interdependency and reciprocity between technological developments and legal rules"). Of course, law and economics does have value as a method of legal research for it transcends national boundaries and particularisms in scholarly legal communication. However, mainstream scholarship in law and economics has become, over the years, impregnated by an increasing dose of dogmatism. Elkin-Koren and Salzberger offer this book in an attempt to bring law and economics back on the path of pragmatism.

- 9 The road to pragmatism wanders forth further in the book along the core elements of the normative analysis, namely the incentive paradigm and the proprietary model of intellectual property. The discussion on the incentive paradigm is particularly captivating, as the authors illustrate how, in the digital age inhabited by social media, the objects of incentives have shifted from incentives to create, to incentives to disseminate and distribute, to disclose, or to improve – each activity justifying a different form and scope of IP rights, in order to secure the desirable monetary incentives. The path to pragmatism continues its course through the meanders of private ordering, which seems to have become the main form of shaping IP rights. While new forms of private ordering keep emerging, for example through open access initiatives, the question arises whether this type of non-institutional “law-making” is desirable from a social welfare point of view. The same remark holds true regarding the phenomenon of governance by technology, where “law-making” occurs through the tweaking of digital rights management systems. The book concludes with a positive analysis of intellectual property law, examining the role of legislation from different perspectives as well as the role of courts in shaping legal policy toward intellectual property.
- 10 All in all, Elkin-Koren and Salzberger’s book makes a convincing contribution to the scholarly writings on the law and economics of intellectual property. And the fact that their approach is overwhelmingly, even if inevitably, American should not be an obstacle to its enjoyment.
- 11 As regards his turn, *Axel Metzger* would like to suggest
Ohly, Ansgar (ed.): *Common Principles of European Intellectual Property Law*. Mohr Siebeck 2012. 272 pp.
- 12 This volume presents a collection of papers given at a conference held in Bayreuth in 2009. The aim of the volume is ambitious, since the concept of “common principles” is based on two analytic perspectives: (1.) Are there any principles common to all or some intellectual property rights, e.g. copyright, patent, trademark, etc. (2.) Are there common European principles of this type? (see the introduction by Ansgar Ohly). The first analytic perspective stands in the tradition of the general parts of codifications, which summarize the general principles applicable to the various specific subject matters covered by the codification, e.g. the famous “Allgemeiner Teil” of the German Civil Code or similar parts of other civil codes, e.g. of Brazil, Greece, Japan, Poland or Russia.¹ The second analytic perspective of common “European” principles follows the model of the working groups and projects in the field of European private law. Because intellectual property has been harmonized intensively by the European Union in the last decades, the contributions to the book follow rather the paradigm of the Acquis Group (on this group see the paper of Gerhard Dannemann) than comparative law projects like the (Lando) Commission on European Private Law.
- 13 This twofold abstraction – over different intellectual property rights and different jurisdictions – is reflected by the subjects covered by the authors. Most papers examine subjects of a rather theoretical and method-oriented interest, e.g. “How far does the incentive paradigm carry?” (Alberto Muso); “Two tiered protection – designs and databases as legislative models” (Annette Kur); “The exhaustion of rights and common principles of European intellectual property law” (Jens Schovsbo); “Limitations and exceptions: Towards a European ‘fair use’ doctrine?” (Jean-Luc Piotraut); and “Fundamental rights as common principles of European (and international) intellectual property law” (Christophe Geiger). But there are also contributions that strive at more concrete questions, especially where horizontal European instruments covering different intellectual property rights have been enacted, e.g. “Common principles of secondary liability?” (Matthias Leistner) and “The European principles of intellectual property enforcement: Harmonisation through communication?” (Markus Norrgård). A special section of the volume contains three papers on the relation of competition law and intellectual property (Steven Andermann, Dirk Visser, Vyautas Mizaras).
- 14 After reading the contributions, it becomes obvious that the principles common to the various European intellectual property rights must be understood as (very) general principles, which in most cases have a rather heuristic value and may be helpful to explain common features and differences. But some of the analyzed principles may also have the potential to be applied by courts as normative standards, e.g. the exhaustion principle. It is, without any doubt, one of the most reputable tasks of European intellectual property lawyers to explore these principles and to explain their mode of operation.
- 15 And, last but not least, *Miquel Peguera* would like to draw the reader’s attention to
Reed, Chris: *Making Laws for Cyberspace*. Oxford University Press. Oxford 2012. 280 pp.
- 16 “Making Laws for Cyberspace” is an interesting and suggestive book by Chris Reed, a Professor of Electronic Commerce Law at Queen Mary, University of London, and a well-known scholar in the field of Computer and Cyberspace Law. In this book Professor

Reed explores an always challenging issue: how the laws that seek to regulate cyberspace should be devised so they can achieve their goal of influencing cyberspace actors' behaviours effectively.

- 17 The question of whether cyberspace is special as to how it should be regulated is clearly answered in the affirmative. The difficult issues posed by the extraterritorially nature of the Internet and the obvious limits to meaningful enforcement suggest the need for a different approach to designing cyberspace laws. Providing an insightful analysis on the probable reasons why these laws so often fail to be accepted and obeyed by cyberspace actors, Reed proposes new ways for lawmakers to tackle this issue.
- 18 The core of the argument is that cyberspace actors – whether individuals or businesses – will only abide by those laws they perceive as coming from a source with legitimate authority to regulate their actions online, and whose content appears meaningful to them. Thus, lawmakers need to ensure both elements if their laws are to be considered worthy of respect. Devising the laws from this standpoint represents a fundamental change in the normal process of law-making.
- 19 When considering the authority cyberspace laws need to achieve in order to be generally accepted, Reed refers to a number of factors that may weigh against them from the users' standpoint. These include users' realization that the state asserting the applicability of a particular law lacks jurisdiction over their actions online or that the law is unenforceable in practice against those users; ignorance of foreign laws, which is inevitable in cyberspace; the impossibility to comply with all the – often contradictory – laws that claim to apply to the same activity; or the users' perception that the connection between their online activities and the state that tries to assert authority on them is too weak.
- 20 Professor Reed contends that the main reason why people ultimately comply with the laws in cyberspace is neither the mere applicability of the law nor the fear of enforcement. Rather, other sources of authority are taken into account by cyberspace actors, which would explain for instance the phenomenon of voluntary compliance by subjects that are not legally bound by a particular set of laws that they nonetheless accept – a conduct the author terms the “Amazon Paradox,” referring to the example of the companies behind the website amazon.co.uk, which in spite of not being UK entities, abide by some UK laws not applicable to them. Among those sources of authority, the sense of community membership turns up to be of the utmost importance, especially in the case of e-commerce businesses dealing with foreign costumers.
- 21 In Reed's view, cyberspace actors choose, however unconsciously, which subset of foreign rules they are prepared to accept and recognize as respect-worthy, and they do so in a rational way. However, these subsets may not necessarily coincide with the legal system of a particular state. Rather, they may be rules of other kinds of communities; based on contractual relationships, such as those resulting from ICANN's Uniform Domain Name Dispute Resolution Policy; or the rules that govern the eBay global community.
- 22 The author warns lawmakers against over-asserting their authority over foreign actors and suggests targeting, instead, those who actually intend to become at least temporary members of the lawmaker's community. He underscores, as well, that it will be very difficult for a law to impose an obligation worthy of respect if that obligation clashes with a well-established norm in the relevant community – an opposition that may account for much of the failure experienced by copyright enforcement laws in cyberspace. Reed elaborates on many other aspects with regards to the content of cyberspace laws, touching upon issues such as over-complexity, contradictory rules, regulation by proxies, or wrong assumptions as to how actors are actually using cyberspace. He notes, for instance, the unintended effects that arise from embedding inappropriate business or activity models in the law. Other key aspects such as limiting the purpose of laws to achievable aims, or dealing with the rapid changes in technology are also considered.
- 23 The book is well-written, reveals a thorough revision of the extensive literature in this field, and provides useful insights on how to deal with the limits of the law as a mechanism for regulating cyberspace. It will surely be a profitable read for both academics and lawmakers and will reopen the debate on these demanding issues.

* The first text has been prepared with the help of Nicole Fallert, Research Assistant at the Institute of Information and Economic Law, Karlsruhe Institute of Technology (KIT), Karlsruhe, Germany.

1 A recent German project on the creation of an “Allgemeiner Teil” for the various intellectual property acts has been finalized and published in 2012, see Ahrens/McGuire, *Modellgesetz für Geistiges Eigentum*, Sellier European Law Publisher 2012, 844 pp.