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Immateriality and Materiality in Intellectual Property: An Indisputable Dichotomy or Essentially Entwined?

One of the most popular justifications for creating property rights for intangible/immaterial intellectual creations, the economic incentive, provides that protertisation facilitates a return on investment and consequently incentivizes creators/investors through such promise of return for their creations/investments (protected as works under copyright and inventions under patents). The limitations of access to such in/tangible creations by public is therefore deemed necessary, under this regime, to ensure such returns and maintain such expectations of the creators/investors for the sustainability of the relevant creative process. In order to coordinate such recognition of protection and limitation of access, tangible/material manifestation of the intangible intellectual creation is considered as a fundamental requirement (at least under copyright and patents) through which the protection is recognized for the intangible/immaterial creation engendered in the creators' mind.

This edited collection, titled *Intellectual Property and Access to Im/material Goods*, takes the reader on an interesting journey, portraying historic, social and economic reasons that underpin the significance of requiring material manifestation as a requisite for intellectual property rights. It further makes reference to historical and contemporary issues surrounding such requirement of materiality for recognizing and preserving intangible creations as worthy of intellectual property protection and the ways in which these issues are exacerbated in an indispensably digital world today.

The essays encourage a reconceptualising of the traditional and artificial separation of intangible and tangible as a necessity for the protection under intellectual property rights to a broader understanding and recognition of the interconnectedness of immateriality and materiality, which would be assistive in addressing some of the issues highlighted in this collection. Therefore in order to fully understand the interrelated nature of the intangible and tangible, as opposed to a dichotomy, this book introduces two theoretical analyses, knowledge commons framework and new materialism, appreciating the varied participation by different parties, human and non-human, beyond the traditional view of creator-user interaction.

Although in/tangible separation, where more focus was given to tangibility, seemed to have addressed the economic interests on intellectual creators to a certain extent, it simultaneously excluded or became problematic in granting protection for intellectual creations that could not have material manifestations of their intangible precursor or did not fit-in squarely with the materiality requirements of the regime (for example, a garden as a dynamic creative work or traditional knowledge of indigenous people). This volume sheds light on such frictions the in/tangibility approach under intellectual property causes, while demonstrating the severity of such frictions when we move from an analogue to

a digital platform where materiality loses its relevance and importance. (such as, restrictions on the rule of exhaustion in copyright in digital copies or restrictions on lending eBooks by public libraries or patenting computer implemented invention which does not have an observable physical effect). While the many chapters of this collection show the various ad-hoc approaches taken in judicial pronouncements in such problematic situations, they further highlight the inconsistencies such approaches create in the wider intellectual property jurisprudence. Accordingly the need to have a persuasive and acceptable intellectual property framework that appreciates such issues is emphasized throughout the book.

An interesting and fresh approach to theorizing intellectual property is provided in part I of the book. In chapter 1, Madison introduces a knowledge commons framework where access is considered as a governance issue instead of the traditional in/tangibility approach under intellectual property. Within this framework, Madison is critical of the traditional approach to intellectual property where the tangibility is seen as a solution to the problem of access between creator/investor and user/public when in fact there could be many different parties to this access problem (for example in a museum the various parties can be its curators, museum directors, board members, investors, donors, museum patrons, audience, artist etc.). His approach challenges the traditional IP view of taking intangibility and tangibility as distinct and separate and argues that the reality is somewhat different where intangibility and tangibility are more interrelated and overlapped. Therefore this new research framework argues that in order to understand the new dimensions the digitization has produced for intellectual property works, the traditional focus on creator- user duality must be broadened to have a wider perspective that includes various participation by diverse groups/institutions in a knowledge resource, a dynamic cultural thing that includes knowledge production, knowledge retention and knowledge sharing where access to this knowledge resource by way of varying participations is considered as governance. Within a governance framework, intangibility and tangibility are not seen as dichotomies but are considered as interrelated and overlapping.

Furthering on the need to create a theoretical framework that sits well within a digital platform, Burk, in chapter 2 takes an approach under new materialism. Burk demonstrates the way in which the traditional copyright theory revolves around the concepts such as “originality” “copy” and “work”, the essential dualist approach of ideal as a separate and distinct from material (on which the intellectual creation is placed) and how it poses further issues in a digital environment where the lack of materiality may challenge the very existence of the intellectual creation due to lack of fixation as a requirement for copyright eligibility. Therefore, with an aim to bridge this gap, relying on new materialism, he proposes firstly, the removal of the doctrine of “the work” and its material counterpart “the copy” by treating the “instantiation of creative goods as a unified whole rather than a conceptual division”. It has been argued that such a doctrinal move would avoid the problematic discussion of “copies” and “fixation” within digital media, which creates the immaterial/material divide. Secondly, going beyond the postmodern critique of romantic authorship, he argues that

new materialism tends to emphasise the agential nature of the material objects in order to de-emphasise the prominence and distinction of human agents, and explore the assemblage (Deleuz) or collectivity (Latour) of human and non-human interaction. This, he argues, would allow the notion of authorship to become further distributed beyond the network of social inputs recognized by the critique of the romantic author. Under a new materialist approach, the human contributor is to be regarded more as a curator for the assemblage of actors (human and non-human) who contributed to the creative result. Accordingly this would appreciate the constitutive nature of immaterial and material rather than see them as dichotomies, in digital media.

Part II of the volume, while connecting with the theoretical reflections provided in part I, takes the discussion further by providing historical reflections on copyright and the “copy” and patent law and “inventions” and challenges posed by the new technologies in the twenty first century case law. In that regard, Yu, in Chapter 3 discusses the emergence of all-important concept of ‘copy’ as a material object in copyright and many ways in which such understanding of the ‘copy’ is challenged within the technological and legal spheres today due to immaterial and material distinctions required to be made. Traversing through several recent court decisions from around the world, he demonstrates how the use of or interaction with digital copies demand new understanding as to what a copy is. In attempting to address such issues, at times inconsistent judicial pronouncements have been made relating to what a copy means (Capitol Records, LLC v ReDigi Inc. [US] and Art & Allposters International BV v Stichting Pictoright [CJEU]) under different economic rights of copyright (reproduction, distribution, public performance and making available) and at times courts have avoided that question entirely for the purpose of delivering an acceptable decision (American Broadcasting Companies, Inc v Aereo, Inc [US]). Yu’s discussion, connects well with the positions proposed under the knowledge governance framework and new materialism where the focus on the copy under traditional immaterial/material dichotomy ought to be replaced by a broader perspective of knowledge governance or a combination of human and non-human contribution where the focus would be on access to a creation rather than its in/tangibility.

In Chapters 4 and 5 through a historical look on patents and the requirements of patentability Lai demonstrates the way in which tangibility still plays a significant role in patents regardless of such an intangible/tangible separation in terms of an invention is artificial. According to this historical account, the author argues that an invention and its development under patent law indicate the interwoven nature of ideas/inventions and their physical embodiments. While chapter 4 speculates that speaking in dichotomies of intangibility and tangibility may not be conducive in achieving the policy goals of patent law, chapter 5 demonstrates the cross-jurisdictional difficulties such an approach has on recognizing information based inventions (computer implemented inventions, biological material and methods of diagnosis and treatment) as patentable inventions in the US, EU, Australia and New Zealand.

Part III of this collection examines practical issues relating to access to intellectual creations due to intangible/tangible dichotomy. In that regard, discussions in this section is focused on public libraries and the restrictions they encounter on lending eBooks (chapter 6), on biobanks and difficulties surrounding a donor-research-patent-consumer access spectrum (chapter 7) and on international trade in intellectual property relating to exhaustion and parallel importing rules (chapter 8). With regard to eBooks, in chapter 6, Spedicato highlights the friction between rules and legal presumptions relating to normal books and eBooks, which have prevented public libraries from relying on a lending model similar to normal books for eBooks. In terms of biobanks, (organized collection of human biological material, stored alongside health information and used for biomedical research) in chapter 7, McMahon underlines distinction between ownership and access to physical specimen and the knowledge/ideas obtained from them and the tensions under patent law in terms of facilitating downstream research based on such knowledge/ideas. In chapter 8, Frankel demonstrates the complicated relationship between intellectual property and international trade in in/tangible goods and services within the WTO legal framework, particularly in terms of parallel importing and exhaustion rules. While such affects may be less so in a digital environment, it is argued that legal separation of goods and intellectual property on a tangible and intangible basis is important and therefore should be preserved in order to avoid or minimise trade-distorting nature of intellectual property rights in international trade. The specific scenarios this section focuses on highlights the ways in which traditional intellectual property views limit access to intellectual creations within non-traditional knowledge creation pathways and platforms and demands the need to address such issues in a comprehensive, consistent and convincing manner.

Part IV of this collection focuses on issues relating to cultural heritage and the role im/materiality plays within it. The discussion includes the case of cultural heritage of indigenous people as intellectual property (chapter 9), respecting indigenous traditions in museums as cultural heritage institutions (chapter 10), preserving born-digital work by heritage institutions (chapter 11) and the impact of in/tangibility dichotomy in these spheres. In chapter 9, Blakeney highlights the struggle of attempting to fit traditional knowledge and traditional cultural expressions, which can be predominantly intangible and are holistic in nature, into a piece-meal structure available under intellectual property regime. Furthering on from this struggle, in chapter 10, Bell, Lai and Skorodenski demonstrate the way in which the cultural heritage institutions attempt to address the preservation of cultural heritage of indigenous people through a combined use of chattel property law, intellectual property law and contract law. In the concluding chapter (chapter 11), the focus is moved to orphan works held by cultural heritage institutions and the restrictions these institutions encounter in attempting to preserve the intangible portion of the work due to the deterioration of the tangible medium on which it is fixed. Although digitizing would resolve this issue, the chapter identifies that, due to the requirement of maintaining the nexus between intangible and tangible which underpins

copyright law, such transfer by the institutions is not generally allowed due to them being orphan works, risking the destruction of the entire work.

This collection of essays ought to be commended for the comprehensive approach it takes in engaging with, a widely known but not widely understood in its full extent, problematic basis of intellectual property: the requirement of materiality and its limiting effect on access to intellectual creations. While such limiting effect on a digital environment is seen, experienced and discussed in diverse fields, across jurisdictions and many academic texts, this collection brings together some of it along with nuanced evaluations of contemporary difficulties surrounding access to im/material goods under intellectual property. Thus this volume adopts an effective approach to educate the reader with the access problem fully while suggesting fresh theoretical approaches to understand and research the problem further from new perspectives.