

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

Mandic

Balancing Necessity

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



Scaria

- Tracks policy determinations--must mitigate social costs of protection: users' rights



Pessach

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



Hunter

Stakeholders

- Crowd-source creator  Lee
- 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



Bolton

Global Distribution

- BioPiracy—Sorghum SbMate Patent



Hinkle

- Traditional Knowledge



Wendland

Redistribution, Sustainable growth, Rewarding custodians—Genetic erosion

Private vs. Public

- TRIPS Article 8(a) Proposed: private economic interests:

rent seekers, 3rd parties, social goals

IPR , health, economic growth



Hilthy

Other Public Concerns

- State Security



Golan

Chap. 6 (Israel Patent Law)

US Invention Security Act of 1951

- State stake in PT

PTO as core state function vs. outsourcing



Potts

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



Adelman

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



Pessach

Final Observations

- The old commonplaces are gone:
Against Policy Coherence
Against Harmonization
- The ultimate balancing: discretion/known rules (fair notice)



Wunsch-
Vincent

Israel © Act, §53: no injunctive relief