

Call for papers
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Theme - Fairness, Morality and *Ordre Public* in Intellectual Property
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Proposition

International Public Order & Intellectual Property

Public Order is a real transversal question for IP. Public Order is a substantive requirement for Patent or trademark. Therefore, IP knows a special sensibility to Public Order. Indeed, there is the application of the international legal order and the legality of agreement, and there is also the validity of the ownership. Public order question is interesting because it is not a pure IP technical question, as novelty or originality can be, but it is a common question of any IP regimes. Every lawyer has an idea of the meaning of Public order. It protects the fundamental values of the society, and substantially covers all mandatory rules parties have no freedom to derogate from. It could be Economic Public Order, Protection Public Order, or Direction Public order. Besides it enables us to think in an international perspective. The efficiency of the IP may be limited to protect Public Order Interests, as a classical balance between private interests and the general interest. Each IP system includes legal limits in order to preserve this general interest. It can be ownership exceptions. It can be legal license or the expropriation of property. But, more than these legal limits, the evolution of the society, the extension of the IP area and the new supranational ownership models have created a new articulation between Public Order and IP.

The supranational Public Order finds its origin in the development of a European IP Law for trademark, design or Patent. The copyright is not directly impacted by this movement, even if the European Court of Human Rights has already applied its legal references to the copyright, especially to find a balance between the freedom of speech and the ownership protection. Considering European Patents, and, may be European unitary patents, the article 53 of the Munich Convention states that a patent shall not be delivered if the commercial exploitation of the invention was contrary to the public order or morality. The Convention adds that such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States. We immediately see the difficult combination between the European patent public order and the Member States' public order. The Munich Convention seems to launch an independent public order. A similar reserve is included in the European trademark Regulation and in the European Design Regulation. Both exclude intellectual goods which are contrary to public policy **or** to accepted principles of morality.

For intellectual property regimes, a public order or morality reference is not an innovation. The innovation lies in the area of reference of Public Order. Public Order criterion has to be appreciated not from a local tradition or a State Law, but in a multicultural area, the multicultural European model of society. This may be the IP Public Order's New Frontier.

The multicultural Public Order can be a way to extend IP. It can also be a way to limit the realm of owned goods. Moreover, the public order can be a way to adapt IP to the evolution of the society. The acceptance of the IP by the society can influence the interpretation of the IP's Public Order, and can reduce the ownership realm. In a multicultural public order, its perception becomes difficult. The judge or the office will be in the center of this legal construction. He or it has to identify this multicultural Public Order and to enforce it. Is this

public order an accumulation of the States' public orders? Is there an autonomous public order for a transcultural society? Will it be a more or a less permissive regime? The accumulation of cultures, religions, and histories give the European project a specific and strong richness. But, it can also become a limit of the freedom of creation because of the public order question. We can think of a few examples of interpretation coming from the EPO or the EU Court of Justice, as *Brüstle cas*, *Couture Tech case*.