



Prof. Orit Fischman-Afori, Dean

Remedies and Fairness in Intellectual Property Law

Orit Fischman Afori

The notion of fairness in intellectual property law is usually associated with exceptions to copyright, headed by the fair use doctrine. However, fairness is no doubt a much broader, multi-faceted value underlying any law. Fairness may represent the aim to maintain the balance of interests of actual parties to a conflict; at the same time, fairness may represent the public interest at large that should be maintained in any interparty resolution. Fairness is often manifested by the general principle of justice — yet justice in-itself encompasses various values, including equality and proportionality.

The notion of fairness is introduced into intellectual property law through several “gates”: through the threshold for protecting the subject matter (*e.g.* “originality” in copyright law, “novelty” and “usefulness” in patent law); through the definition of the rights (for instance the “public performance” right in copyright law *ab-initio* is defined as governing only performances that were held in “public”); and through the exceptions and limitations to the rights (*e.g.* “fair use” or “fair dealing” in copyright law). Another, most important gate for the introduction of fairness into law is through the grant of remedies. While the former gates are strictly defined by international intellectual property law, remedies are left to local judicial discretion. Therefore, remedies have become one of the most important challenged arenas for implementing the notion of fairness in Intellectual Property law.

The centrality of remedies in that regard may be demonstrated through several major topics of debate: the use of the measure of “proportionality” as an underlying principle in all remedies granted in the EU; the re-acknowledgement of injunction as an equitable relief in the USA; the new tool of internet site blocking orders as the most controversial remedy for striking the balance between competing interests in the digital environment; and statutory damages as a punitive measure. In all these cases, local courts should implement the notion of fairness within a concrete conflict framework, while considering the comprehensive impact on the perception of fairness in intellectual property law at large.