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Remedies and Fairness
in Intellectual Property Law

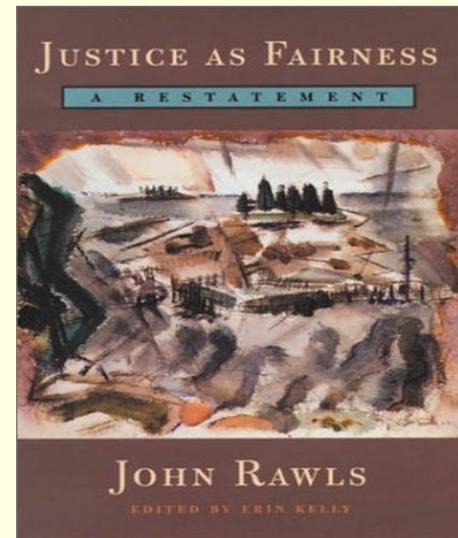
Introduction

- Intellectual Property law is in a “moral” crisis:

Accused of not promoting a “**fair**” and “**balanced**” outcome.

- In theoretic terms:

The initial “**Allocative Justice**” is questioned.



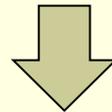
Introduction

- **Ways for easing the crisis:**
 - **Redefinition of rights**
 - **The remedial path**

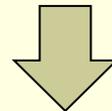
Normative Background

■ General Normative Theme:

Fairness is promoted by Allocative Justice definition of rights.



Corrective Justice serves as a means to executing Allocative Justice.

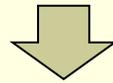


The vehicle for achieving Corrective Justice is **remedies**.

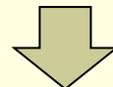
Normative Background

■ Specific Normative Theme:

The allocation of IP rights is in crisis.



Remedies should be used as a pragmatic vehicle for promoting **fairness** in intellectual property law – on a case-by-case basis.



Notions relating to **fair remedies** in Tort Law should be applied in IP Law as well.

Doctrinal Examples

■ **Remedies** as a pragmatic vehicle for promoting **fairness**, on a case-by-case basis:

A. Actual damages

B. Contributory negligence

C. Discretionary injunctive relief

Actual Damages and Statutory Damages

- The purpose of granting damages is “*Restitutio in Integrum.*”
- Fairness = avoiding over-compensation and under-compensation
- Courts should enjoy full discretion to grant actual damages instead of statutory damages – on a case-by-case basis.

Actual Damages and Retroactive License Fees

Can courts calculate damages based on a hypothetical retroactive license fee?

Yes? → The basis for damages should be *Restitutio in Integrum*
(*Oracle Corp. v. Sap AG* – *factual exception*)

But → What about deterrence and observance of laws?

Actual Damages and Retroactive License Fees

- The infringer's state of mind is important for the promotion of fairness:

Intentional (willful) Infringement

or

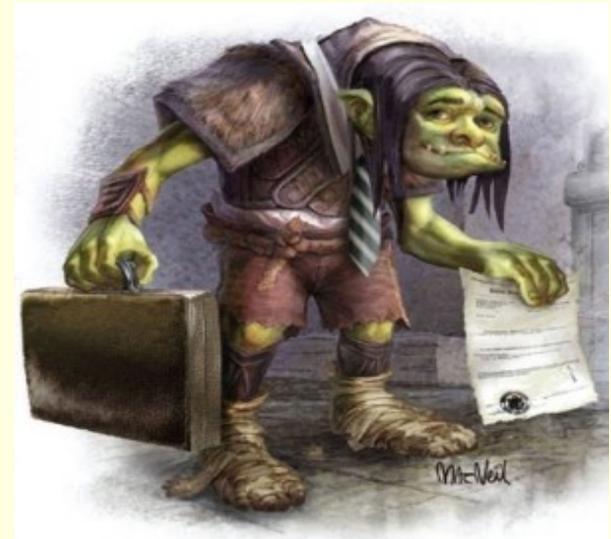
Accidental/Inadvertent Infringement

Contributory Negligence

- **The right holder's state of mind and behavior should be taken into account in the calculus of damages:**
 - **Right holder's misrepresentations;**
 - **Right holder's laches (and reliance of user);**

Contributory Negligence

- **Courts should divide liability in IP cases as in Tort cases**
(e.g., 50% contributory negligence = 50% compensation)
- **Relevant example:**
IP trolls



Discretionary Injunctions

Injunction is an equitable remedy

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Subject to judicial discretion

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**Granted when it is appropriate within
a cost/benefit analysis**

Discretionary Injunctions

- U.S. Supreme Court has called for realizing judicial discretion in granting injunctions:

In copyright: *New York Times Company, Inc. v. Jonathan Tasini*, (2001)

In patent: *eBay, Inc. v. MercExchange*, (2006)

- Nevertheless, in reality, injunctions are granted on an automatic basis, especially in copyright cases.



Discretionary Injunctions

- **When an injunction is granted, discretion should apply to various additional factors, in order to draft a fair and balanced remedy, such as:**
 - **Clear and focused definition of the coverage of the injunction**
 - **Time limit of the injunction**

Discretionary Injunctions

For example – a website blocking order is a kind of injunction:

- **Should always be subject to judicial discretion, on a case-by case basis.**
- **When granted, should be drafted in a proportionate way – with exact coverage and time limit.**

(e.g., The Football Association Premier League LTD v. B.T. (2017))

Conclusion

Remedies are a key element for promoting fairness in Intellectual Property Law !

