IS IT POSSIBLE TO BALANCE CREATIVITY AND COMMERCE?

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At its core, IP is a social contract between creative people, rights-holders and the public. It should encourage creativity, both by facilitating it in the first place and by rewarding those who then want to benefit from their work. Creativity – re-using ideas – and commerce – benefiting from this re-use – should be in balance.

To understand this social contract we have to look at a diverse lot of conventions, directives, laws, court judgements, business practices and licensing deals. We have to look at the whole picture.

Even so, it is hard to discern how creativity and commerce are balanced. At a governmental level, the EU has used its directives to strengthen the Internal Market with little regard for social or cultural factors; and WTO has used TRIPS to facilitate global trade with little regard for development policies. In most cases, a certain class of rights-holders – the major entertainment companies, the big pharmaceutical companies – lead the way. Other rights-holders have less influence. The public virtually has no voice at all. As policymakers extend copyright and patents (and trademarks) to more and more areas of human activity, so the absence of clear principles becomes troublesome.

Is IP law today like property law in the late Victorian era: abstruse, arcane, unfair and expensive? If current trends continue (and there are hardly any countervailing pressures within the law community or parliament) will copyrights become eternal, like trademarks, and will everything be patentable?

What are the core principles of a sensible, fair, user-friendly IP regime for the 21st century? How can we establish it?