As the title suggests, this book seeks to answer the question of whether one size fits all in Intellectual Property regimes. Apparently, one size cannot fit all. Even within the confines of a 361-page book, not all of the article authors included can agree on the specific areas where IP protection needs to differ. But they do all agree that uniformity imposes costs which can be avoided by specifically tailoring IP rights to fit different needs.

The chapters in this book look at the title question from several different angles: Should different countries/regions have different IP laws? Do different technologies call for different patent rules, or different forms of art for different copyright rules? Should the rights granted by patents and copyrights and the exceptions to those rights be made more similar in areas where both forms of protection apply? In general, what exceptions to IP rights are legitimate?

Part I discusses the foundations and limits of IP. The first chapter, *Remarks: ‘one size fits all’ consolidation and difference in intellectual property law*, by Graeme B. Dinwoodie, analyzes a previous attempt to create a unitary IP right and sets the tone for the book. The sponsors of that attempt claimed that the differences in modern IP rights are mere legal formalisms, and that the only real difference between copyrights and patents is copyright’s *droit moral*.\(^1\) There is some support for this thesis in the expansion of subject matter covered by each IP right. Dinwoodie

points out serious flaws in this argument. For example, trademarks are meant to prevent consumer confusion, not to reward innovation. These two aims are fundamentally different. Even in areas where protection is nominally the same, empirical evidence suggests differences. Representational art is often given more copyright protection than abstract art, and some types of marks are more often recognized as valid trademarks than others.\(^2\) Finally, different countries have different needs and hence different standards for IP, within the framework allowed by international agreements.

Dinwoodie makes a convincing case for tailoring IP rights to fit the real world. The empirical study of how copyright is applied in practice provides useful insight for one of the toughest issues in patent law: the conflict between the electronics industry, where a new invention may involve components covered by hundreds or thousands of other patents, and the biotech industry, where inventions are often wholly new and not subject to dominant patents. Perhaps electronic patents should receive a lower level of protection, in order to facilitate the evolutionary process that is standard in the industry. The copyright experience suggests this can be done through the back door, without officially changing doctrine.

Chapter 2, Michael Carroll’s *A framework for tailoring intellectual property rights*, discusses the need for IP rights and the alternate systems which policymakers could use, such as direct compensation for worthwhile inventions. Other systems might reduce the administrative costs involved in the patent system, and the costs of litigation over rights, but would result in decisions being made by people even more poorly equipped than the market to determine the value of inventions. However, other systems could be valuable in areas where market-based solutions have clearly failed, such as in creating better drugs for diseases primarily afflicting people too poor to pay for expensive medication. One size fits all patents and copyrights are

\(^2\) *Id.* at 11.
inefficient because they do not fit every situation perfectly. Carroll supports narrow tailoring of rights to avoid uniformity costs, arguing that courts already do this more often than they like to admit, and should do so more openly. Dinwoodie’s study of copyrights supports this view.

Chapters 3 is titled *Patents and progress: the economics of patent monopoly and free access: where do we go from here*, and is written by Rudolph J.R. Peritz. Peritz, looks at decades-old attempts to determine whether IP rights stimulate enough innovation to justify their social costs, and concludes that this question is still as open as it was in the 1950s. The answer may depend on the industry. Some economists argue that normal economic competition creates incentives for innovation without patents. But the question as Peritz poses it is so broad that it has only limited usefulness. In reality, the proper question is generally not patent versus no patent, but current patent system versus a different set of patent rights. Schmidt’s counter-argument in Chapter 4 is more convincing.

Claudia Schmidt attempts to determine optimal levels of IP protection in *Comment: Some Economic Considerations Regarding Optimal Intellectual Property Protection*. Schmidt disagrees with Peritz, arguing that economic results are actually quite clear. The problem is that different situations call for different answers. Any attempt at a uniform solution will yield inconclusive results, but tailoring IP rights can produce optimal solutions in each situation. She claims that, “aside from pharmaceutical and chemical industries, 80 to 90 percent of inventions would have been made in the absence of patent protection.”

Optimal patent lifetime varies by industry and the difficulty of making the invention. Optimal copyright protection length should

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match the costs of creation. Where creating a work is cheap, not as much incentive is needed to stimulate it. On average, optimal copyright length would be about 15 years after creation.\footnote{Id. at 55.}

*Patents and open access in the knowledge economy*, by Ulf Petrusson, is the fifth chapter. Petrusson discusses the interplay between the patent system and open science and open innovation. In the long run, patents may promote open access, because they provide an incentive to disclose information which may otherwise be kept secret well past the term of the patent. But in the short term they may actually *increase* secrecy, as firms keep an invention secret in the development phase in order to meet novelty requirements later on. Petrusson argues that the social value of patents largely depends on the structure of the public domain. Also, private innovations in the public domain can correct some of the excesses of the patent system. Patent regulations often create norms that are followed by private groups when establishing open access between members. Private standard-setting bodies have recently shown a trend toward increased use of standards that use patented technology. Once a standard is established, it may be impossible to participate in the market at all without adopting it, which makes standards based on patented technology quite problematic unless fair, reasonable, and non-discriminatory (FRAND) license terms are available to all comers. This chapter would benefit from a discussion of how to ensure that FRAND license terms are available when market-dominating standards depend on patented technology. In the US, antitrust actions could force patentees to provide FRAND license terms if friendlier methods fail. One assumes that similar options are available in Europe.

Chapter 6 is titled *Free access, including freedom to imitate, as a legal principle—a forgotten concept?* and is written by Ansgar Ohly. This chapter’s contribution to the work is the divination of one of the key problems with the modern convergence of IP rights: overlaps between rights can undermine exceptions that are necessary for the public good. Ohly argues that
IP protection is generally too broad, and that most of its aims could be achieved in more narrowly tailored (and hence less costly) ways by unfair competition law. A weakened IP regime could still protect the most worthy innovations. Ohly’s case for such a radical change is not fully persuasive. Smaller changes may work as long as they address the fact that IP overlaps steal rights that belong to the public.

The book then moves to Part II. Finetuning the Scope of Protection: Limitations and Exceptions. Andrew Christie’s chapter, Maximizing permissible exceptions to intellectual property rights is the seventh chapter. It looks at the three-step test required by the Berne Convention and the TRIPS Agreement. This test limits the exceptions that signatories can make to protection of IP rights. Because the three-step test sets these limits, the way to maximize allowable exceptions to IP rights is to write the three-step test into statute. Doing so may be necessary to preserve the balance between the rights of IP owners and IP users.

Chapter 8 is titled Overprotection and Protection Overlaps in Intellectual Property Law—the Need for Horizontal Fair Use Defences and is written by Martin Senftleben. Senftleben continues Ohly’s argument that the convergence of IP rights impinges on vital fair use exceptions. IP protections can damage fundamental rights, such as free speech, if not balanced by strong fair use exceptions. The three-step test as applied in the European Community is especially egregious. It can destroy national fair use exceptions, but not create new ones, because the exceptions are rigidly defined by national laws while the three-step test is flexible, like a wrecking ball destroying a structure as it swings. The patent version of the test is a bit more reasonable than the copyright version. In spite of this, the federal circuit has recently

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neutered the experimental use defense. A fair use exception to patent rights could stimulate innovation in industries where inventors face a thicket of pre-existing rights. Exceptions carved out of one IP right need to be made in other rights as well. Ironically, the one area where anyone makes a convincing case for a one size fits all approach is in the exceptions to IP rights. Failure to align the exceptions essentially means there are no exceptions when IP rights converge.

Chapter 9 is titled Intellectual property and technology—looking for the twelfth camel? And is written by Maciej Barczewski and Jerry Zajadlo. The “twelfth camel” story at the opening of this chapter is a parable involving three heirs’ search for a way to divide their father’s estate equitably. The authors use this as an allegory for legal scholarship as an effort to create a legal system providing justice, security, and usefulness. The chapter then analyzes some issues in IP where these values conflict, namely digital rights management (DRM, used for copyright self-help) and genetic use restriction technologies (genes that keep patented plants from reproducing). These methods actually tend to disturb the balance of rights, as where DRM prevents resale of copyrighted materials, in violation of the first sale doctrine.

Part III: IP Rights as Objects of Property looks at who can own IP rights and how they can be transferred. The tenth chapter is Alexander Peukert’s Individual, multiple [sic] and collective ownership of intellectual property rights—which impact on exclusivity? Individual ownership is standard for most IP rights. Multiple ownership of rights may exist under several scenarios: combinations/adaptations (e.g. the typical electronics patent), aggregations of different rights (e.g. the copyrights of a film’s writer, director, actors, and producer), parallel territorial rights (e.g. patents held by different inventors in different countries), double innovation or parallel trademarks, and group innovations/creativity (e.g. the copyright in a recording of an

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Collective ownership is different from group ownership in that it involves unitary rights rather than single conflicting rights. Geographical indications are a collective IP right. No one owns any one portion of a geographical indicator. Instead, everyone who produces their product in the specified region may use it, while excluding all others. Peukert also looks at claims of IP protection for traditional knowledge (TK), and rightly points out that IP protection as currently conceived is not the answer. TK rights do not fit neatly into any traditional IP categories. They also do not respect the public domain, which is a vital part of the bargain for an IP right.

Proprietary transactions in intellectual property in England and Germany: transfer of ownership, licensing, and charging, the 11th chapter, is written by Stefan Enchelmaier. Some of the differences reveal just how underdeveloped German patent law is (perhaps intentionally, perhaps unwittingly; this is never clear). The author states that Germany’s highest court has not addressed the question of whether a licensor might “be allowed to turn against the customers of the licensee, against whom he has not undertaken any obligation to let them exploit his invention undisturbed.” Any competent contract attorney could resolve this dilemma easily enough. German copyright protection is also problematic. Many rights are nontransferable, even if the author wishes to transfer them. As Enchelmaier notes in his critique, “…it is not obvious that authors are more vulnerable than other adults of full capacity.” Some German legal scholars have proposed allowing the transfer of most of authors’ personal rights, retaining heightened protection only for very basic ones such as the right to be credited as the author of a work.

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9 Id. at 236.
English copyright law, in contrast, favors transferability of rights. In both countries, true transferability of trademarks is a recent innovation. Previously, trademarks were considered little more than a geographical indicator and could not be transferred without selling the factory where trademarked products were made. In English law, mortgage of an IP right involves a full assignment of the IP to the creditor. Absent a license, the debtor has no right to exploit the IP until the debt is repaid. A charge simply gives the creditor the right to seek a judgment against the debtor, secured by the IP in the event of default. German law allows pledge of IP rights that could be assigned (patents, trademarks, the right to exploit a copyright, but not the copyright itself). A strong argument against unified patent laws lurks within this chapter (maybe stronger than in anywhere else in the book, due to the more detailed look at the national systems). But Enchelmaier never quite brings it out in the open: both German and English patent laws have serious flaws in their default rules. Without reforms at the national level, a more unified patent system poses a risk of adopting the worst components of each national system, rather than the best.

The 12th chapter would have been a better fit for Part II. Titled Control of Museum Art Images: The Reach and Limits of Copyright and Licensing, and written by Kenneth D. Crews and Melissa A. Brown. The chapter focuses on the problems in the approach many museums take toward protecting digital images of their artwork. Many museums claim copyrights far beyond where copyrights can exist. Digital images of paintings generally aim for maximum fidelity to the original, with no originality in the photos of the art. Without originality, copyright is impossible. But many museums falsely claim they have copyrights in these images, which Crews and Brown consider not only legally ill-advised, but in contravention of museums’ stated mission of making art accessible. Some museums have begun addressing the legal aspect of this
issue through contract law. Visitors to their websites must accept terms of service that prohibit any copying of images contained therein, copyrighted or not. Others recognize the conflict between copyright crackdowns and their fundamental goals, and have explicitly released images to the public domain.

Part IV: International IP Law: One Size Does Not Fit All is upfront about the conclusion that has been tucked away in the chapters in each previous section. Chapter 13, Exploring the Flexibilities of the TRIPS Agreement’s Provision on Limitations and Exceptions, by Christophe Geiger, is a primer on exploiting the ambiguities in the TRIPS Agreement. In fact, many scholars argue that trade-related treaties must give way to the human rights objectives of such treaties as the Universal Declaration of Human Rights. At minimum, human rights treaties have equal importance and the TRIPS agreement should be interpreted in a way that does not conflict with such agreements. Geiger also rejects the argument that the three-step test does away with fair use exceptions in copyright, pointing out the test was first proposed by the United Kingdom, which considers fair use a fundamental tenet of copyright law. He proposes a narrow reading of the three-step test’s restrictions on the limitations states may place on IP rights.

The fourteenth and final chapter takes a look at more of the flexibility being added to international IP law. The Concept of Sustainable IP Law—New Approaches from EU Economic Partnership Agreements? is written by Henning Grosse Ruse-Khan and addresses the need for balance with human needs. Ruse-Khan promotes tailoring of IP rights to match each nation’s developmental needs. This position is closer to existing treaties than generally recognized. The European Community-CARIFORUM Economic Partnership Agreement lists sustainable

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development as a primary objective. Ruse-Khan also argues for a very flexible interpretation of the three-step test in the TRIPS Agreement.

This book makes a fairly convincing case that one size cannot fit all in any of the dimensions where IP rights are analyzed. Its weakness is that almost all of the contributors are intellectual property law professors. Specific recommendations are harder to accept in light of the relatively narrow perspectives considered. Some topics, such as the question of whether droit moral is the only difference between modern copyrights and patents, had to be addressed by IP attorneys. But a contributor with international human rights law experience may have had more to add to the section on international IP law. It also would have been nice to hear from a few commentators who do believe one size can fit all. The section on the limitations and exceptions to IP protection had an economist as a contributor, and was markedly improved by the addition of that perspective. Overall, this book is a worthwhile contribution to the literature and raises important issues which need to be kept in mind as trade becomes more globalized and as the scope of protection of individual IP rights expands into spheres previously reserved to other IP rights or the public domain.

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