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Consumers & SMEs
in the Digital Single Market (Digi-ConSME)
Jean Monnet Centre of Excellence

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Seminar Series

The New Frontiers of Innovation, Policy and Law

Algorithmic Arts, Digital Creativity and Aesthetical Progress in Patent Law

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Aula Seminari, Torretta SDE, Strada Maggiore 45 Bologna
via Microsoft Teams at https://bit.ly/3qQ8BZm

Chair: Prof. Federico FERRETTI (UNIBO)
Speaker: Prof. Nari LEE (Hanken School of Economics, Finland)

For information: Prof. Federico FERRETTI – f.ferretti@unibo.it

Abstract

Patent law purports to promote utilitarian technological progress. As a consequence, the subject matters in patent law are utilitarian art and the aesthetical objects are often excluded in patent law's rules on eligible subject matters. Digitalization of technology challenges this. As the art comments on society, contemporary arts of today are often enabled by technological tools and sometimes embody technology. Moreover, consumer electronical goods and wearable technologies are obvious examples where utilitarian innovation may be simultaneously visually appealing and technologically useful. Recent advances in Artificial Intelligences and robotics present creative possibilities of non-human created aesthetic expressions and challenges human centric definition of artworks. These examples underscore the conundrum in patent law's exclusion of visual arts.

Aesthetical arts, in contrast to technological arts, are excluded from patentable subject matter but the exclusion of visual aspects of an object from patent are not necessarily connected to other excluded subject matters. Notably, exclusion of immoral subject matters (i.e. either as such or their commercial exploitation is against *ordre public*) seem to be justified based on morality. Likewise, exclusion of natural laws or mathematical algorithms are justified using the rationale that building blocks of inventive activities cannot be subject to exclusive right. Other classes of excluded subject matter include discoveries, i.e. things that exist in nature are excluded as they do not involve human ingenuity, and arbitrary methods, personal skills, and business methods, that may involve human ingenuity and yet may not be objectively reproducible. The constellation of the excluded subject matter may thus be justified based on public policy or other reasonable policy-based arguments. Among these, aesthetical creations stand out as it does not fit with the rest, as they involve human ingenuity, do not form building blocks of invention, and can be objectively reproducible. Exclusion of visual subject matters from patent protection may only be explained that utilitarian objects and aesthetical objects are essentially different, and the incentives that require for their creation are different. As a corollary to the explanation that utilitarian objects are different from aesthetic object is the prejudicial view of what art is, i.e. patent protects and should protect low art (i.e. technical art), and copyright should protect high art – fine art. In other words, technological invention as a utilitarian tool serving the master of aesthetical high art. By examining the history of patentable subject matter and contrasting it to the observation of today's aesthetical tools serving the master of technology, this paper explores the position of aesthetical art in patent law. As the merger of the utility and aesthetics is witnessed more and more, visual objects may only take that aesthetic forms as a result of underlying technological solution. The paper identifies three cases where (1) visual arts that could inherently also have technological function (Hirst), (2) fine arts which are original works of expression which are normally subject matters of copyright but expressed only through strong technological tools, (Bellamy) and (3) the inventions that have visual and aesthetical elements (TeamLab). Whilst explicitly rejecting the argument a so called 'if value then right', this paper observes that the normative argument for hard exclusion rule that the aesthetical objects should be excluded from the patentable subject matter has become hard to accept. Whilst the origin of the exclusion may be based on regulatory efficacy and reluctance of involving administrative agency in aesthetical judgement, the overlaps and legal hybrids make the hard demarcation rule of subject matter category difficult and indeed the practice developed over the years seem to suggest that it may not be possible to put hard demarcation into practice

Speaker's Bio:

Nari Lee is the professor intellectual property at Hanken School of Economics and the deputy director of the IPR University center. She has joined Hanken faculty in 2012. She has studied law at Ewha Womans University in Korea and at Kyushu University, Japan (LL.M), and holds a Ph.D from University of Eastern Finland and Doctor of Laws (LL.D) degree from Kyushu University, Japan. Since 1996, she has researched and taught in the area of intellectual property and international trade in universities in Europe, Asia and USA. Her research experience includes post of an affiliated research fellow at Max Planck Institute for Intellectual Property and Competition in Munich, Germany

(2012-2014), Research Visitor at University of Cambridge (2016), Senior Global Hauser Fellow at New York University (NYU) Law School (2017). In 2019 Spring, she served as a Designated Professor, at the Center for Asian Legal Exchange at Nagoya University, Japan and in 2019 Spring-Summer as Research Visitor at Center for IP and Information Law (University of Cambridge).

ABOUT Digi-ConSME

"Consumers and SMEs in the Digital Single Market (**Digi-ConSME**)" is the name of the newly established Jean Monnet Centre of Excellence that has been awarded by the European Commission to the Department of Sociology and Economic Law of the University of Bologna.
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Yours sincerely,
Prof. Federico FERRETTI
Director

If you have any question regarding the Webinar, please feel free to contact us at:
f.ferretti@unibo.it

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