

Contents

<i>Preface by Giuliano Amato</i>	x
<i>Preface to Intellectual Property and Competition Law</i> <i>by J.H. Reichman</i>	xii
<i>A nouvelle vague? Author's brief foreword</i>	xvii
<i>Acknowledgements</i>	xx

1 Introduction: the basic paradigms and constitutional framework of intellectual property law	1
1. Foreword. The Mosaic and the Fabric	1
2. From Paris and Berne to Marrakech: IP's Basic Paradigms	2
I. The classic dualism between patents and copyright, and its evolution	2
II. The (expanded) protection of trademarks	4
3. The Firm as the Central Reference of IP Law	5
4. Rationale of that Centrality	8
5. The Dialectic with Social Interests Involved in the Overall Constitutional Framework	9
6. Intellectual Property and Antitrust: Distinct Rules ...	11
7. ... But Nonetheless Dialectically Intertwined	13
8. The Guiding Principles	17
9. Current Protectionist Trends	19
10. Specific Examples	20
11. Signs of an About-turn ...	23
12. Keep a Tight Hold on the Helm	28
Bibliographical Notes	30
 2 Patent protection of innovations: a monopoly with pro-competitive antibodies	 33
1. The Dialectic Physiognomy of Patents	33
Part I The area of patentability: the often arduous distinction between basic and applied research	37
2. The <i>Privatisation</i> of the Fruits of (Applied) Research	37
3. Again on the Delimitation of Patentability to Applied Research: Its Rationale: Epistemological Considerations ...	40
4. ... And Economic Considerations	43

5. The (Fragile) Boundary between ‘Basic’ and ‘Applied’ Research: So-called Targeted Research	45
6. Interpretative Adjustments	47
Part II Striking a balance between exclusive protection and competitive dynamics of innovation	50
7. General Outline (Conditions and Limits of Exclusivity), Commencing from the Time Limits to Protection	50
8. The ‘Exclusivity for Knowledge’ Trade-off and its Effects	53
9. The Systemic Corollary: No Upgrading of Secrets to IP Protection: A Warning from an Italian ‘Reform’	56
10. Qualifying Access to Patents: From ‘Indulgence’ ...	59
11. ... To a Hoped-for Increased Strictness – Beginning from Patent Offices	61
12. A Corollary on ‘Inventiveness’ in Utility Models: No to a Double Standard	64
13. Strict Proportion of the Scope of Exclusivity to What has been Effectively ‘Found’ (<i>Inventum</i>): Principle and Corollary	66
14. Patents and Innovation Dynamics: Foreword on Subsequent Innovation	69
15. Subsequent/ <i>Substitutive</i> Innovation: Qualification Criteria	69
16. Derivative/ <i>Dependent</i> Innovation: A Virtuous Regime of ‘Non Voluntary’ Cross-licences	71
17. Patents in the Distribution Chain: The Principle of Exhaustion	77
Part III Conclusions, and some proposals	80
18. Preserving the Competitive Dynamics of Innovation	80
19. Some Corollaries, with Regard to Compulsory Licensing	82
20. Further Pro-competitive Corrections	86
21. Some Proposals for Extending Patent Protection	87
22. Finale: An Overall Rethink of the System – Should Winner Take All?	89
Bibliographical Notes	92
3 From art to technology: the expansion of copyright	98
Part I Copyright v. Patent. Comparing rules and rationales	98
1. The Classical Model of Copyright: Historical Overview and Subject Matter	98
2. The Constitutional Basis and Essential Structure of Copyright	102
3. The Subject Matter of Protection: Expression, Not Ideas	103
4. Key Features of Copyright (and Differences Compared to Patents)	104

5. Plurality and Independence of the Exclusive Economic Faculties Granted by Copyright Law: The Power to Bar the Publication of Derivative Works (Including Translations)	108
6. Copyright and Third Parties' Access: The Debatable Approach of Directive 2001/29: 'Free/Fair Uses' as Discretionary 'Exceptions': on the Limits of Admissibility of Technological Protection Measures (TPM)	110
7. Circulation: Attenuated Exhaustion	118
8. Neighbouring Rights	119
9. The Articulated <i>Rationale</i> of Copyright	122
Part II 'Technology copyright': the rationale of a 'trespass', and the related risks for the development of subsequent innovation and competition	124
10. Foreword on the Contemporary Features of <i>Technology Copyright</i>	124
I THE CONVERGENCE BETWEEN FUNCTION AND AESTHETICS: FROM <i>APPLIED ART TO INDUSTRIAL DESIGN</i>	126
11. The Terms of the Question from an International Perspective. Or the Ambiguities of the EC Regulation	126
12. Playing Fields Distinction, Not Mere Cumulation, i.e., Amassing of Legal Protections	127
II COPYRIGHT AND INFORMATION TECHNOLOGY	130
13. Origins and Scope of Copyright Protection for Computer Programs	130
14. The Protection of Databases	134
III AN EFFECT-ORIENTED ASSESSMENT OF TECHNOLOGY COPYRIGHT	136
15. The Substantive Reasons: 'No Cost, No Test, No Access'	136
16. Has the Classic Model been Superseded in the Contemporary Context of Innovation?	136
17. Specific Reference to Network Industries and Conclusion	138
Part III Copyright and the diffusion of culture and information through the new communication technologies	140
18. The Risk of Cultural Exclusion	140
19. Remuneration of Creative Work and Related Investments: New Content Distribution Models	142
20. Cultural Pluralism at Risk?	144
Bibliographical Notes	146

4 The distinguishing function and advertising value of the trademark: aspects and critique of the European reform	156
Part I The classic system (before the reform)	156
1. The Fundamental Distinguishing Function of Trademarks	156
2. The Classic Paradigm Based on Protection of the Distinguishing Function	158
3. The Pro-competitive Role of Protecting the Distinguishing Function	160
4. Some Critical Aspects of Trademark Protection from a Competition Standpoint	161
Shape marks (three-dimensional marks)	161
5. Limitations to the Principle of Exhaustion at European Community Level	174
6. Beyond the Distinctive Function: Protection of the Trademarks' Suggestive Value ('Selling Power')	177
Part II The reform: The business interests protected	181
7. The Cornerstones of the Reform	181
8. The Expanded Protection of Trademarks with 'Reputation'	182
9. Greater Protection also in <i>Similar</i> Sectors?	184
10. Expanded Protection of 'Renown' to <i>De Facto</i> Trademarks?	185
11. Conclusion: The Systemic Meaning of the Special Protection of Renowned Trademarks	187
12. A Further Aspect of the Reform with Competition Implications: Revocation for Becoming Generic	188
13. Whom Does the Reform Benefit?	188
Part III The reform, and the risks of consumer deception	191
14. Fragmented Identity, and <i>Informative</i> Compensation	191
15. <i>Qualitative</i> Compensation?	193
Part IV Weighing up the reform	196
16. The Effects on Competition and the Market	196
17. Prices and Propensity to Innovate	197
18. Possible Repercussions on Denominations of Origin	199
19. Normative Room and Interpretative Tools to Balance out the Protectionist Effects of the Reform	201
I. From inside trademark law	201
II. From the 'outside'	204
Bibliographical Notes	204

5 Intellectual property and regulation(s) of competition	209
1. Foreword	209
Part I Intellectual property and antitrust	213
2. The Earlier Perspective: Checking the Contractual Exercise of IPRs	213
3. Phase Two: Storming the Sanctuary Commencing from Telecommunications Standards	216
4. The Door is Open – But Not Wide Open; from <i>Magill</i> to <i>Microsoft</i>	218
5. Does the Exercise of IPRs Confer Market Power? Checking Each Basic Paradigm	221
6. Intermezzo: In Search of the Historical Roots of the European Approach	227
7. The Technological and Economic Rationale of the European Approach	229
8. Further Points and a Note about the Effects on the Dynamics of Innovation	232
Part II Intellectual property and unfair competition	235
9. The Corporatist Origins of the Law	235
10. A Fresh Breeze from across the Channel	237
11. The ‘New’ Relationship with IPRs	238
12. Unfair Competition, Antitrust, ‘Unfair Commercial Practices’: Which Convergence?	239
13. Conclusion: A Systemic Convergence Focused on Consumer Welfare	240
Bibliographical Notes	242
 Appendix – On TRIPs and developing countries: ‘Don’t do unto others ...’	 247
1. Foreword	247
2. <i>Adieu</i> to the ‘Local Working Requirement’	250
3. On the Deadlines for Applying TRIP Rules	252
4. Drawing some Conclusions ...	254
5. ... And Searching for Remedies	255
6. More on the Rationale for the Local Working Requirement, also as Concerns the Supply of Patented Drugs	256
7. <i>Seq. A Fortiori</i> , When Exploitation of Local Biodiversity is Concerned	259
Bibliographical Notes	260
 <i>Index</i>	 263