TEACHING AND TRAINING IN THE FIELD OF INTELLECTUAL PROPERTY IN UNIVERSITIES AND OTHER INSTITUTIONS

by

Professor Marco Ricolfi

1. Introductory

Ladies and Gentlemen, I am greatly honoured to speak in this occasion. This is what all speakers say at the onset of their presentation. So let me start again and say in so many words that I am genuinely delighted to be here, as this, in a way, is a first time for me. Even though I have been teaching IPRs for over twenty five years now, strange as it may seem, I never had a chance to speak—and to organize my thoughts in that very special way which is triggered when you start to imagine you are going to interact with an audience—on the very substance of my professional endeavour, which is teaching. So I will try to make the best of this opportunity and I renew my expressions of gratitude to the Government of India, the Indian Institute of Technology Delhi and WIPO, who gave me this chance.

Having said so much, I must add that the task before me is daunting. There are so many things which deserve attention and so much which might be said on each of them. So I shall concentrate first on the purposes of teaching and training in the field of intellectual property; and, in doing so, I shall say a few words about a preliminary question which seems of paramount importance to me: what are the outer boundaries of intellectual property? After dealing with the ends of teaching, I shall move on to the means and I shall look at the methods which are—or should be—employed in teaching and training, as well as at the tools we may, in the different circumstances in which we from time to time find ourselves, use to implement the method we have chosen.

The last two years of my professional life have been enlivened by the connection between the Torino Law School, in Italy, where I teach now, and the WIPO Academy in Geneva. So I shall expand my remarks to what I seem to be learning from that novel challenge I had the good fortune to face recently.

2. The objectives of the teaching and training in IP

In connection with the *purposes* of teaching and training, let me start with an obvious remark. Teaching of IPRs—and even more so training in IPRs—is a practice-oriented enterprise. Here, as it usually happens in the law, we use words not just to generate other words, thoughts or emotions—this is the business of arts, philosophy and literature—but rather to make things happen. Or, to be more precise, in our field we

teachers use words so that eventually the words our students shall have been able to find and frame and articulate with our initial help, may make things happen out there, in the world outside of classes and Universities. These things may be very different; they may be very mundane or high-flying and vary from filing and processing a patent and trademark application to defending an infringement case in court and negotiating a license agreement; from writing an administrative or court decision to drafting regulations and legislation; and, at the end of the circular process, we find again teaching, this time as practiced by our students which in the meantime shall have had the chance to comment and elaborate on novel phenomena we are not even able to imagine now.

This practical dimension is something we should never forget and lose from sight, whatever the context of each teaching process may be.

And certainly this context varies a lot.

In fact, teaching and training can take place in various formats and for the benefit of very different audiences. Here I can identify the three ones which appear the most relevant to me and seem also to be appropriate looking at the list of participants to this event.

First comes University teaching. Usually this variety of our enterprise takes place in law schools; but this is not necessarily so. In my country we had routinely IP courses also in the Departments of Economics; but what we are witnessing to is the expansion of IP teaching in all kind of Departments. I myself have been teaching for several years a course in Law & Biotechnology at the Department of Sciences; on top of this we have now IP courses in the technological area (in Torino in the newly founded Department of Biotechnology) and even outside it: from next year we shall have regular IP Courses in the Department of Communication and Media. I will come back to this extraordinary expansion of the field in which our teaching is required. For the moment I shall note that IP teaching at University levels has several important features. One stands out: University education is for life. After graduation, our students may be exposed again to classrooms for brief periods of time and in specific contexts; but usually they do not go through another complete formation cycle. This we have also to keep in mind. Even though, as I said before, IP teaching is a practice-oriented enterprise, this does not mean we may confine our task to imparting technical skills and even less so to transmitting notions ready to be put in practice. Those very skills and notions which fill a given need today may become obsolete in a very short time; so that our purpose is to give our students the tools through which, also *but not only* by mastering that particular technical skill and learning a certain amount of currently applicable notions, they shall be in a position to generate new knowledge as technology and law move on. And this goal we may attain only if we teach also policies, not just rules; when we do not confine

ourselves to explain *how* things happen but also *why*. When a student becomes able to grasp the conflicting interests which are at play when we have to choose among different legal solutions; what alternatives are available; what are the constraints posed by the legal system; what is the relevance of inputs coming from other fields, from constitutional law to engineering as the case may be, then we have a person who is going to be able to adapt to new professional environments for quite a few decades.

When we turn to professional training in a stricter sense, the goals may change to a certain extent. If we try to create specialists in trademark law for a Patents and Trademark Office or provide for the training of junior personnel in some State agency, the period of time may be shorter; the specific knowledge required may be easier to determine in advance. Here the specialistic component may possibly become proportionally larger; but it should never be at the expense of a perception of the links which each party of the body of knowledge has to the rest of the organism.

Higher education, from Specialization Courses as the WIPO-Torino Law School one I shall revert to later (§ 5) to Master and PhD degrees are again a different matter. Here we cannot proceed only horizontally but also vertically. What I mean is that what matters is the depth of the teaching imparted rather than the extension of the field covered. In this occasion, I cannot belabor the point. What I can however say is that here instruction on all research tools, paper and on line, which per force must have remained sketchy at the University level, becomes crucial here. And what is more important is that the relevance of research tools should become fully appreciated at this stage. When a PhD candidate has been led to realize that even in the microcosm of the tiny sub-subsection of a fine legal point he is examining in fact all the macrocosm of knowledge is involved, then we may conclude we did our job well.

3. What is the Subject-Matter of Intellectual Property Law?

The discussion of the different types of IP teaching and training and of their—different but complementary—objectives leads us naturally to a large question. What is, in fact, the subject matter of IP?[1]

Is it better to have separate courses let us say in Patents, Trademarks, Copyright or a general course in Intellectual Property? Is Antitrust or Competition law part of IP or

[1] For a brilliant treatment of this question in the perspectives of U.S., EU and international law see C.R. MCMANIS, *Taking Trips on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, in 41 *Villanova Law Rev.*, 1996, 207 ff., at 208 and 216. How the Italian perspective fits the international context is set forth in P. SPADA, *Diritto industriale. Introduzione*, Giappichelli, Torino, 1999, 10 ff.

better left out of it? How can we incorporate Law & Economics principles in our teaching? All these are thorny issues.

Before addressing them I would like to come back to a point I made earlier on the extraordinary expansion of IP law. When I started studying, more than thirty years ago, in my country IP was considered a small province in the immense imperial domain of Business law. This included—and still includes—the law of business enterprises, of partnerships and corporations, securities, commercial contracts, insurance and banking, negotiable instruments and bankruptcy. IP was conceived as a subchapter of the first part, enterprise law, of this enormous curriculum.

Now IP has become an empire in its own right. Not only it encompasses Trademarks, Patents, Copyright and Unfair Competition but it has incorporated so many novel and important fields, from Plant varieties to Utility Models, from Designs to *sui generis* protections like Data Bases and Chips. And there is more to it: the municipal dimension is being overridden by the supranational one. TRIPs is, in a way, the constitutional charter of IPRs; and, as we Europeans very well know, the regional dimension is becoming so important that we have systematically started to rethink our ancient domestic legislation, which may go back to several centuries in its origins, in terms of the overarching EU law principles. Finally, IP law moves at the very frontiers of legal change. It touches on questions which are literally vital for our future. What I always tell my students is that the most exciting areas of legal evolution in this decade are to be found in the areas of financial markets, of life sciences and of digital technology. And the second and the third belong to IP.

Coming back to the questions I asked before, what I can say is only that we do not have a definite answer. It depends on the context. Let us imagine a IP course in Italy within a Law School curriculum There I would insist that the course covers all the fields, Patents, Trademarks, Copyright and Competition law. Why do I say that? Because the most interesting questions are arising at the intersection of the old categories, in the shady areas laying in between the old dichotomy between useful and aesthetic creations.[2] And there is no way to give students a precise idea of the thorny questions coming up in areas such as software, data bases and design if you do not sketch the overall picture. May be in doing so you are leaving out a few details of the law as it stands; but you do help them to figure out for themselves the details of the questions they will be facing a few years from now.

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[2] For a most thorough treatment of this area, which may be used in structuring our teaching, I recommend a great attention to J.H. REICHMAN, *Legal Hybrids Between the Patent and Copyright Paradigms*, in 94 *Col. L. Rev.*, 1994, 2432 ff.

I do have my idiosyncrasies. So I insist in imparting my students also a teaching of the essentials of antitrust law. The reason for this is the following. IPRs are monopoly rights; however they foster economic efficiency exactly as antitrust does. The discussion of the relationship between IP and Antitrust seems therefore essential to me. Personally I also insist on the links between IP and the wider scene of Business law. May be I do this because, until last year, I was teaching Business law as well. But let me say that transfer of rights is one crucial feature in all IPRs; and one of the reasons why licenses, assignments and collateralisation of IPRs may be taught in sub-standard ways is that not every IPR lawyers is as well conversant in the niceties of contract law as he would be if he were proficient in Business law as well.

Of course, coming back to the main question, things do change if the University course is to be give in non-legal Departments. Biotech patents shall be the main building block in the Departments of Biology and Sciences; copyright and neighbouring rights in the Departments of Communication Sciences and Media. In the Department of Economics you may use Economic analysis of law while leaving out a few nice points of detail e.g. in procedural and administrative matters.

And again specially tailored teaching should be devised when we come to more professionalized training.

On one point I would however insist: the international dimension. This is an angle nobody can escape, however short or technical the range of the teaching may be. Here I do not refer only to the conflict of laws aspect of the matter, however important they may be, e.g. in licensing. The point I am making is that even interpretation of a domestic rule has to be adjusted, possibly to consider the fact that it has been adopted to implement international or regional obligations. No IP lawyer should ignore what is the meaning of the question of direct effect of international provisions and so on. May be I am too strict on that But for two modules in IP law (total of 20 hours) for Biotechnology Department students I insisted they should be instructed on the primacy of EU law over domestic law and the way it affects biotech patents.

4. Methods. Tools.

But then, what are the methods we use and should use in the actual practice of the class room? What are the tools we do employ or should employ to impart an effective teaching?

Here in theory the replies are clear cut. Actual practice of the classroom is less so. In the U.S. I learned that the most effective teaching technique is the case method. Teaching based on cases has several advantages over traditional face-to-face

presentations. It is fact intensive. You can require the students to start thinking about legal rules in a specific context. The question: "So Mr. X, what are then the facts of this case" may sound a bit worn now, after one century of use; but it may still carry a tremendous potential. This is even truer in connection with IP law, where facts are sometimes so close to everybody life—tens of millions of people were downloading music through Napster when Judge Patel ordered the discontinuance of the practice—and very often entertaining, as the stories of domain name grabbing or the family sagas, as the Gucci cases all over the world, show in glittering or lurid detail. At the same time, the case method is policy intensive. Certainly you can distinguish a precedent from a prior one; and show how the same rule may be adapted to novel circumstances. Even more so you can show that different rules may lead to same outcome and the same rule to different outcomes. In all these cases, the discussion moves on from rules to policies; and this is, as I said before, the more durable side of our task.

It is ironic, however, to notice that I seldom in a position to teach in accordance to my ideal. Why is that so? First of all Italy is not the U.S. The tools are not there. We do have textbooks; but not casebooks, for one thing. Why do I not prepare my own case book? Well, ministerial instructions tell me that from next year I shall require my students to read 360 or may be up to 400 pages. This amount is not enough to give a case based treatment of the subject. On the contrary our best textbook[3] is 579 pages long, so that by a few appropriate cuts I shall be able to comply with ministerial regulations.

But this is only a part of the story. In the last twenty five years I have not been able to persuade my students that they should read the materials before class. A few of them do; the others don't. If I enforced strictly my plea, asking them questions the same way U.S. instructors do, they would just not show up in class. Attendance is not required in my country, for the simple reason that if all the students showed up in class, we would not have enough room and chairs for them.

Here I am talking about constraints, about scarce resources. This has an impact on teaching. The question whether I prefer to give presentations on the blackboard or using powerpoint is in fact moot. When I asked my dean whether we could fit a room for powerpoint presentations in a seminar, he thought I was kidding. Actually I prefer the blackboard, may be because I never came around the—very simple—technique of powerpoint presentations; but I rationalize this shortcoming by saying that powerpoint presentations are like predigested food, they require a modicum of attention by the students and end up giving them a pill teaching. But in certain cases technology would be essential. This year I had a most distinguished lawyer in Torino, Avv. Rossotto, give a seminar on advertising. It was essential that the students should apply the standards they

[3] A. VANZETTI-V. DI CATALDO, *Manuale di diritto industriale*, Giuffrè, Milano, 2000.

had learned to a few of the commercials on which we have rulings by the different authorities. When I asked about the availability of a television set, my Dean thought I was starting to go too far in my kidding. So I witnessed to Mr. Rossotto carrying his office television set with appurtenant cassettes through the campus (which cannot be accessed by car) in a fine May afternoon. It is fortunate that he is a vigorous man.

On the other hand, I must say my dean is right. Our students pay about $1,000 a year in taxes; and they cost the State about five times as much. So we do not have the possibility of having frills.

There are things which can be done. One is to have small groups, tutorials. Students need to write and to have their writings supervised. You can simulate a negotiation; you can bring a draft contract with a few loose ends to be tied up. You can have a mock trial. And all the students like that, at least in Italy, even if they do not get exemptions from the materials of the course by virtue of attendance to the seminar. They feel it is an extra service they are offered; they feel they get a chance to know better the professor; so they flock to seminars.

Seminars may be extraordinary things. A few years ago I had two seminars which were especially successful. The formula was a simple one. I prepared a moot case, in both occasions in the area of the conflict between trademarks and domain names which was starting to be fashionable just then (it was 1997 and 1998). The students, about 25, were divided in four groups. The first two groups illustrated the legal rules and the technological details (IP addresses; Registration authority rules etc.). The third group would prepare a brief for plaintiff; the fourth a brief for defendant. In both cases actual Judges, Judge Barbuto, today President of the Torino Tribunal, and another very bright young judge, dott. U. Scotti, were present at the oral discussion. I was so fortunate that one of the cases I had imagined took in fact place while we were mooting it and the interested party—who had assented in advance to have the situation discussed as a moot case; and who, in real life, decided not to bring the case before a "real," "bricks-and-mortar" Court—came in to testify at the mock hearing. The judges gave what they decided to call "a virtual decision"; and came to class, a fortnight after delivering their opinion, to discuss it with students. The students were breathless and felt that they were enjoying an unheard of opportunity. They had suggested that the whole seminar should be put up on the internet; so that, if you are prepared to learn Italian, you shall find the details on line.[4] What I can tell you is that, as my students felt their writings were to be

[4] www.jus.unitn.it/cardozo/Obiter Dictum/Sent.htm. The "virtual cases" have not passed unnoticed in Italian literature: see P. SPADA, *Domain Names e dominio dei nomi*, in *Riv. dir. civ.*, 2000, 713 ff., especially at 730 ff.

subject to the scrutiny of a global audience, they paid an attention to detail which was extraordinary. Which is no small matter.

Of course you can use the case method in seminars. And the same you can do—and I do in actual practice—in advanced courses. In our joint Specialization Course the students pay a hell of a sum just to be admitted, this year over $4,000 for three months. They have piles of materials to read; so that, as soon as I tell them I am going to ask questions about specific cases in the class, they jump to the opportunity. They do want to get value for their money; and they know that once a cases has been properly discussed in class, it will be their lifeblood for ever.

As you have seen, while I was discussing of methods and tools, I ended up to talk in fact of constraints. I am an Italian lawyer. In a way I sit on middle ground between the Anglosaxon world, were I completed my education and which made a permanent impression on me for the standards of excellence I learned there, and the South of the world. Italy itself is sitting in the same middle ground; and this is especially so for the South of Italy, which has not a few of the unfortunate as well as of the felicitous characters of the South of the world. This is why I always say that my three years down in the southern-Italian town of Lecce have been so important for me (while adding that my students from Lecce have been my favorite and best ones).

So we Italians do know all too well what the constraints are. Teaching is a twofold enterprise. You need spiritual resources. But you also need material resources. Secretarial assistance; information to students; availability of photocopies for distributing teaching materials; tutors; coordinators; sometimes television sets and even powerpoint. All this is required but so many times it just is not forthcoming.

Now, we can either lament or invent. And in fact what I suggest is that we invent or, as patent law jargon suggests, invent around. A certain amount of ingenuity may still overcome so many obstacles.

And we should always remember we do have a formidable resource available: our students. Sometimes they are unfathomable. This year I brought to class the leaflet for free access to the WIPO Academy distance learning course. I said to them it is excellent; that I had been exposed to it as a tutor; that it is in English; that for this year it is for free. I know my pupils; so that I immediately realized that they wanted to explore the opportunity but were afraid this might increase their burden. May be they were afraid that, if I specifically identified those who attended the course, I would ask additional questions at the examination (which, in Italy, is oral). So I decided to leave the brochure on my bench, so that it could be retrieved after I had left. A few leaflets did in fact disappear; but to this day I do not know whether any student did register in the course.

However, students are a terrific driving force and stimulus in other ways. I mentioned earlier it was they who suggested to put up all the seminars over the net. I did not do a thing, short of making sure that their presentations and briefs would be perfect in all the details. I should add that specifically in the field of IPRs the help and knowledge of students is essential for an old gent as I am now. The reason why I knew about, say, Napster, MP3, *caching* and IP-addresses before there were cases about them is simply that I had listened to my students; in fact I learn a lot from them. The important thing is to have a general idea about the areas in which they excel and of those where they fail.

And fail they do.

Use of the Internet is again a very good example.

On the net there is not much of an editorial function. You find everything; the jewel and rubbish as well. So we teachers should encourage students to use the net for updating (this is good for us as well: I had on my desk the Microsoft and Napster decisions on the very day they were handed out). But is terrible as a beginning. The beginning has to be books and articles and cases; the net comes after. Now students tend to believe internet may be a shortcut for them; therefore we should teach them it may delay them for eons in the very difficult task of sorting wheat from chaff, if they do not have their bearings right before starting the act of downloading. And this they can do only reading paper: books and law reviews.

5. The Joint Specialization Course in IP set up by the WIPO Academy and Torino Law School

Am I saying that, as the world is not perfect and scarcity of resources reigns, and especially so in countries where education is as advanced as in a few fortunate Western countries, we should content ourselves with what we have at hand? Not really. My point is rather that we should have a clear idea about what is the best practice; but should never give up in our effort of obtaining the best result in any give circumstance even though we have limitations. *In der Beschraenkung steht die Kraft*, as old Goethe said once.

What I have to add is, however, that, even though our teaching may not always take place in ideal conditions, still we should, at all times, try to have benchmarks against which to set our current practice. Scarce resources can limit our practice but not our commitment to excellence.

In this regard, I have been especially lucky, as WIPO and Torino Law School joined their forces to try to establish what I regards as our benchmark for IP education, the Joint Specialization Course I have referred to several times by now.

I do not want to go into details of what has made this course remarkably successful in its first edition. The resources have been there, WIPO Academy has been grand, the best students applied, the infrastructure—from computers to manpower—has been very good and all that.

Also the format is a promising one: when you have a residential course with good or very good teachers coming from all the world to teach classes and bring there the best of their knowledge, you have a kind of "brainstorming added value." Participants end up having IP as the main issue in their mind; it becomes the subject of so many of their discussions even after class in a way which is not to be found in a regular University setting.

There are however two aspects on which I would like to comment.

First, in such an extended course, it is essential to have an economist starting to give the participants the essential building blocks of economic theory. This means the theory of price, the pricing mechanism, the notion of consumer welfare. Competition, Monopoly and IP. Neoclassical economic theories, Economic analysis of law and competing paradigms.

This is indispensable if you want to go into depth. You do not begin to understand an issue, like parallel imports, which goes through all IP, from trademark patent and copyright down to antitrust, if you do not know whether and when price discrimination is efficient; whether granting exclusivity may give incentives or disincentives to licensing; whether strict enforcement of IPRs in licensee's country may be a "signal" encouraging technology transfer and under which circumstances.

Then it is essential that this kind of knowledge is to a certain extent made available to the class bottom up. This is why we need to have different people in the class. We had mainly lawyers, but also economists. And you cannot imagine how much time has been spent—mostly outside of the classroom—in endless debates pitting economists against lawyers, the former ones accusing the latter of favouring inefficient monopolies, the latter countering the former countenanced piracy. We had as many people coming from the South of the world as the ones coming from the North. Both were exposed to points of view which up to that moment had been at best just theoretical to them.

We therefore had enormous differences of "potential," in the sense of energy theory. And we still want to increase them. We are trying to bring in a few

technologists, especially engineers and communication sciences graduates: those are essential to explain to their peers how cryptography in fact works, how copy management systems can embedded in files and the like, on which we instructors may just make a few passing remarks.

This argument leads me to the second point, which I might describe as networking. These people have been discussing earnestly serious issues for three months. Now they are member of a community which spans over four continents. We teachers need to give serious stuff for the thoughts of our students so that they may get to know each other while discussing it among themselves. This is essential for their future life, more than any individual notion we may impart on them.