

Legal Regulation & Education: Doing the Right Thing?

Abbe Brown

University of Aberdeen

abbe.brown@abdn.ac.uk

"Too much of a right thing? Innovation, energy and conflict."

-Theoretical framework

Legal regulation is a wide term; so is "the right thing". Determining what is the right thing can depend upon the legal regulation in question; and there might be more than one regulation which is relevant to an issue, and dispute about the extent to which one system of regulation is an effective way of bringing about a right thing. This is particularly so when innovation is involved.

For example intellectual property ("IP") confers on IP owner a limited right to control the results of innovation. Supporters of IP (and TRIPS, and initiatives such as ACTA and the TPP), argue that IP encourages innovation, and investment in it; and that protecting and enhancing IP is the "right thing." Many dispute this, however, and argue that innovation can be encouraged and measured by other means (such as prizes and government support). Another form of legal regulation involving a "right thing" is found in international and regional human rights treaties. There is scope for conflict between these and IP: obligations imposed on states to protect rights in respect of freedom of expression, health, life, sharing in cultural life, sharing in the benefits of science and respect for the environment – consider, for example, resolutions of the UN Sub-Commission on Human Rights from 2000 and 2001, General Comments, the Doha Declaration and subsequent WTO developments, decisions in Ashdown, Ashby and Pirate Bay and the work of Shaver and Rimmer. Further, in the evolving technological world, is a focus on states the "right" way to address human rights? What of the power held by large companies?

Another "right thing" is protection of the environment and environmental justice. To support this, in addition to human rights regulation, there is the United Nations Framework Convention on Climate Change and the Kyoto Protocol. This is placing increasing focus on technology and its transfer. Yet there is limited reference to IP; potential, then, for a clash of "right things". Technology transfer also involves another form of legal regulation, competition law (which is also interested if the controller of technology has significant power). Competition policy aims to bring about an unrestricted market and dynamic innovation; another "right thing". Yet the scope for conflict between IP and competition law is well established, with contemporary issues being standard essential patents and licensing rates and the availability of injunctions (for now with a focus on communications, consider the German Orange Book case and the Commission's investigation of Samsung) and finalising new arrangements for technology transfer in the EU. Finally, while governments, regulators and policymakers take steps to reduce carbon emissions, they are also considering how best to maximize recovery of oil and gas (which would increase emissions), and the embracement of technology in respect of this. This is receiving particular attention in all parts of the UK, by the Department of Energy

and Climate Change, the Wood Review and in Scotland by the Industry Leadership Group's Strategic Plan. Increased use of technology in oil and gas would support the UK's energy security and maintain the UK (and particularly the Scottish) economy; so there is another possible clash of "right things".

-Argument

Each of these conflicts is well recognized and has been the subject of valuable policy and scholarly attention. This paper is the start of a wider project, which will seek to explore the conflicts between a wider range of different legal fields and forms of regulation; the impact of this on delivery of "right things", including those explored above; and the steps which could be taken to address this. It will draw on the work of Helfer in respect of regime shifting, the increased interaction between fields relevant to international intellectual property policymaking and activism (Yu, Cottier, Ogumanam, Matthews), and principles of statutory interpretation in the UK and EU, and through interpretation of treaties under the Vienna Convention on the Law of Treaties, eg at the WTO.

Against this backdrop, this paper will map conflicts between "right things" with a focus on innovation and the energy sector. It will consider the relevance of the private/public divide, the impact of different enforcement mechanisms and the holders of rights and responsibilities, the relevance of underlying justifications (or the lack of them) and the power of supporters of different forms of regulation. An objective for combining regulations - and for doing the right thing - might be bringing about a base for a structured balance; but can this be achieved if IP is either an unavoidable power or an elephant in the room?