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Editorial

Old Rules and New Technology and the Necessity of Distinguishing

One of the more fascinating questions that private law science in generally has to deal with, is to what extent old rules and concepts are fit for new developments, especially those caused by new technology. Given the importance of this question for many rules, it is not astonishing that a majority of contributions in this issue deals with such questions. And it is no surprise either that there is not a single answer to this question. Whereas sometimes old rules are simply fit as such, and in other cases it is clearly necessary to develop new rules, in many cases old rules are fit provided they are interpreted or applied by analogy on the basis of the *ratio legis.*

At least four contributions in this issue deal with phenomena and questions that were only made possible through the development of the internet: collaborative economy platforms, bitcoins, the 'digital heritage' on social media and 'copyright tourism'. In 'fighting European copyright tourism' by Milos Novovic, the existing rules of jurisdiction and conflicts of laws on copyright violations turn out to yield problematic outcomes in a 'digital realm'; given the difficulty to modify uniform EU rules (one of the big disadvantages of uniform rules ... .), the author analyses to what extent national legislators can, within the margin left to them, create a (second-best) solution by modifying substantive copyright law. In his article on the Collaborative Economy Platforms, Antonio Orti Vallejo states that the existing rules are difficult to apply, but nevertheless succeeds to clarify the rights and obligations of the parties by analysing separately the different relationships, which turns to be much more fruitful than a single general approach trying to grasp such new phenomena as a whole. Equally, in his article on the qualification of bitcoins as documentary intangibles, Tycho de Graaf convinces us that it is perfectly possible to fit this new technology into existing legal categories of contract law and property law provided the analysis is carefully made. The decision of the Bundesgerichtshof on access post mortem to a Facebook account by family members (the parents of a deceased girl) is another example of solving new problems on the basis of old rules, and we have a very fine set of annotations dealing with the argument from the perspective of seven jurisdictions. On the other hand, it is an excellent example of the dangers of vague categories not linked to a specific *ratio legis*, as in this case the notion of rights or contracts *intuitu personae.* This is a good example of a term that may sound monosemic, but is, at least in legal terms, very polysemic. We thus have to distinguish rights that can only be exercised by the person itself (by his own will) to protect that person and expiring at death (e.g. to marry), from rights that cannot be exercised by another in order to protect the

party against whom it is exercised (e.g. liquidation of a marital community), from rights that cannot be transferred in order to protect its owner (certain rights to performance), from rights that cannot be transferred to protect the other party (some types of property rights or rights to performance), from personal rights that can be inherited but nevertheless not exercised by another party during the life of that person – the digital inheritance including the existing content of a Facebook being the featured example of the last category. All these rights are sometimes called *intuitu personae*, although subject to different rules, which highlights the necessity to scrutinize the purpose of a rule before simply putting it in some kind of general category.

The necessity to distinguish is moreover a theme that is also present in most of the other contributions to this issue. It is a basic theme in the contribution of Fabrizio Cafaggi and Paola Iamicelli on unfair trading practices in food supply chains, it pops up in the article by Carri Ginter, Kadri Härginen and Albert Linntam on the passing on of fines incurred by airlines. In a certain sense, it is even present in the article by Christain Aschauer and Lukas Klever on Overriding mandatory provisions and arbitrability, a plea for a less black and white approach. Finally, in order to balance this overwhelming vague of distinctionism, we also publish an article arguing in favour of the abolition of a distinction: Seyyed Rohallah Ghasemzadeh on the Development risk defence in product liability. Enjoy reading!

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