

# IP Intermediaries in Conflict of Laws: A Social Network Perspective

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## *Abstract of the Paper*

Creativity is one of the one of the key driving factors of knowledge economy. Besides talent, the development of truly innovative ideas rests upon the collaboration of multiple creators, joint R&D and investments. The process of creation as well as the dissemination of information involves a number of actors: authors and readers; singers, composers and audience; inventors and future licensees etc. In fact, third parties such as publishers, record labels or patent offices who play a crucial role in the dissemination of information. The emergence of the digital telecommunication technologies not only curtailed the costs of sharing the data but also facilitated the development of wider range of networks between various actors.

The dissemination of information closely relates to the self-interest of actors involved: some act in pursuit if fame and recognition; others seek to benefit by connecting creators and users. Recent controversies (e.g., Pirate Bay, the shut-down of Megaupload.com and launch of mega.co.nz) illustrate intricate challenges of regulating cross-border activities of IP intermediaries. Although much effort has been devoted to align substantive IP laws of various countries by adopting international treaties, yet, recent harmonization attempts have been problematic. Accordingly, some scholars have called for a more weighty role for private international law as a second-best alternative to provide for more legal certainty and facilitate the dissemination of information across the borders.

In order to illustrate the reach and limits of legal regulation, this paper offers to adopt social networks theory which has been developed in other fields of social sciences (sociology, psychology, mathematics).<sup>1</sup> Social network analysis – although not (yet) applied in legal literature – offers a great number of thought-provoking concepts and methods which may sometimes lead to counter-intuitive conclusions. Social network analysis requires identification actors, their positions and the characteristics of relationship among them. Identification of actors within the social system could be reduced to dyads (relationship between two actors) and triads (a common friend Actor<sub>m</sub> could be a reason for Actor<sub>i</sub> and Actor<sub>r</sub> to become friends). The study of triads also provides for a number of insights concerning the position of intermediaries and the

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<sup>1</sup> See, e.g., David Easley and Jon Kleinberg, *Networks Crowds and Markets* (Cambridge, CUP, 2010), also available at: [goo.gl/f8WJ4](http://goo.gl/f8WJ4); Charles Kadushin, *Understanding Social Networks* (Oxford, OUP, 2012); John Scott, *Social Network Analysis* (Sage, London, 2<sup>nd</sup> ed., 2000); Mark S. Granovetter, 'The Strength of Weak Ties' 78 *American Journal of Sociology* (1973) 1360-1380, also available at: [goo.gl/0jE1j](http://goo.gl/0jE1j).

central role they play in a given social network. The identification of social structures sheds more light to the behavior of separate actors. Based on social network structures and the behavior of actors, further investigation of most efficient institutional frameworks could be conducted.

The notion of 'double embeddedness' marks a two-pronged idea: on one hand, social systems are embedded in networks; on the other hand, networks are embedded in the respective social systems. The entirety of ties between a number of actors could be considered as a kind of social capital (e.g., in getting information about the available job position). On a smaller scale such as a relationship between two actors, the most valuable capital is mutual confidence among themselves.

In our paper, the notion of confidence is employed to explain how the existence of ties affects the regulatory structure in the transnational area. As for public regulation, i.e. regulation by establishing positive law rules on national and international level is based on what we call '*deemed confidence*'. Deemed confidence connotes the assumption that the actors usually follow legal rules. Based on such assumption of deemed confidence, international conventions aim to establish harmonized frameworks and thus align the behavior of individual actors. The continuous interaction which occurs over time between separate actors on the basis of deemed confidence could result in the establishment of 'actual' or 'substantial' confidence (e.g., Patent Prosecution Highway). Yet, we argue that although legal institutions could be used to establish deemed confidence between actors; they are not capable to lead to the creation of mutual confidence.