

# Book Review : Intellectual Property, Climate Change and Technology

Paul Kimani\*

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## BOOK

A Brown, *Intellectual Property, Climate Change and Technology*, 2019, Edward Elgar Publishing, 368pp, ISBN 9781788111102

## REVIEW

Professor Abbe Brown's insightful book, *Intellectual Property, Climate Change and Technology*, critically examines one of the predominant subjects of our times, climate change. Contemporary political viewpoints highlight the fact that climate change, indeed the very acceptance of its existence, is not something to be taken lightly. Accepting that climate change is a pertinent issue for mankind and acknowledging the scientific evidence of its immense detrimental impact on the earth, the book commences by noting that technology is a key way of seeking to respond to and manage climate change. However, such technology, invariably developed by private actors, is often the subject of intellectual property (IP) rights. Professor Brown explores the complex relationship between these three areas – climate change, technology and IP and how they can be managed coherently to increase climate ambition. Specifically, she highlights the role of legislative action, administrative procedure, policy, and judicial decision making.

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\* Paul is a third-year PhD Candidate in Law at the University of Exeter.

The initial consideration of the book is international law, wherein the author notes that the discussions on climate change and technology have hitherto been limited. What emerges, as is to be expected, is that most international treaties are subject specific and there are little practical linkages between the three areas. This is the concern that the book seeks to propose a remedy to.

International law is implemented at the national level, and thus in the second chapter, the author focuses the discussion on the United Kingdom (UK), more specifically England and Scotland; noting that the UK is legally advanced, is a member of IP and climate change international treaties and has taken steps to encourage innovation in response to climate change. Professor Brown's native Scotland offers a particularly good setting for the considerations of this book, owing to its advanced deliberations on environmental matters sparked by its strong oil and gas sector.

The discussion of IP and climate change legislation in the UK, as is the case in respect of the international treaties governing these areas, reveals distinct differences which portend a potential for conflict. Fundamentally, IP laws confer private rights to control while climate change laws create an obligation on Ministers (and in Scotland additionally on some other public bodies) to deliver a reduction of emissions.

The legislatures of both the UK and Scotland have passed laws on climate change – the UK Climate Change Act 2008 ('CCA') and the Climate Change (Scotland) Act 2009 ('CCSA'). Since the publication of the book, the Scottish Parliament has passed the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 which received Royal Assent on 31 October 2019. The Act amends the CCSA, setting targets for the reduction of greenhouse gases emissions and makes provision about advice, plans, and reports, in relation to those targets. The CCA provides that Ministers must ensure that the net emissions account for 2050 is at least 80 per cent lower than the baseline. The CCSA previously provided a similar obligation on Ministers and additionally as noted above on other Scottish public bodies. The amendments to Scotland's Act, which its government describes as 'world-leading climate change legislation' now sets a target date for net-zero emissions of all greenhouse gases by 2045.

The author seeks to highlight that the differences in approaches between IP laws and climate change laws in the UK and Scotland create a potential for conflict which is not being recognised, much less addressed. For instance, in key contrast to IP legislation, the CCA, and CCSA, do not have any express enforcement provisions. It has been argued that the clear nature of the obligations imposed in the CCA and CCSA means that actions can be raised. The author considers this

potential in detail in Chapters 4 and 5 where she sets out hypothetical case studies which involve disputes at the intersection of IP and climate change noting the rules that would currently apply and thereafter in Chapters 6 and 7 she suggests new approaches and rules that courts may use for their resolution.

Before delving into the case studies and proposals for new rules, Professor Brown offers a comprehensive review of the existing theoretical frameworks that underpin both IP and climate change laws. It becomes clear that the traditional rationales for IP, such as the incentives, rewards, utilitarian, and Lockean labour approaches, do not adequately account for the environment.

Similarly, the rationales and principles relevant to climate change law, such as the equity approach that the greater burden in responding should be borne by those most able to bear it, differ from those underlying IP. The theoretical framework underpinning IP underscores private rights whereas the theories on climate change underscore public rights. The author challenges this binary division and suggests that the theories can be aligned for a better response to climate change. For instance, she argues that IP can learn further from climate change regarding the place of equity, stewardship, sustainable development, and the taking of an ecological interconnected approach.

The author then turns to consider how IP law currently engages with climate change. In doing so, she presents hypothetical case studies which touch on both of these areas. As with the theories underscoring them, it is seen that there is also a clash between the laws governing the two fields. Indeed, it appears that IP law in itself may be a hinderance in efforts to respond to climate change. It is emphasised that the key challenge in this regard is that IP and its private rights and direct enforcement are seen within the private realm and climate change and its public goals and obligations within the public sphere.

Professor Brown takes this argument in a different direction. She provides proposals on how the divisions between the two can be reduced, suggesting a pluralist approach in which IP rights may be considered in actions under climate change legislation. Furthermore, moving access to the courts and the enforceability opportunities of IP law into the public law space would provide new opportunities for those who are without legal pathways against power holders.

Two means of enabling courts to have regard to different areas of law which can be relevant to a practical scenario are suggested. First, regarding statutory interpretation, it is argued that the existing words can be widely construed in their context and a broad approach can be taken to the relevance of other legal fields. Second, a new hybrid action enabling different fields of law to be

considered together and interpreted through a balanced regard to a wide spectrum of human rights could be allowed.

These proposals are focused on Scotland and the UK. The author makes proposals for direct amendments to the CCA, CCSA and IP legislation which could address specific issues, proposing that changes should be introduced to parliamentary standing orders such that when a Bill involves IP or technology considerations on climate change should be had.

In seeking to justify her proposition for integration of these differing subjects, Professor Brown refers to the field of sociology where she draws primarily on the work of Bourdieu, Habermas, and Luhmann, acting as a theoretical basis of linking these fields. These theorists underscore that different fields can, and should, adjust reflexively to each other, including the fact that there is a place for coherency across them.

In her final chapter, the author explores the rise of Investor–State Dispute Settlement (ISDS) and its implications for the regulation of the environment, biodiversity, and climate change. ISDS is increasingly being provided for in bilateral and multilateral trade and investment agreements, in addition to the more frequent state-state enforcement opportunities. Broadly, ISDS means that if a State takes an action in legislation, policy creation, or, in its courts, which an investor considers to be inconsistent with the State’s commitments to investors from the investor’s country under the agreement, then the investor may directly make a claim against the state.

Again, as with the theoretical framework and the national laws governing IP and climate change, the challenge of IP being viewed as a private right and climate change as a public matter rises in respect of ISDS. Whereas holders of IP rights, which are generally considered assets, can be expected to be able to pursue a claim under ISDS, the position regarding matters touching on climate change is not as clear. In response, the author proposes a new model that would require the ISDS tribunal to look to the wide landscape of laws touching on the matter at hand, including laws on climate change and consider them with equal weight in determining whether there has been a breach of obligations regarding the IP right in issue.

In conclusion, Professor Brown’s sterling offering lends an authoritative voice to the discussions on a New Green Deal.