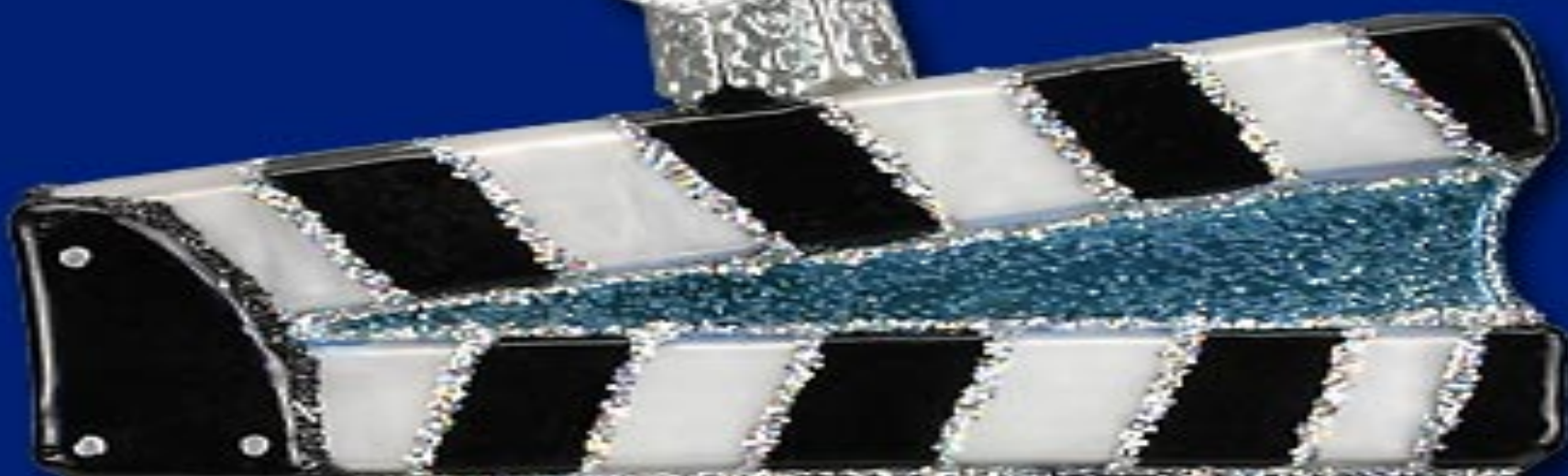


Interaction Between IP and Competition Law



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Future of IP in Europe



- ❧ The future of intellectual property law in Europe looks brighter than ever!
- ❧ Articles 2 and 3 TEU → respect for human rights among the Union's core aims!
- ❧ Article 6(2) → The EU shall accede to the ECHR!



EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPÉENNE DES DROITS DE L'HOMME



Union's External Action



- ❧ Democracy
- ❧ Rule of law
- ❧ Universality and indivisibility of human rights and fundamental freedoms
- ❧ Respect for human dignity
- ❧ Equality and solidarity



Federalization of IP



- ❧ Article 207(1) TFEU federalizes Union's external intellectual property policy
- ❧ Article 118 TFEU federalizes Union's internal intellectual property policies
- ❧ The EUC: *Infopaq* and *Bezpe nostni softwarová asociace* → threshold of originality in copyright law!
- ❧ *Promusicae* → interpretations that "allow a fair balance to be struck between the various fundamental rights protected by the Community legal order"



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Back to reality



- ❧ **Strong** rights and ^{high} level of protection..
- ❧ EU Charter → argument *for* extensive protection and problematic sanctioning of IP infringements..
- ❧ Secret negotiations of ACTA..
- ❧ TRIPS affects the interpretation of European-level fundamental rights and not vice versa.. (*Metronome Music*)

Could these Be Norms with Constitutional Functions?



- ☞ Intended to shelter IP exclusivity from outside threats...
 - ☞ ...including traditional constitutional norms and competition law!
- ☞ The three-step test → censors the availability of fundamental rights -related limitations by establishing a neoliberal judicial review
- ☞ Affects interpretations → "fair balance of rights"?

"New constitutionalism"



- ❧ Stephen Gill, Ran Hirschl, David Schneiderman, Gavin Anderson..
- ❧ Legal and quasi-legal institutional arrangements such as global investment rules, are used to preserve the hegemonic forms of the economy..
- ❧ Insulation of key aspects of the economy both from democratic decision-making and judicial activism..
- ❧ New constitutionalist discourse of IP?
- ❧ IP Anti-Constitution?



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Competition law?



- ❧ Building too much on competition law entails risks..
- ❧ Yet competition law could be developed to better tame harmful informational power based on IP.

Competition law and Informational Power



- ∞ In information society economic power based on IP has increasingly social and political dimensions.
- ∞ : Technological architectures of communication based on the Internet are also structures of competition!
- ∞ IP regulates power over technologies underlying communications and individual expression.
- ∞ Competition law → potential limitation of excessive and harmful IP based power..

Transforming Competition Law?



- ❧ Workable markets, diversity of types of actors → collective good aspect of many economic rights among the objectives of competition law.
- ❧ They need constitutional protection against abuses of power in order to enable the exercise of fundamental rights in the economic sphere.
- ❧ The same applies to freedom of expression and communicative diversity in relation to the character of the society as an open society.

Communicative diversity and competition law (1)



- ❧ Convergence of media through digitization and the Internet and continuing concentration of media enterprises with each others and with the providers of communications technologies
- ❧ Power over distribution channels and technologies → power over content..
- ❧ The ideal of communicative diversity overlaps with the more traditional competition law objective related to market pluralism, diversity of economic actors and avoidance of excessive market power.
- ❧ Maintaining these values is a conscious effort!

Communicative diversity and competition law (2)



- ∞ The openness of the core communication networks, information platforms and freedom of information → constitute central pre-requisites related to workable competition and freedom of market values in the information and network -based economy.
- ∞ Protecting such values is thus often in line with the traditional interests and orientation of competition law to secure workable and diversified competition also in the longer-term perspective!



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The Grimm Reality..



- ❧ The change of paradigm in Europe from form-based ordoliberal competition law to effects-based microeconomic analysis.
- ❧ Arguments related to fundamental rights, collective goods and democratic values have to be smuggled in to the scholarly antitrust discourse by using the language of microeconomics...
- ❧ ...Infrastructure theory developed in the US by Frischmann and others..

Competition Norms of TRIPS



- ❧ Constraints on the global level: TRIPS competition norms
- ❧ They require *consistency* of the domestic competition law measures with the other provisions of TRIPS.
- ❧ Could immunize substantive IP standards required by TRIPS from the application of competition laws..
- ❧ The requirements of *abusive behavior* and *adverse effect on competition* could *strengthen* factual IP protection under TRIPS by sheltering licensing practices from competition law also when the interference would *not* frustrate the substantive TRIPS-standards.

European antitrust doctrine



- ❧ Microsoft: a *significant negative impact on the intellectual property owner's incentive to innovate* could justify *any* restriction of others' rights or collective goods needed for the realization of rights.
- ❧ hierarchy of values → the protection of innovation incentives on the top.
- ❧ Could lead to a more generic insulation of property rights from the reach of competition law, provided they are the result of sufficient investments.



Commission's Position



- ❧ Industrial property (2008): “rigorous application of competition rules” would counterbalance the “strong industrial property rights.”
- ❧ Mere legitimation for a scheme based on strong intellectual property rights?



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My Final Words



- ❧ Realize the inherent constraints new constitutionalist measures impose on progressive reforms.
- ❧ Such constraints also relevant for competition law.

The image features a classic hypnotic spiral background, consisting of concentric circles that create a sense of depth and motion. The colors are primarily red and black, with the spiral transitioning from a dark red at the center to a black at the outer edges. Overlaid on this background is the iconic phrase "That's all Folks!" written in a white, elegant cursive script. The text is positioned diagonally across the center of the spiral, starting from the lower-left and ending at the upper-right. The central part of the spiral is a solid dark blue/black circle, which serves as a focal point for the text.

That's all Folks!