

14<sup>th</sup> EIPIN CONGRESS

Human Rights & Intellectual Property – from Concepts to  
Practice

# Right to a Fair Trial & IP Enforcement

Jonathan Griffiths

Queen Mary, University of London

[j.griffiths@qmul.ac.uk](mailto:j.griffiths@qmul.ac.uk)

6th April 2013

# Fair Trial Rights and IP

- Little explored by comparison with other IP / fundamental rights relationships
- But growing concern with the fundamental rights aspects of *enforcement*
  - Extension in scope of criminal sanctions
  - ACTA
  - ISPs – (C-70/10) *Scarlet Extended*; (C-360/10) *Netlog*; *Golden Eye (International) Ltd v Telefónica UK Limited* [2012] EWCA Civ 1740

# Fair trial rights in Europe - Art 6, ECHR

- “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.....” (Art 6(1))
  - Also further explicit guarantees in Art 6(1) (eg public hearing)
  - Includes implicit rights – eg equality of arms, access to court

# Particular protection in the case of criminal proceedings – Art 6, ECHR

- Presumption of innocence (Art 6(2))
- Other specific rights – eg adequate time and facilities to prepare defence, legal assistance when the interests of justice require (Art 6(3))

# Fair trial rights in Europe - Art 7, ECHR (legality)

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed...”

# Fair trial rights in Europe – EU Charter

- Chapter VI (Justice)
  - Right to an effective remedy and a fair trial (Art 47)
  - Presumption of innocence and right of defence (Art 48)
  - Principles of legality and proportionality of criminal offences and penalties (Art 49)
  - Right not to be tried or punished twice (Art 50)

# Criminal enforcement in EU law?

- Failure of Criminal Enforcement Directive
- Jurisdictional issues resolved? (Art 83(2), TFEU)
- Rejection of ACTA

# Criminal enforcement in EU law?

- Obligation to comply with relevant provisions of the Charter
- Including Art 49 (legality and proportionality of criminal offences and penalties)



# EU Charter, Article 49(1)

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed....”

# EU Charter, Art 49(1)

- Interpreted in line with Art 7, ECHR
- See, for example, *Camilleri v Malta* 42931/10, 22<sup>nd</sup> January 2013
  - Art 7 a safeguard against arbitrary prosecution, conviction and punishment
  - Including a requirement that offences and penalties are to be clearly defined (otherwise not “law”)

# EU Charter, Art 49(1)

- Prohibiting a broad interpretation of criminal provisions
  - “[Art 7(1)] lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy....’  
(*Scoppola v Italy (No 2)* (10249/03) [93])

# EU Charter, Art 49(1)

- However:
  - “Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”
    - (*Camilleri v Malta* [37])

# Application of Art 7(1) in IP law

- *Ashby Donald v France*, 36769/08, 10<sup>th</sup> January 2013
  - National court not interpreting national exception covering “works of graphic, plastic or architectural art” as extending to fashion articles
  - National courts having first responsibility to interpret law
  - Court only to intervene if violation of Art 7

# *Ashby Donald v France*

“En l’espèce, la Cour de cassation s’est prononcée sur le champ d’application d’une exception à la règle protégeant le droit légitime des auteurs. La Cour ne décèle dans l’interprétation à laquelle elle a procédé aucun élément susceptible de caractériser une atteinte aux principes posés par l’article 7 de la Convention.” [23]

# Will Art 49(1), EU Charter ever apply in IP law?

- Inherently uncertain areas of the law?
  - Patent infringement?
  - Trade mark – use “in the course of trade”?
  - The Court’s harmonisation agenda in copyright? (*Titus Donner*, Art 5(5)...?)
- A further interpretative principle for the Court of Justice in criminal IP matters (to add to author-centric, “effective” interpretation, other fundamental rights)?

# Proportionality of criminal sanctions (Art 49(3), EU Charter)

- “The severity of penalties must not be disproportionate to the criminal offence.”
  - A risk in an environment characterised by a desire / obligation to “deter”?
  - Examples of disproportionate civil sanctions?



# Criminal sanctions implicating other fundamental rights

- *Neij and Sunde Kolmisoppi v Sweden* (40397/12):
  - “...[T]he nature and the severity of the penalties are factors to be taken into account when assessing the proportionality of interference with the freedom of expression guaranteed by Article 10...In the present case, the Court considers that the prison sentence and award of damages cannot be regarded as disproportionate.”