



Human Rights in IP Adjudication



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Panel What Role for Human Rights and Ethics in IP,
Investment and Trade Disputes?
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Introduction

- *The Rompetrol Group N.V. v. Romania*, ICTSD case No. Arb/06/3 (May 6, 2013)
- *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/AB/R, Dec 21, 2009)
- *Australia – Tobacco Plain Packaging* (DS 435, 441.458, 467)?

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19th and 20th Century Legal Fragmentation

- The divide of private and public law and the fact of non-communicating constituencies
- The national focus until the advent of European integration under international and European law (*Grundig-Consten* 1966)
- The institutional fragmentation of international adjudication (Trade, Investment, Human Rights)

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Embedding IPRs in Public International Law

- General principles of law including equity
- Unfair competition law
- Anti-trust law and competition policy
- Trade law and policy
- Investment protection and cooperation
- Human Rights

Concurring Goals and Values

- Copyright, property rights and right to do business,
- Copyright is a precondition of freedom of expression and information against government constraints: *Harper and Row v. Nation Enterprises* 471 US 539 (1985)
- Moral rights and right to human dignity, personal moral integrity and reputation (*Persönlichkeitschutz*)
 - Art. 12 Universal Declaration of Human Rights:
 - No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks
- Procedural due process rights and fair trial

Potentially Conflicting Goals and Values (EU Charter)

- Art. 1 Human dignity
- Art. 3 Right to integrity of the person
- Art. 7 Respect for private and family life
- Art. 8 Protection of personal data
- Art. 11 Freedom of expression and information
- Art. 13 Freedom of arts and sciences
- Art. 14 Right to education
- Art. 20 Equality before the law
- Art. 26 Integration of persons with disabilities
- Procedural due process rights and fair trial

Universal Human Rights

Art. 17(1) Universal Declaration

1. Everyone has the right to own property alone as well as association with others
2. No one shall be arbitrarily deprived of his property.

Art. 27(2) Universal Declaration

Everyone has the right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.

Art. 15 International Covenant on Economic, Social and Cultural Rights (1966)

The States Parties to the present Covenant recognize the right of everyone:

(c) To benefit from the production of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and diffusion of science and culture.

Property: an institutional guarantee

- *Donaldson v Beckett*, 1 English Reports 837, 839 (1774)
- Bundesverfassungsgericht Case 1 BvL 19/76 12 June 1979, BVerfG 52, 1 (*Kleingarten*); Bundesverfassungsgericht Case 1 BvR 987/58, 14 November 1962, BVerfG 15, 126 (*Staatsbankrott*)
- *Golan v. Holder*, 132 S.Ct 873 (2012); *Eldred v. Ashcroft*, 537 US 186 (2003)
- Property is defined by legislation and subject to it; there no do predefined notion of property in natural law (utilitarian concept)

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Protocol (1) to the Convention for the Protection of Human Rights and Fundamental Freedoms

ARTICLE 1: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

European Court of Human Rights

- ECommHR, *Smith Kline and French Laboratories Ltd v. the Netherlands*, No 12633/87, Commission decision of 4 October 1990 (Compulsory license justified under exceptions)
- ECtHR, *Anheuser Busch Inc. v Portugal* [GC] no 73040/01 11 January 2007, ECJR 2007 I. (Application for a trade mark protected under property rights under Protocol)

Case Law ECtHR

- ECtHR recognises property protection but exercises strong deferential standards towards domestic law and measures enforcing IPRs including high fines:
 - ECtHR, *Dima v. Romania*, no 58472/00 (no copyright protection for created state emblems upheld)
 - ECtHR, *Balan v. Moldova*, no 19247/03 (29 January 2008) (unreported) (no copyright for photos taken for official purposes upheld)
 - ECtHR, *Ashby Donald and others v. France*, no.36769/08, 10 January 2013 (unreported) (restriction of freedom of press upheld and high penalties)
 - ECtHR *Frederik Neij and Sunde Kolmisoppi v. Sweden*, no 40397/12, 19 February 2013 (Free downloads protected by freedom of expression, but restrictions justified by copyright law, high penalties upheld)
 - ECtHR, *Ahmet Yildirim v Turkey*, no 3111/10, 18 December 2012, Reports of Judgments and Decisions 2012 (blocking of internet by Turkey incompatible with freedom of expression and information)

Case Law CJEU

- The approach of the Court is characterized by a requirement to balance the different interests at stake, strongly depending upon facts of case
 - ECJ, Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008], Judgment of the Court (Grand Chamber) of 29 January 2008, ECR I-00271 (no obligation of internet provider to disclose identity of infringer in EU law)
 - CJEU, C-70/10, *Scarlet Extended NV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers, CVBA (SABAM)* [2011], Judgment of the Court (Third Chamber) of 24 November 2011, ECR I-1959; and
 - CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers, CVBA (SABAM) v. Netlog NV*, Judgment of the Court (Third Chamber) ECR_____ (MS must respect prohibition of general monitoring by IPS (E-Commerce Directive 2000/31 and of IP enforcement directive 2004/48. Filtering amounts to general monitoring prohibited).

Case Law CJEU (con't)

- CJEU, C-314-12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wege Filmproduktionsgesellschaft mbH* [2014] Judgment of Court (Fourth Chamber) of 27 March 2014, ECR ____ (stresses freedom of expression in the Internet; injunctions taken on the basis of the Information Society Directive 2001/29 Art 8(3) must take human rights into account).
- CJEU, Case C 201/13 *Deckmyn and Vriheidsfonds VZW v. Vandersteen (...)* and *WPG Uitgevers België* [2014] Judgement of the Court (Grand Chamber) of 2 September 2014, ECR ____ (Freedom of expression to be taken into account in assessing fair use exemptions leading to broad concept of parody).
- CJEU, Case C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer KG*, [2014,] Judgement of the Court (Fourth Chamber) of 11 September 2014, ECR ____ (Publishers cannot restrict access to works under Art 5(3)(n) of the Information Society Directive 2001/29 and bar public libraries for the purpose of research and private study undertaken by individuals)
- CJEU, Case C. 34/10 *Brüstle v. Greenpeace*, Judgement of the Court (Grand Chamber) of 18 October 2011 (importance to take human dignity into account in patent law).

Relationship

- The legal relationship of IPRs and Human Rights depends upon the jurisdiction of Courts
- Constitutional and Human Rights Courts assessing IP induced restrictions of human rights should examine legality, compelling public interest and proportionality
- WTO panels and BIT arbitration today is limited to contextual interpretation and balancing of interests (Art. 3.2. DSU)

Ports of Entry in TRIPs

- Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives
- Art. 7, 8 TRIPs “provided that such measures are consistent with the provisions of the Agreement”
- Article 17, 30 (fair use), 31 (CL), Art 40
- No general exceptions Article XX GATT (except for parallel trade issues)
- Art10bis Paris Convention: unfair competition rules suitable to enforce CSR

VCLT Article 31:3(c)

- 3. There shall be taken into account, together with the context:
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- (c) any relevant rules of international law applicable in the relations between the parties.

Utilitarianism

- What is the impact of utilitarian thought (David Hume) for shaping the scope of IPRs in WTO and BITs adjudication?
 - Pursuit of general interest and welfare
 - No apriori protection albeit property rights are considered of paramount importance for security
 - Balance of different topoi and interest required
 - Protection of IPRs subject to legislation
 - IPRs are subject to Human Rights
 - How does this affect the definition and interpretation of scope of rights?

Example: Right to Health

- How does the Right to Health influences the scope of patent and trade mark rights?
 - How does it influence stockpiling of generic drugs (cf. Canada – Patent Protection)?
 - How does it influence the scope of trade mark rights (Australia – Tobacco Plain Packaging)
 - How does it affect regulations of parallel trade in pharmaceuticals (Art. 6, 16 TRIPs, XI, XX GATT) ?



Thank you for your attention!

Thomas Cottier, *Embedding Intellectual Property in International Law*, in: P. Roffe, X. Seuba (eds.), *Current Alliances in International Intellectual Property Law: The Emergence and Impact of Mega-Regionals*, ICTSD/CEIPI 15-45 (2017)

Thomas Cottier, *Copyright and Human Rights: The Impact of of International and European Law*, 26 AIDA 51z8-537 (2017).