What developments for the European Intellectual Property System?
- An Institutional Perspective: Will it get any better?

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Introduction
Overview (1)

Routes of development of European IP law

- **Internal Route**
  - European Legislation + Interpretation

- **External Route**
  - Treaty law + Interpretation
Overview (2)

Institutional setting:

- **Principle of ‘Institutional Balance’**
  not: separation of power

- **Originally: The ‘The Cathedral of the Holy Trinity’**
  Commission + Council + Court of Justice

- **Since Maastricht/Lisbon: ‘Institutional Balance Plus’**
  + Parliament (Co-decision power)
Overview (3)

Institutional setting:

- Commission
- Court of Justice
- Council
- Parliament
Problem of Rent-Seeking in IP (1)

Article 13(1) TEU:
The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

Article 9 TEU:
In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. (…)
Problem of Rent-Seeking in IP (1)

Hypothesis: ‘Rent-seeking leads to expansion of IP’

(1) 2005 Recommendation of multi-territorial licensing of copyrights in musical work

- Communication 2004 on collective rights management – broad consultation (80 responses)
- 7 July 2005: Commission Staff Working Paper with three options for multi-territorial licensing, including the so-called “rights-holders’ option”
- Submission of comments by music publishers associations in favour of right holders’ option; Germany's critical comments of September 2005 rejected for being late
- 18 October 2005: Recommendation published with date of ’18 May 2014’
- EP Resolution: ‘Commission violates principle of democratic participation and harms cultural diversity’
- 2012: Proposal for a CMO Directive – Recommendation did not have positive results (why? No binding effect)
Problem of Rent-Seeking in IP (2)

Hypothesis: ‘Rent-seeking leads to expansion of IP’

(2) Harmonization of national design law

Conclusion:
(a) Strong industry interests are more successful than diffuse interests of users
(b) Problem of lack of transparency (especially in international IP)
(c) All institutions potentially affected, but ‘political proposals by Commission’ most problematic
(d) Important role of the Parliament to oppose unbalanced proposals
The Court of Justice

- **Most criticized EU institution**
  - by everybody (including scholars)
  - regarding all fields (trade mark, copyright, patent law)

- **In favour of a more balanced assessment**
  - Exploding number of referrals increases risk of inconsistency and error
  - IP is not different from any other field of EU law
  - CJEU addresses the need to balance interests by relying on the Charter of Fundamental Rights (e.g.: SABAM v Netlog 2012; Deckmyn Sept 2014; AG Wathelet in Huawei Nov 2014)
  - Legislature can repeal case-law that interprets secondary law (e.g.; L’Oréal v Bellure)

- **Institutional reform needed**
  - Specialized chambers can increase consistency and expertise
  - CJEU should admit errors and changes in case-law
The European Patent Package

Complete failure of the principle of institutional balance (so far …)

- Many reasons why a unified patent and a unified court system would make sense
- Yet: The European Patent Package causes concerns in all different sectors of the IP community (industry, law firms, courts, scholarship)
- **Commission:** From resistance against initiative of the Member States to ‘It is our project and it has to be successful, finally!’
- **Member States:** Strong political influence (Germany) – But **who are the beneficiaries?**
- **European Council:** Sets aside the Court of Justice – But **who will guarantee balance of interest?**
- **European Parliament:** Agreed to delegate legislative power back to Member States and, thereby, failed to fulfil its function of guaranteeing a balance of interest
- **Court of Justice:** **Advocate General provides no hope!** Duty of the Member States to ratify the UPC Agreement by accepting the decision that the CJEU will not have any power to interpret it
Outlook

- Difficult to predict the future
- Keep the broader picture in mind!

Intellectual property development can be disruptive in two ways!

- It can disrupt the credibility of the IP system
- It can disrupt the credibility of the European Union

⇒ Many IP scholars are concerned about both risks

- Factors for future development
  - Growing awareness of the political responsibility of the Commission ⇒ Reform of the institutional structure of the Commission – Project teams across Directorates General
  - ‘Digital Single Market’ as one of a few central Commission projects, which includes the modernisation of EU copyright law may bring about a better balance of interests Also European Parliament seems to put a particular and critical focus on IP in the future
  - TTIP most crucial for credibility of the EU
  - And finally: How will the CJEU decide on the unitary patent?
Merci pour votre attention!