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 \(\rightarrow\) respect for human rights among the Union’s core aims!

Article 6(2) \(\rightarrow\) The EU shall accede to the ECHR!
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”
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 \( \rightarrow \) censors the availability of fundamental rights-related limitations by establishing a neoliberal judicial review
- Affects interpretations \( \rightarrow \) ”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?
HOLLYWOOD

PRODUCTION

DIRECTOR

CAMERA

DATE   SCENE   TAKE
Building too much on competition law entails risks..
Yet competition law could be developed to better tame harmful informational power based on IP.
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..
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!
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?
Realize the inherent constraints new constitutionalist measures impose on progressive reforms.
Such constraints also relevant for competition law.
That's all Folks!