

Looking Forward: Implementing Intellectual Property Provisions in Human Rights Instruments

14th EIPIN Congress,
Strasbourg, Maison Interuniversitaire des Sciences de
l'Homme - Alsace (MISHA),
7 April 2013

Christophe Geiger

Associate Professor, Director General
and Director of the Research
Department,
Centre for International Intellectual
Property Studies (CEIPI), University
of Strasbourg

Christophe Geiger

Looking Forward

I. INTRODUCTION: DEFINING THE PROBLEM

Intellectual property rights (IPR) are currently facing a serious crisis of legitimacy in public opinion

Many reasons for this, some of which are:

- Multiplication, lack of transparency of the functions of IP protection
- Lack of clarity regarding the true beneficiaries of IP protection
- Unclear rhetoric and perception of IP protection

Christophe Geiger

Looking Forward

I. INTRODUCTION: DEFINING THE PROBLEM (continued)

Consequence: A need to give IP law new legitimacy and to restore its **social function**:

1. Intellectual property needs to be considered no longer as an “absolute” right, but a right with **social limits**, a right that can give way when required by the **general interest** (Josef Kohler, Otto von Gierke, Louis Josserand)
2. IP is the product of a type of a “**social contract**” between the creator and society:
 - IP is a “**conditioned**” law
 - The grant of rights implies certain duties/ obligations
 - In the interests of society, the right to exclude may be transformed in a right to receive **adequate and fair remuneration**

Christophe Geiger

Looking Forward

II. Human rights – the solution? the Ambiguity of the Constitutional framework at European Level

The European Constitutional Framework for IP:

- Provisions of national Constitutions
- European Convention on Human Rights (ECHR)
- The Charter of Fundamental Rights of the EU (the Charter)

Christophe Geiger

Looking Forward

1. Provisions of different national Constitutions

- IP is often not mentioned at all, but is considered as protected under the general right to property
- Functional aspects are not sufficiently expressed
- In some constitutions IP (more often – copyright), if mentioned, is dealt under relatively vague clauses that do not emphasize the link to the creator

Christophe Geiger

Looking Forward

2. European Convention on Human Rights (ECHR)

No specific provision on IP in the ECHR. However, the protection is granted through Article 1 of the First Protocol to the ECHR (property):

- The only Article in the Convention that applies to legal persons
- The European Court of Human Rights (ECtHR) has gradually attached different IP rights to Article 1 of the First Protocol:

Potentially very broad scope of protection: a striking example – *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007, ECHR 2007-I – the human rights protection extended to the “mere” application for registration of the trademark.

3. The Charter of Fundamental Rights of the EU: Article 17(2)

**“Intellectual property
shall be protected”**

... You shall not murder, You shall not commit adultery, You shall not steal, You shall not bear false witness against your neighbor, You shall not covet....

Commandment 11?

You shall protect intellectual property!

Christophe Geiger

Looking Forward

3. Article 17(2) (continued)

- Who is protected? No reference to the **creator**
 - Rather strange **uplifting** of an “ordinary” economic right to the constitutional level
 - The wording is unclear and ambiguous: there is **neither a reference to the public or general interest nor to any other particular objective** of the right. Several interpretations have been proposed:
 - IP as an end in itself?
- Or
- Special mention of IP alongside property as a mark of its specificity?

Christophe Geiger

Looking Forward

III. PRACTICAL CONSEQUENCES OF THIS AMBIGUITY: AN “ABSOLUTIST” UNDERSTANDING OF IP

1. Secondary legislation

-Expanding existing IP protection. *E.g.*: Recital 11 to Directive 2001/29/EC (InfoSoc) [2001] OJ L 167:

*“A **rigorous**, effective system for the protection of copyright and related rights is one of the main ways of ensuring [...] European cultural creativity”*

2. CJEU case-law

-*Laserdisken ApS v. Kulturministeriet* (C-479/04) [2006]: the Directive 2001/29 (InfoSoc) precludes international exhaustion

-*Infopaq International A/S v. Danske Dagblades Forening* (C-5/ 08) [2009]: even certain parts of sentences may be considered a protected work

3. ECtHR case-law

-the human rights protection extended to the “**mere**” **application** for registration of the trademark (*Anheuser-Busch Inc. v. Portugal*, 11 January 2007)

-**corporations** invoke their “human right” to property as a justification for a stronger IP protection

Christophe Geiger

Looking Forward

IV. THE BETTER OPTION: A SPECIFIC AND BALANCED IP PROVISION INCLUDED IN THE CONSTITUTIONAL FRAMEWORK

Such examples can be found:

- In International Human Rights Instruments
- In some National Constitutions
- In Quasi-Constitutional Provisions

Christophe Geiger

Looking Forward

1. International Human Rights Instruments

Article 27 UDHR:

*“(1) Everyone has the right freely to **participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.***

*“(2) Everyone has the right to the protection of the **moral and material** interests resulting from any scientific, literary or artistic production of which he is the **author**”.*

Article 15 ICESCR follows this language almost verbatim

Both Article 27 UDHR and Article 15 ICESCR offer **modern and balanced provisions** on IP protection

Christophe Geiger

Looking Forward

2. National Constitutions

A number of the more recent constitutions, particularly in Eastern Europe, follow the UDHR logic by safeguarding the creator's rights under the **freedom of arts and sciences** (Art. 42 of the Lithuanian Constitution, Art. 54 of the Bulgarian Constitution, Art. 34 of the Czech Charter, Art. 73 of the Polish Constitution, Art. 43 of the Slovak Constitution, etc.):

E.g.: Constitution of the Republic of Lithuania of 1992 (Article 42):

"Culture, science and research, and teaching shall be free.

*The State shall **support culture and science**, and shall take care of the protection of Lithuanian historical, artistic and cultural monuments and other culturally valuable objects.*

*The law shall protect and defend the **spiritual and material interests of an author** which are related to scientific, technical, cultural, and artistic work".*

Christophe Geiger Looking Forward

2. National Constitutions (continued)

US Constitution (Article I, Section 8, Clause 8):

*“Congress shall have the power [...] **to promote the Progress of Science and Useful Arts** by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.*

Christophe Geiger

Looking Forward

3. “Quasi-Constitutional Clauses” (A. Dietz, 2007)

- **European harmonisation directives** provide for a number of valuable elements of a balanced clause which help to fill the missing link between the protection and its justifications in the general interest (recitals 9 to 12, 14 and 22 of the Directive 2001/29 (InfoSoc))

E.g.: recital 14 of the Directive 2001/29:

*“This Directive should seek **to promote learning and culture** by protecting works and other subject-matter while permitting exceptions or limitations **in the public interest** for the purpose of education and teaching”.*

- **WIPO Copyright Treaty 1996 (Preamble):**

*“[...] Recognizing the need to maintain a **balance between the rights of authors and the larger public interest**, particularly education, research and access to information [...]”.*

Christophe Geiger

Looking Forward

V. WHERE TO FIND SUPPORT FOR A BALANCED IP CLAUSE?

- Charter preparatory documents
- Charter and ECHR provisions (Articles 17(1), 52 and 54 of the Charter and A1P1 of the ECHR)
- Recent CJEU case-law
- Recent ECtHR case-law
- National Constitutional Courts' decisions in Europe
- Other sources (Vienna Convention on the Law of Treaties, General Comment No. 17)

Christophe Geiger

Looking Forward

1. Support in the Charter preparatory documents

Note from the Praesidium, Explanations Relating to the Complete Text of the Charter, Dok. CHARTE 4487/00 CONVENT 49, pp. 19-20:

- *“Protection of intellectual property is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. **The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.***
- ***Article 17** is based on **Article 1 of the First Protocol to the ECHR** and the **meaning** and scope of Article 17 are **the same** as those of the right guaranteed under Article 1 of the First Protocol to the ECHR”.*

Christophe Geiger

Looking Forward

2. Support in the Charter and the ECHR

Article 17(1) of the Charter (Right to Property):

*“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, **except in the public interest** and in the cases and under the conditions provided for by law, **subject to fair compensation** being paid in good time for their loss. **The use of property may be regulated by law in so far as is necessary for the general interest**”*

Article 52(1) of the Charter: Principle of Proportionality

Article 54 of the Charter: Prohibition of Abuse of Rights

Christophe Geiger

Looking Forward

2. Support in the Charter and the ECHR (continued)

Article 1 of Protocol 1 ECHR (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”.*

- Both Article 17(1) of the Charter and A1P1 of the ECHR consider the right to property as a right having **strong social bounds** – it should be **limited in the general interest**

Christophe Geiger

Looking Forward

3. Support in the most recent CJEU jurisprudence

IP is **not absolute** and must be **balanced** against the protection of other fundamental rights:

- *SABAM v. Netlog NV* (C-360/10) [2012] at [41] and [42]
- *Scarlet Extended SA v. SABAM* (C-70/10) [2012] at [44]
- *Promusicae v. Telefonica de Espana SAU* (C-275/06) [2008] at [65]

Interpretation of intellectual property within the framework of Article 17(1):

- *Martin Luksan v. Petrus van der Let* (C-277/10) [2012] at [68]

4. Support in the most recent ECtHR jurisprudence

A conviction for illegally reproducing or publicly communicating copyright-protected material, even for profit-making purposes, is **an interference with the right to freedom of expression** and information (Article 10(1) ECHR):

- *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013
- *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013

Christophe Geiger

Looking Forward

5. Support in the national Constitutional Courts' decisions in Europe

E.g.: German Constitutional Court, the “school book” decision, July 7, 1971 ((1972) IIC 394): **the social function of copyright**

6. Support in Other Sources

- Recognizing some balanced perspectives on IP is also consistent with the **Vienna Convention on the Law of Treaties** (Art. 31(3)(c))
- **General Comment No. 17** of the ICESCR (2005): the right under Art. 15(1)(c) safeguards the **personal link between authors and their creations and between peoples** and is **intrinsically linked to** the right to take part in cultural life (art. 15, para. 1 (a)), the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)), and the freedom indispensable for scientific research and creative activity (art. 15, para. 3)

Christophe Geiger

Looking Forward

VI. SOLUTION:

To introduce in the Charter of fundamental rights of the EU a constitutional clause on IP modelled on international, national constitutional and quasi-constitutional provisions reflecting the modern concepts of social and cultural policy in Europe

TWO OPTIONS ARE PROPOSED:

- The “classical” option: introduction of an IP provision in the framework of **Property**
- The innovative/modern option: introduction of an IP provision in the framework of **Freedom of Arts and Sciences**

Christophe Geiger

Looking Forward

VI. SOLUTION (continued)

Alternative I: Protection in the framework of property: Revision of Article 17 (Right to property)

Current wording	Suggested wording
<p>1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, <u>subject to fair compensation</u> being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.</p> <p>2. Intellectual property shall be protected.</p>	<p>1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, <u>subject to fair compensation</u> being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.</p> <p>2. In order to promote the progress of science, creativity, learning and culture, everyone shall have the right to the protection of the moral and material interests resulting from his scientific, literary or artistic production. The guarantees laid down in paragraph 1 apply.</p>

Christophe Geiger Looking Forward

VI. SOLUTION (continued)

ART. 17 (2) OF THE EU CHARTER:

“Intellectual property shall be protected”

becomes:

“In order to **promote the progress of science, creativity, learning and culture**, everyone shall have the right to the protection of the **moral and material interests** resulting from **his** scientific, literary or artistic production. **The guarantees laid down in paragraph 1 apply**”.

Christophe Geiger

Looking Forward

VI. SOLUTION (continued)

Alternative II: Protection in the framework of Freedom of Arts and Sciences: Revision of Article 13 of the Charter (Freedom of Arts and Sciences)

Current Clause	Suggested Clause
<p>The arts and scientific research shall be free of constraint. Academic freedom shall be respected.</p>	<ol style="list-style-type: none"><li data-bbox="981 501 1870 696">1. Everyone has the right to benefit from the achievements of scientific progress, to enjoy the arts and to participate in the cultural life of the community.<li data-bbox="981 739 1870 1186">2. Creators of scientific, literary or artistic production shall have the right to the protection of the moral and material interests resulting from their creative activity. The rights granted are regulated by law in so far as is necessary to guarantee the rights in the preceding paragraph and the general interest.

Christophe Geiger

Looking Forward

VI. SOLUTION (continued)

ART. 13 OF THE EU CHARTER

becomes:

1. Everyone has the right to benefit from the achievements of scientific progress, to enjoy the arts and to participate in the cultural life of the community.
2. **Creators** of scientific, literary or artistic production shall have the right to the protection of the **moral and material interests** resulting from **their creative activity**. **The rights granted are regulated by law in so far as is necessary to guarantee the rights in the preceding paragraph and the general interest.**

Christophe Geiger

Looking Forward

VI. SOLUTION (continued)

Advantages of protecting IP under Article 13:

- Such protection is in line with Article 27 UDHR, Article 15 ICESCR and a number of national constitutions in Europe as it places IP in the category of cultural rights
- The cultural right status of IP makes its social function more visible
- Balances IP against human dignity and freedom of expression

Note from the Praesidium, Explanations Relating to the Complete Text of the Charter, Dok. CHARTE 4487/00 CONVENT 49:

*“This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to **Article 1 (Human Dignity)** and may be subject to the limitations authorized by **Article 10 of the ECHR**”.*