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Intellectual Property and the Judiciary

IP and European Courts – Intellectual Property in front of the Court of Justice of the E.U.

Vincent Cassiers

Lecturer (UCLouvain, KULeuven), Partner at Sybarius

vincent.cassiers@uclouvain.be – v.cassiers@sybarius.net

Plan

I. The role of the CJEU in the elaboration and the implementation of IPRs

- a. Interpretation
- b. Creation
- c. Limits to the power of the CJEU
- d. Dynamic of the CJEU case law

II. The evolution of the CJEU in the field of IP Law

- a. Growing number of IP cases
- b. A specialized chamber in IP
- c. Economic and legal issues

The role of the CJEU in the field of IP

I. Interpretation of primary and secondary EU Law : Art. 19 TEU and Art. 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

➔ Basic function of the CJEU is to assure uniform interpretation and application of EU Law in the whole Union ➔ Integration and harmonization.

The role of the CJEU in the field of IP

II. Creation of EU Law

CJEU has built crucial principles of EU Law:

- Van Gend and Loos (1963): Direct effect of EU Law
- Costa (1964): Primacy of EU Law on national laws
- Cassis de Dijon (1979): mutual recognition of marketing approvals

CJEU has built the “general principles of EU Law”.

These principles are used as levies by the CJEU in order to make “uniform interpretation and application of EU law”... when autonomous concepts of EU Law exists.

The role of the CJEU in the field of IP

II. Creation of EU Law

➔ CJEU tends to “discover” many autonomous concepts of EU Law in the field of IP Law even when the provision is optional (e.g. *Padawan* – ‘fair compensation’ / *Deckmyn* – ‘parody....’).

Justification: needed by the general principle of the useful effect (“effet utile”) of the EU Law.

Context: MS often are unable to agree on the exact wording of a provision: general wording open for interpretation. The CJEU fills the gaps by giving the exact sense of the provision.

The role of the CJEU in the field of IP

II. Creation of EU Law

From interpretation to creation of new rules:

- *Exhaustion of IPRs and identification of the specific subject matter of IPRs*
- *Dataco (2012): exclusion of the sweat of the brain concept in copyright law (+ Infopaq (2009) and Painer (2011): originality)*
- *Lego (2011): prohibition to combine patent and trademark on technical solution*
- *At the periphery of IP Law: Google Spain (2014) – right to be forgotten and Schrems (2015) – Safe harbour.*

The role of the CJEU in the field of IP

II. Creation of EU Law / Balancing conflicting laws

IPRs as fundamental rights (art. 17 EU Charter on FR)

Balance: between conflicting fundamental rights IP vs freedom of speech, freedom to conduct business, freedom to work,...

Key: proportionality principle. Limitation of IPRs.

- *Netlog (2012) - freedom to conduct business*
- *Promusicae (2008) – personal data protection*

The role of the CJEU in the field of IP

II. Creation of EU Law / Balancing conflicting laws

IPRs and competition law

The ECJ adjust the limits of IPRs to preserve competition within the EU.

Key: proportionality principle. Limitation of IPRs.

- *IMS Health (2004)*
- *Monsanto (2006)*
- *Microsoft (2007)*

Important new rules are enacted and substantial legal and economic impact

The role of the CJEU in the field of IP

III. Limits of the CJEU's interpretative activism and creativity

- The wording of the rule
- The context of the rule
- The historical content
- The purpose of the rule
- The existing case law (including the general principles of EU Law)
- The existing rules (Treaties EU and non EU, other legal instruments)

The role of the CJEU in the field of IP

IV. The dynamic of the CJEU's case law

- CJEU as a policy maker

Theological interpretation of the rule, based on its purpose, favors integration and harmonization policy.

This reinforces the creation of (new) harmonized rules.

- CJEU as a policy trouble maker

The wording of the rules limits the role of the CJEU: however can stimulate legislative intervention (*cf. Padawan etc.*)

The evolution of CJEU in the field of IP Law

I. The reasons for a change

- Important legal and economic impact of the decision of the CJEU in the field of IP Law

Knowledge economy, e-commerce, intangible assets (IPRs), data are important economic levies.

IP Law is complex and this complexity is growing.

- Growing number of IP cases at the CJEU (2nd largest category – 47/610 new cases in 2014)

The evolution of CJEU in the field of IP Law

II. A specialized chamber in IP Law?

- Require judges with specialized knowledge in IPRs.
- Quicker and more effective decisions.
- Adaptation of procedural rules
- Increased consistency and predictability of case outcome → reduction of litigations
- BUT:
 - Difficulty to isolate IPRs from other aspects of EU Law
 - Normative role of the CJEU extend beyond technicalities of IPRs

The evolution of CJEU in the field of IP Law

III. IP Law is too important to be left to lawyers

- Important normative and economic impact of the CJEU's decision
- Interdisciplinary is of the essence of a democratic legislative process
- Dynamic of the CJEU: integration, harmonization, achievement of the internal market.
- What role for economists at the CJEU ?