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# Intellectual Property in front of the European Court of Human Rights

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# I. INTRODUCTION: SHIFTING CENTRES OF GRAVITY IN EUROPEAN IPRS PROTECTION

## Increased emphasis on the importance of “knowledge economy” in the EU:

- IPRs are made one of the priorities in the recent strategic documents from the European Commission (Communication from the Commission, “A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe” (COM (2011) 287), at 4. See also “Europe 2020” strategy (COM (2010) 2020) and the Digital Agenda for Europe (COM (2010) 245))
- As the EPO/OHIM study demonstrates, IPR-intensive industries contribute 39% of total economic activity (worth some €4.7 trillion annually) and 26% of all employment in the EU (56.5 million jobs) (“Intellectual property rights intensive industries: Contribution to economic performance and employment in Europe”, September 2013)
- Elaboration of a highly developed legal framework in the field of IP: **more than 100** IP Directives and Regulations adopted in the past 20 years!
- General provisions of competencies permit to act only “in the light of the functioning of the internal market”, meaning that the EU legislator has a mandate to approach IP from a strictly economic perspective: what about cultural, social, environmental or philosophical implications?

**At the same time...**

**... the influence of Human Rights on European Law continues to grow:**

- Charter of Fundamental Rights of the EU enters primary EU legislation (Art. 6(1) TEU)
- EU accedes in the future to the European Convention on Human Rights (Art. 6(2) TEU). Although the CJEU rejected the draft agreement of EU accession to the ECHR (Opinion 2/13 of 18 December 2014), EU retains a *binding obligation* to accede to the ECHR (accession delayed, not abandoned)
- CJEU and national courts increasingly use fundamental rights to interpret European and domestic law, frequently relying in such interpretations on the ECtHR case law

**The result?**



## **Shifting centres of gravity in European IPRs protection**

From strictly economic, isolated approach towards greater account for the Human Rights law obligations in European IP legal construction,

**Need to rethink the role of the European Court of  
Human Rights *vis-à-vis* IP law?**

## The ECtHR shaping the contours of IP protection in Europe:

- Human Rights (public law) court is not necessary familiar with the *specifics* of IP protection (private law);
- ECtHR has a *different angle* of dealing with cases than a classical IP court – ECtHR considers the case from the perspective of an alleged violation of one of the rights listed in the Convention (not from an specialized IP perspective)
- The ECtHR's approach to IP is still under the construction, even though the Court is less reluctant now to deal with IP issues than it used to be even 10 years ago



# II. EUROPEAN COURT OF HUMAN RIGHTS (ECTHR) AND IP: AN OVERVIEW

## ECHR rights relevant for shaping IP protection in Europe:

- **Primarily:**
  - Right to property (Art. 1 of the First Protocol to the ECHR)
  - Right to freedom of expression and information (Art. 10 ECHR)
  - Right to privacy (Art. 8 ECHR)
  - Right to a fair trial (Art. 6 ECHR) and right to an effective remedy (Art. 13 ECHR)
- **But also (potentially):**
  - Non-discrimination (Art. 14 ECHR)
  - Right to life (Art. 2 ECHR)
  - Freedom of assembly and association (Art. 11 ECHR)

## 1. Right to Property (Art. 1 of the First Protocol to the ECHR)

- Under the ECHR, intellectual property falls, albeit not explicitly, within the *general ambit of property protection* provided by Article 1 of the First Protocol to the ECHR:

See, among many others, *Balan v. Moldova* [2008], no. 19247/03; *Melnychuk v. Ukraine* (dec.) [2005], no. 28743/03; *Dima v. Romania* (dec.) [2005], no. 58472/00; *Paeffgen GmbH v. Germany* (dec.) [2007], nos. 25379/04, 21688/05, 21722/05 and 21770/05; *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.) [1990], no. 12633/87

- Art. 1 of the First Protocol envisages the possibility of restrictions of the right “*in the public interest*” (para. 1) and allows the State “to enforce such laws as it deems necessary to control the use of property *in accordance with the general interest*” (para. 2)
- However, protection is at times excessive: see e.g. *Anheuser-Busch Inc. v. Portugal* [GC] [2007], no. 73049/01 – extending the human rights protection to the “*mere*” applications for registration of trademarks; allowing corporations to invoke their “human” right to property as a justification for a stronger IP protection

## 2. Freedom of Expression (Art. 10 ECHR)

### - File-sharing on the Internet:

*Neij and Sunde Kolmisoppi v. Sweden* (dec.) [“The Pirate Bay”] [2013], no. 40397/12;  
*Ashby Donald and Others v. France* [2013], no. 36769/08:

- The use of a copyrighted work can be considered as an *exercise of freedom of expression*, even if the use qualifies as an *infringement* and is *profit-motivated*

### - Website blocking:

*Akdeniz v. Turkey* (dec.) [2014], no. 20877/10:

- Complaint under Art. 10 ECHR by a frequent user about blocking access – on the grounds of copyright infringement – to the music-sharing websites “myspace.com” and “last.fm” is inadmissible *ratione personae* (no victim-status), because:
  - ✓ as the “mere” user, the applicant was only indirectly affected by the blocking,
  - ✓ the applicant had only been deprived of one means of listening to music among many (legitimate) others,
  - ✓ it was not alleged by the applicant that the websites at issue distributed information of a specific interest for him or that the blocking deprived him of an importance source of communication,
  - ✓ the applicant’s interest had to be balanced against the right to property of copyright holders, likewise protected by the Convention (Art. 1 of the First Protocol)
  - ✓ the blocking was strictly targeted



## 2. Freedom of Expression (Art. 10 ECHR) (continued)

### - Trademark parodies:

*Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* [1991], no. 17200/91:

- Prohibition on the use of Camel trademark in an anti-smoking campaign constitutes an *interference* with freedom of expression of an anti-smoking association
- Such interference is, however, *proportionate* to the aim of protection of reputation of tobacco company, because “*the applicants had not merely informed the public about health risks of smoking in general, but presented their criticism in the form of a caricature with an ironical slogan distorting the plaintiff’s trade-marks and its advertising slogans*”

**Compare:** French Supreme Court, *CNMTR v. Société JT*, 19 October 2006 (Cass (F)):

- Finding that the use, in analogous circumstances, of a trademark for the purposes of criticism was lawful and justified by freedom of expression
- Would the ECtHR 1991 case be decided differently today?
- “*That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law*”

(see, inter alia, *Matthews v. The UK* [GC] [1999], no. 24833/94, § 39; *Loizidou v. Turkey* [GC] [1995] (preliminary objections), § 71)

### 3. Privacy (Art. 8 ECHR)

#### - Anton Piller orders:

*Chappell v. the United Kingdom* [1989], no. 10461/83:

- Anton Piller order – allowing representatives of the rightholders (film companies) to enter the applicant's premises and to search for and remove infringing film-copies and documents relating to such copies
- This order constituted an *interference* with the exercise of the applicant's right to respect for his "private life" and "home"
- Such an interference was, however, *proportionate* to the legitimate aim of defending the plaintiffs' copyright against unauthorised infringement, since the safeguards contained in the order and the circumstances of its execution were in conformity with Art. 8 ECHR

#### - "Moral rights" in the trademark context:

*Vorsina and Vogralik v. Russia* (dec.) [2004], no. 66801/01:

- Reproduction of the portrait and name of the applicants' great-grandfather in the brewery's trademark did not cause them distress such as to encroach on their private and family life, since:
  - (i) the applicants by their own initiative passed a copy of the portrait to the museum, thereby agreeing, in principle, that the portrait may be seen by others; (ii) the portrait was reproduced in the trademark of the brewery once founded by the applicants' ancestor

## 4. Fair Trial (Art. 6 ECHR)

### - Access to court:

*Lenzing AG v. the United Kingdom* (dec.) [1998], no. 38817/97:

- Impossibility to appeal to the national court the decision on revocation of the applicant's patent by the Board of Appeal of EPO constituted an *interference* with the applicant's right of access to court
- Such interference was, however, *proportionate* to the legitimate aim of ensuring an effective European system of registration of patents, insofar as the EPC provided for an "equivalent protection" with regards the ECHR

### - *Res judicata* (finality of court decisions):

*SC Parmalat Spa and SC Parmalat Romania SA v. Romania* [2008], no. 37442/03:

- Quashing – following an extraordinary review by the Procurator-General of Romania – of a final court judgment establishing an infringement of the applicant company's trademark was *contrary* to the principle of legal certainty (*violations* of Art. 6(1) (*res judicata*) and Art. 1 of Protocol No. 1 (protection of property) ECHR)

## 4. Fair Trial (Art. 6 ECHR) (continued)

### - Reasoned judicial decision guarantee:

*Hiro Balani v. Spain* [1994], no. 18064/91:

- The court's failure to address the applicant's argument relating to her trademark's priority amounted to a *violation* of a reasoned judicial decision guarantee
- That guarantee, although not requiring a detailed answer to every argument, obliges the courts deciding on the merits to give a reply to at least those applicants' submissions that are the subject of argument

### - Length of proceedings:

*Denev v. Sweden* (report (31)) [1998], no. 25419/94:

- Proceedings before administrative courts decisive for the registration of the applicant's design that lasted almost 4 years *violated* Art. 6(1) (fairness) ECHR, because,
- had the applicant's design eventually been registered, *the protection afforded would have been practically useless* given the fact that the registration of a design was valid for only 5 years from the date of filling of the application

## 4. Fair Trial (Art. 6 ECHR) (continued)

### - Enforcement of a final judicial decision:

*I.D. v. Romania* [2010], no. 3271/04:

- A failure to enforce a final court judgment awarding the applicant royalties for the use of his patent by the private company was attributable to several procedural errors on the part of domestic courts and hence amounted to a *violation* of Art. 6(1) (fairness) ECHR

## 5. Other ECHR Rights *Potentially* Relevant for European IP

- **Non-discrimination (Art. 14 ECHR)**
  - Cf. CJEU, *Deckmyn* [2014], C-201/13 – finding that, if the parody conveys a discriminatory message, the holders of copyright in the original work have a legitimate interest in ensuring that their work is not associated with such a message, to the effect that *discriminatory works would not fall under the parody exception* of Art. 5(3)(k) InfoSoc Directive 2001/29/EC
- **Right to life (Art. 2 ECHR)**
  - Potential influence of the case law under Art. 2 ECHR on the level of protection required for human embryos in the EU
  - Compatibility with this case law of the morality exception to patentability concerning the use of human embryos for industrial or commercial purposes under Art. 6(2)(c) of the Biotech Directive 98/44/EC, as interpreted by the CJEU (*Brüstle v. Greenpeace eV* [2011], C-34/10)
- **Freedom of assembly and association (Art. 11 ECHR)**
  - Does the mandatory membership in CMOs comply with Art. 11 ECHR?
  - Cf. ECtHR, *Sørensen and Rasmussen v. Denmark* [GC] [2006], nos. 52562/99 and 52620/99 – finding that the closed-shop agreements (requiring an employee to be a member of a trade union or a specific trade union in order to obtain employment) *violated* freedom of association



# III. CONCLUSION: WHERE ARE WE HEADING AND WHAT TO EXPECT?

## 1. Increase in the influence of the ECtHR on EU law:

- Future (obligatory) accession of the EU to the ECHR (Art. 6(2) TEU)
- The Treaty of Lisbon (entered into force on 1 December 2009) places Human Rights at the very top of the hierarchy of norms – the Charter of Fundamental Rights of the EU enters primary EU legislation (Art. 6(1) TEU)
- Interpretation of the EU Charter, as applied by the CJEU and national courts, in the light of the ECHR. Art. 52(3) of the EU Charter:

*“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same as those laid down by the said Convention.** This provision shall not prevent Union law providing more extensive protection.”*

## 2. Increase in the influence of the ECtHR on European judicial practice:

- CJEU gradually decides IP disputes not as a matter of secondary IP legislation, but as a question of the fundamental rights' application:
  - **In the field of copyright:** *Promusicae* [2008], C-275/06; *Painer* [2011], C-145/10; *Scarlet Extended* [2011], C-70/10; *SABAM v. Netlog* [2012], C-360/10; *UPC Telekabel* [2014], C-314/12; *Deckmyn* [2014], C-201/13, etc.
  - **In the field of trademarks:** *PAKI* [2011], T-526/09; *Representation of the Soviet coat of arms* [2011], T-232/10; *L'Oréal v. eBay* [2011], C-324/09; *Coty Germany* [2015], C-580/13, etc.
  - **In the field of patents:** *Netherlands v. Parliament and Council* [2001], C-377/98; *Brüstle* [2011], C-34/10, etc.
- **National courts** rely explicitly on the ECHR while setting the national IP law standards. E.g. Constitutional Court of Belgium, *BioPheresis Technologies Inc v. State of Belgium*, No. 3/2014, 16 January 2014; Supreme Court of the Netherlands, *GS Media BV v. Sanoma Media Netherlands BV and Others*, 3 April 2015; French Supreme Court, 1st Civil Chamber, no. 13-27391, 15 May 2015.

# Thank you!

## Further readings:

- ✓ C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, Cheltenham/Northampton, 2015)

