European and International Intellectual Property Law between Propertization and Regulation: How a Fundamental-Rights Approach Can Mitigate the Tension

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European and International Intellectual Property Law between Propertization and Regulation: How a Fundamental-Rights Approach Can Mitigate the Tension

Josef Drexl*

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I. INTRODUCTION

Intellectual property (IP) has become a political battleground. This is also true for international IP law. Technologically advanced countries advocate and press for ever-higher standards of IP protection with the objective of enhancing their competitiveness in international markets against the growing economic power of emerging and developing countries.1 At the same time, it becomes more

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1. Whether such a policy can really be successful is critically reviewed by Josef Drexl, The Concept of Trade-Relatedness of Intellectual Property Rights in Times of Post-TRIPS Bilateralism, in TRIPS PLUS 20—FROM TRADE PRINCIPLES TO MARKET RULES (Reto M. Hilty et al., eds., forthcoming) (reviewing the policy of developed countries, including the U.S. in particular, with regard to the inclusion of IP in the law of the World
difficult for emerging and developing countries to maintain their own flexibility and regulatory autonomy in designing their own IP laws that more adequately respond to their innovation potentials. In addition, inclusion of IP in multilateral and, more recently, bilateral trade agreements has increased awareness of how much IP affects the daily life of human beings worldwide. In particular, IP may restrict access—especially of the poor—to education as well as essential goods such as medicine, seeds, and food. Therefore, IP in the global arena is also highly debated from a human-rights perspective. In this debate, proponents of strong IP protection rely on IP as property and sometimes even equate insufficient protection and enforcement in other countries with “intellectual property theft.” In contrast, non-governmental organizations and emerging and developing countries invoke the social rights of individuals in order to guarantee and maintain sufficient access to certain goods.

This article discusses the strength of the “property claim” for justifying demands for higher levels of IP protection on the international level. In doing so, it takes inspiration from more recent case law in the European Union (EU) on the constitutional status of IP as “property,” based on the Charter of Fundamental Rights (CFR) of 2000. \(^2\)

However, the basis of the “property claim” on the international level is not so clear. Use of the term “property” in “intellectual property” by itself cannot serve as a foundation for international human rights protection of IP. Such a basis is provided by the often-cited Article 27(2) of the Universal Declaration of Human Rights (UDHR) of 1948, which states that “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.” \(^4\) Yet this provision, in light of both its wording and its systematic context, seems surprisingly unrelated to the general clause on property protection contained in Article 17 UCHR. \(^5\) The
same is true for the recognition of protection of the results “from any scientific, literary or artistic production” in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Nevertheless, specific multilateral IP treaties make explicit reference to the property concept. Most importantly, the Paris Convention for the Protection of Industrial Property of 1883 uses the term “property” for rights such as patents, trademarks, and even for protection against unfair competition. In contrast to the UDHR and the ICESCR, Article 16(2) of the CFR as a document on general human rights protection integrates IP in the framework of the general property provision and thereby provides that “[i]ntellectual property shall be protected.”

Of course, Article 16(2) is in need of interpretation. It is not clear whether this clause is intended to lay the foundation for a natural-rights approach, obliging the state to protect pre-existing property rights. Indeed, the “property claim” for IP is rejected by others. According to this view, IP is only seen as a means to an end; as a regulatory instrument of market intervention, IP laws are only adopted to create incentives for innovation and creativity, and, thereby, to promote economic growth in the public interest.

This article will first argue that there is no inherent conflict between the two concepts of IP as a property right, and IP as a regulatory tool. Then, it will explain that IP is not substantially different from real property, at least in regards to the principles that define the scope of protection and the possibility to limit protection, both in the public interest and the private interest of others using the subject-matter of protection. The article will then analyze the European Convention of Human Rights (ECHR)—the basis for the first European discussion of the scope of IP rights as fundamental property rights—and then turn to the CFR. Based on this analysis, the article will finally draw conclusions for international IP law.

be able to rely on Article 27(2) of the UCHR, whereas the assignee of IP rights could also rely on the property concept as a fundamental right.


7. In this context, the use of the term stems from the French term “propriété industrielle,” as a result of the natural-rights approach to IP that emerged from the French Revolution.


10. Id. at 265.

11. Infra Part III.

12. Infra Part IV.

13. Infra Part V.

14. Infra Part VI.
II. SOLVING THE CONFLICT BETWEEN THE PROPERTY CLAIM FOR IP AND THE REGULATORY CHARACTER OF IP

This part of the article will show that there is no real conflict between the property claim for IP and the regulatory concept of IP. The property claim, by itself, cannot justify any extension of IP protection, nor does the regulatory concept of IP argue against a constitutional property concept of IP. The solution can be found in how IP, as property, should correctly be constructed from a constitutional perspective.

A. No Intellectual Property without Legislation

While intellectual property can theoretically and philosophically be perceived as a “natural” property right, it still needs to be defined by the legislature. Unlike tangible property, which has a natural, or anthropological, point of attachment in form of physical possession, IP protection depends entirely upon recognition by the legislature. In providing for IP protection, the legislature has to make a series of choices regarding the different core elements of such protection. This includes defining the subject-matter of protection and the threshold for protection, identifying the owner of the IP right, as well as delimiting the scope of protection.

The natural-rights concept may play a crucial role in vesting the right in a particular person, and in recognizing certain rights. This explains why continental European laws grant the original copyright to the creator of a work, thereby rejecting the work-made-for-hire doctrine and recognizing the moral rights of the author, such as the right of integrity and the right to be named as the author. Still, U.S. copyright law proves that these continental European laws also make a choice, namely, by preferring the so-called droit d’auteur approach to the Anglo-American copyright approach.

Regarding the scope of protection, IP laws need to define what exclusive rights are granted to the right-holder, for what period of time, and to what extent the conflicting interests of third parties are taken account of in the form of exceptions and limitations. In short, there cannot be any IP law that does not define its own boundaries. For the same reason, reliance on the property paradigm as such—in the sense that IP is property and, therefore, the legislature has to strengthen IP protection—cannot support any claim for raising the level of IP protection. Still, IP laws may postulate a principle of high standards of protection, as in the case of EU copyright law, which strives to provide a “high level of protection.”\(^\text{15}\) Such claims are inspired by a natural-property concept.

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But, the very fact that EU law enounces such a principle proves the legislative choice that was made.

This analysis is also instructive for the understanding of the international protection of IP as property. Apart from the case of unitary IP rights (e.g., the Community trademark) granted pursuant to supranational law, property rights only arise from national legislation. International IP agreements merely oblige national legislatures to respect certain minimum standards of protection in the interest of foreign right-holders, thereby limiting the autonomy and flexibility of national legislatures regarding national IP rights. Since the rules on exceptions and limitations are key for defining the scope of protection, these rules constitute an integral part of the legislation on IP rights as property. Traditionally, international IP agreements only take exceptions and limitations into account by authorizing states to limit the scope of protection in certain regards. However, the fact that states enjoy flexibility with regard to exceptions and limitations—without having any obligation to provide for such rules—merely proves that IP rights as property rights arise from national legislation. It was only more recently that international obligations to introduce maximum standards of protection (so-called “ceilings”) have been enacted under the Marrakesh Treaty on Visually Impaired People. Such binding ceilings constitute international IP law defining the international standard of IP protection.

B. Attaining Regulatory Goals through IP Legislation

The property paradigm cannot answer the question of how IP law, and hence, property rights, should be designed. Such an answer can only be given in light of the regulatory goals of IP law. Two considerations play a role in this regard. First, the very introduction of IP rights must be justified in light of the objectives of intellectual property protection. The U.S. Constitution clearly points this out by stating that Congress has the power “[t]o 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.” Under this provision, Congress’ legislative power seems to end where IP law no longer enhances, but rather, hampers innovation and creativity. Indeed, the assumption that more


18. This, however, does not answer the question of how much discretion Congress has in making such an assessment. On the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, the majority of the U.S. Supreme Court declined to accept the plaintiff’s argument that retroactive extension of the term of protection for protected works would not produce any positive incentives on authors to produce new works. See Eldred v. Ashcroft, 537 U.S. 186 (2003).
protection will lead to more innovation and creativity is not true. In particular, expanding protection may reduce dynamic competition by making it more difficult for competitors to enter the market, thereby decreasing the right-holders’ own incentives to invest in further research and development.

Second, the legislature should also take account of the costs of IP protection to society. IP protection may incentivize innovation and creativity, but these advantages may be outweighed by the exclusionary effects of such protection on consumers who can no longer afford to buy the respective products.

Also, the regulatory function of IP protection matters for the understanding of international IP law. The costs and benefits of IP protection are distributed very unequally across different countries. Patent protection may exercise more incentives for innovation in technologically advanced countries. In contrast, access costs are higher in poorer countries, which, for instance, cannot finance general healthcare and access to essential medicine. Therefore, the economic cost-benefit analysis of IP seems to argue in favor of promoting national trade-offs, and, hence, full flexibility of national legislatures to design their IP systems according to their needs.

Yet this analysis ignores the fact that markets in a globalized world become more integrated, and that goods implementing the subject-matter of protection can often easily be traded across borders. With full national autonomy comes the risk that some countries would implement sub-optimal IP legislation that allow to free-ride on the incentives for innovation arising from higher standards of protection in other countries. Hence, there is an argument for international standards of protection. However, there is no support for full harmonization of IP law. Such harmonization would only be appropriate in a fully integrated world

19. See Peritz, supra note 9, at 266 (arguing that simply as a matter of logic it is not possible to conclude that increasing means will increase the end).

20. The latter effect can also be produced by retroactive extension of the term of protection. See supra note 18 and accompanying text. Without expiry, right-holders could rely on continued protection of existing works and products and would be less likely to invest in the creation of new works and the development of new and better products. In this regard, expiry of the term of protection forms an integral part of the incentive structure for innovation of patent law. A pharmaceutical company that knows the patent for a blockbuster drug will soon expire will feel more incentive to invest heavily in research and development to maintain the firm’s profitability based on a portfolio of patented drugs conferring a sufficient degree of market power.


22. The so-called “property rights theory” of economics explains IP production as a trade-off. According to this theory, IP protection should be designed so as to maximize social welfare (economic efficiency), which requires taking into account the costs caused by the exclusionary effect of protection. See id.

23. See id at 18–19.

24. Id.

25. From the perspective of political economy, it cannot be assumed that full harmonization would meet the international trade-off. Even in multilateral negotiations the more-economically powerful states could manage to push through a level of protection above this trade-off. This problem is even more acute in the case of bilateral agreements, where developing countries find themselves in particularly weak bargaining positions. The law of powerful trading nations even prescribes that the national standard of IP protection should be
market. Such a market, however, does not exist; neither World Trade Organization law nor bilateral trade agreements establish such a market for IP-related products. In particular, these agreements do not provide for cross-border exhaustion of IP rights, and consequently, they still allow national laws to empower right-holders to prevent parallel imports. The situation is only different in systems of economic integration based on principles of internal exhaustion. This explains why, in the EU, both principles of exhaustion and harmonization of IP rights are applied. Since IP has become just one issue states agree upon in much broader trade agreements, there is even a risk that states will trade concessions in IP for benefits in other unrelated fields of trade. This should not be criticized in general; but it may be difficult for national decision-makers to assess the costs and benefits of such agreements. The inclusion of IP in more comprehensive trade agreements may lead to an expansion of the international standard of IP law that is not justified in light of the regulatory function of IP.

To conclude, it should be noted that the concept of IP as a form of regulation relies on IP as property to achieve its own regulatory objectives. The regulatory dimension of IP highlights the particular need to limit IP protection to attain a trade-off between incentives for innovation and creativity deriving from IP protection and the social costs of such protection. The property claim cannot justify a deviation from that trade-off. Even within the framework of international IP law, it remains the task of national IP law to define property rights. International law should only pursue some harmonization; namely, to prevent free-riding on the incentives for innovation and creativity arising from the law of countries with higher levels of protection.

implemented in international agreements. For instance, the U.S. Bipartisan Trade Promotion Authority Act of 2002 obligates U.S. negotiators to ensure that "the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law." Trade Act of 2002, H.R. 3009, 107th Cong., § 2102(a)(4)(A)(i)(II) (2002).

26. TRIPS safeguards the freedom of World Trade Organization Members to make autonomous decisions on the issue of exhaustion. See Josef Drexl, EU Competition Law and Parallel Trade in Pharmaceuticals: Lessons to be Learned for WTO/TRIPS?, in INTELLECTUAL PROPERTY AT THE CROSSROADS OF TRADE 3, 16–18 (Jan Rosén ed. 2012) (arguing against exhaustion as a principle of international trade law since it would weaken the policy of poorer countries that try to promote the interest of their citizens in accessing essential goods such as drugs).

27. Such concerns convinced the Max Planck Institute for Innovation and Competition to elaborate a set of principles on how decision-makers on the different levels of negotiating and implementing bilateral agreements should deal with demands for higher IP standards. See Josef Drexl et al., Principles for Intellectual Property Provisions in Bilateral and Regional Agreements, 44 INT’L REV. INTELL. PROP. & COMP. L. 878 (2013).
III. THE ANALOGY TO TANGIBLE PROPERTY

Proponents of the property claim for IP also seem to equate intellectual property with tangible property. According to them, IP infringements are a particular form of theft.28

Yet there are considerable differences between the theft of a tangible object and the infringement of IP. The use of another person’s copyright or patent does not prevent the right-holder from continuing her own use. Hence, “intellectual property theft,” for the most part, only affects the financial interests of the right-holder in drawing maximum profits from her property without the taking of the object of property that characterizes the theft of tangible objects.

What is more important for the purpose of our analysis, however, is the fact that even real property does not provide its owner unlimited protection. Historically this may have been different when the common-law tort of trespass provided protection against any unauthorized intrusion. Yet, already in the 19th century U.S., population growth and progressing industrialization necessitated balancing the interests of land owners with those of neighbors. For instance, land owners were obliged to tolerate certain forms of interference by their neighbors’ economic operations, such as a railway companies, whose interference increased social welfare.29

This shows that even limitations of real property have become an inherent feature of modern societies, enabling socially beneficial economic activities that would otherwise be prevented when markets get too congested with property rights. Indeed, the same problem arises in situations in which economic actors have to invest in markets that are highly congested with IP rights and where rights-clearing has thus become particularly difficult. For instance, the manufacturer of a smartphone for which the use of numerous patents is required, may easily become a victim of a patent hold-up once considerable investment has been made in the production of the smartphone.30

28. The concept of intellectual property theft seems to have taken hold in the public debate in the U.S., in particular, although theft is a concept alien to IP law. For instance, the term is officially used by U.S. police agencies. See FEDERAL BUREAU OF INVESTIGATION (FBI), Intellectual Property Theft—It’s an Age-old Crime: Stealing, FBI.GOV, http://www.fbi.gov/about-us/investigate/white_collar/ipr/ipr (last visited Nov. 18, 2015) (on file with The University of the Pacific Law Review). In addition, the term is extensively used by private initiatives that advocate vigorous enforcement of IP laws against infringements both nationally and internationally. See Christopher Burgess & Richard Power, How to Avoid Property Theft, CIO (July 10, 2006), http://www.cio.com/article/244546/security/0/how-to-avoid-intellectual-property-theft.html (on file with The University of the Pacific Law Review); see also COMM’N ON THE THEFT OF AM. INTELLECTUAL PROP., supra note 2.


30. See Mark A. Lemley & Carl Shapiro, Patent Hold-up and Royalty Stacking, 85 TEX. L. REV. 1992 (1991) (regarding the economics of the patent hold-up problem); see also infra Part V.C. (regarding the current development of the law on access to standard-essential patents in the EU).
This congestion phenomenon also translates into constitutional law. The property clauses of modern constitutions do not provide unlimited property protection. For instance, the CFR explicitly provides that the “use of property may be regulated by law in so far as is necessary for the general interest.”  

Beyond this, the 1946 Constitution of Bavaria even provides for an explicit fundamental right of access to another person’s land. Bavaria, a state in Germany’s south, is blessed with beautiful landscapes, including mountains. But it is also densely populated. To guarantee its citizens free enjoyment of the state’s natural beauty, Article 141(3) of the Bavarian Constitution provides as follows:

The enjoyment of natural beauty and recreation in the outdoors, in particular the access to forests and mountain meadows, the use of waterways and lakes and the appropriation of wild fruit to the extent customary in the respective region shall be permitted to every person.

This provision has its peculiarities. The addressees of this right to access are not limited to the state or other public bodies as owners of land. The right addresses any other—even private—person owning the respective land. This has a tremendous effect on the landscape and the accessibility of land in Bavaria. Tourists will not encounter any fences in the forests or mountains, except those needed to protect young plants or prevent cattle from going astray. This provision provides an example of a very specific “users’ right” that takes precedence over the property right of respective landowners. Again, the provision needs to be understood as a balance of competing interests in a landscape that is highly congested with private property rights.

This nostalgic but powerful provision of the Constitution of Bavaria not only proves that the rights of users can considerably restrict real property. This provision is also instructive for better understanding the case law that has recently emerged from the Court of Justice of the European Union (CJEU). There the Court relies on different provisions of the CFR in order to promote a balance of interest in intellectual property law. Before turning to the analysis of this case law, the jurisprudence of the European Court on Human Rights (ECHR) should also be taken into account, with regard to the application of the property provision of the system of the European Convention on Human Rights (ECHR) to intellectual property.

31. CFR, supra note 8, at art. 17(1).
32. CONSTITUTION OF THE FREE STATE OF BAVARIA, Dec. 2, 1946 (as amended Nov. 10, 2003), art. 141(3).
33. See id.
34. Infra Part V.
IV. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY

The European Convention on Human Rights (ECHR), which was concluded between the Member States of the Council of Europe in 1950, contains no express provision on intellectual property. But, the ECtHR has accepted, as a matter of principle, that intellectual property is protected by the general property provision of Article 1 of Protocol No. 1. The provision reads as follows:

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, however, shall not 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, to secure the payment of taxes, other contributions, or penalties.

The most important case on intellectual property concerns a conflict between trademark protection and the protection of geographic indications. In the underlying case, Portugal had rejected registration of Anheuser Busch’s “Budweiser” trademark, since such registration would have collided with pre-existing protection of a geographic indication (GI) for breweries located in the Czech city of Budweis (České Budějovice). Anheuser-Busch made a very far-reaching claim before the Court arguing that the rejection of the registration by the trademark office, which is required for the acquisition of the trademark, violated its property rights.

The Court followed Anheuser-Busch’s line of argument to a considerable extent, but Anheuser-Busch ultimately lost the case. The Court accepted that Article 1 of Protocol No. 1 protects not only registered intellectual property as such, but even the application to register an IP right. The Court justified this by the fact that the mere application conveys economic value; therefore, the Court did not require a justified expectation that the right would finally be granted. However, the Court found itself unable to consider rejection of the application as an interference with the peaceful enjoyment of possession. The Court confirmed

38. Id. at 57, 59.
39. Id. at 65.
40. Id. at 66–67.
41. Id.
that, by giving precedence to older GI protection, the Portuguese authorities and courts had only applied national law and international agreements.\textsuperscript{42}

In the light of fundamental rights, this judgment proves that foreign firms cannot claim IP protection against the national and international rules of IP legislation. Constitutional protection of IP as property requires recognition of the specific IP right by the legislature.

\section*{V. The EU Charter of Fundamental Rights and Intellectual Property}

Article 1 of Protocol No. 1 to the ECHR served as a template for the drafting of the property provision in Article 17(1) of the CFR. Yet, by adding a second paragraph stating that intellectual property is protected, the CFR explicitly recognized the application of the general property clause to IP.\textsuperscript{43} Therefore, there is no doubt that the \textit{Anheuser-Busch} judgment is also relevant to the application of the CFR.\textsuperscript{44} With Article 17(2), the CFR even seems to provide particularly strong protection to IP.\textsuperscript{45} Yet, in recent case law, the CJEU has also relied on the fundamental rights of users, alleged infringers, and even third parties, as provided by the CFR in order to bring more balance into European IP law.

\subsection*{A. The Procedural Context}

Regarding this more recent EU case law, it is important to understand its procedural context. While the ECHR acts as a supranational human-rights court that reviews the conformity of national laws, executive acts, and judgments with the fundamental rights contained in the ECHR, the CJEU has jurisdiction to interpret the full body of EU law. Consequently, the CJEU mostly decides cases referred to it by national courts concerning the interpretation of both primary and secondary EU law.\textsuperscript{46}

Most cases the CJEU decides nowadays relate to the interpretation of so-called directives that are, in principle, not directly applicable in the Member

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item CFR, supra note 12.
\item Note that the ECHR, as adopted within the framework of the Council of Europe, is not directly binding on the EU. On December 18, 2014, the CJEU found the draft agreement on the accession of the EU to the Convention incompatible with the EU Treaties, although Art. 6(2) of the Treaty on European Union (TEU) explicitly provides that the Union must accede to the Convention. \textit{See} Case 2/13, Opinion Pursuant to art. 218(11) TFEU, ECLI:EU:C:2014:2454 (Dec. 18, 2014). Yet the fundamental rights of the ECHR have traditionally been recognized as part of the “general principles” of EU law that are to be respected by EU institutions and the Member States when implementing and enforcing EU law. A reference to the ECHR was included in the EU Treaty, even before the adoption of the Lisbon Treaty in 2009, stating that the Union must respect human rights as guaranteed, \textit{inter alia}, by the ECHR as general principles of Community law.
\item See Drexl, supra note 1, for an early critique.
\item Primary EU law consists of the law of the Treaties concluded by the EU Member States establishing the EU; secondary EU law comprises the law adopted by the EU legislature based on the provisions of the Treaties.
\end{enumerate}
\end{footnotesize}
States, but need to be implemented in the Member States’ national law framework. The national courts are obligated to interpret national law in conformity with the relevant directives, which enables these courts to refer questions on the interpretation of directives to the CJEU. Secondary trademark legislation quickly produced a large body of case law of the CJEU, and more recently, a similar development has also occurred in the field of copyright law. The CJEU has mostly relied on the CFR as guidance for the interpretation of directives in the latter field of law.

Of course, national courts may also refer cases to the CJEU when they need to know whether national law complies with treaty provisions. In such a recent case, Advocate General (AG) Wathelet explicitly relied on the fundamental rights of the CFR of both the patent holder and the user of the patent to bring about a balance of interests of the parties involved. The central issue was whether the grant of injunctive relief for the infringement of a standard-essential patent under national patent law conforms to Article 102 of the Treaty on the Functioning of the European Union (TFEU)—the EU competition rule on abuse of market dominance.

B. Interpretation of Directives in Copyright Cases

As mentioned above, recent copyright cases have produced a series of judgments in which the CJEU relied upon the CFR to promote a better balance of interests. The nature of these cases varies quite considerably. So far, two major types of cases can be identified. First, in Deckmyn, the CJEU provided an interpretation of the parody exception to copyright protection under the Information Society Directive, thereby relying on the fundamental rights in the Charter to interpret a very vague term of secondary legislation. Second, the CJEU was asked several times to apply secondary EU law in cases where copyright

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48. See TFEU, supra note 47, at art. 267 (on the referral of questions for preliminary rulings by the CJEU concerning the interpretation of EU law). See, e.g., CRAIG & DE BÚRCA, supra note 47, at 287–96 (providing further details on this case law concerning the interpretation of national law in conformity with directives).

49. See infra Part V.B.


51. See the final judgment of the CJEU, Case C-170/13, Huawei Technologies Co. Ltd. v. ZTE Corp., ECLI:EU:C:2015:477 (July 16, 2015); infra Part V.C.

owners sued Internet access providers to stop their customers from infringing on copyrights. In these cases, the CJEU was confronted with the difficult task of applying overlapping directives that pursue conflicting objectives such as copyright protection on the one hand, and protection of personal data on the other hand.\(^5\) Reliance on the fundamental rights in the Charter in these cases enables the CJEU to coordinate the conflicting directives and to enhance a balance of interests of the parties concerned.

### 1. The European Parody Exception

In *Deckmyn*, a member of the Flemish right-wing party, Vlaams Belang, distributed calendars as a gift on New Year’s Day of 2011.\(^{54}\) The calendar cover showed a copy of a cartoon from the famous “Suske en Wiske” series by the Belgian cartoonist Willy Vandersteen.\(^{55}\) The principal figure on the drawing was replaced by the mayor of Ghent flying over a city street dispersing coins. Underneath this scene, the copier inserted people with dark skin, wearing traditional Muslim clothes, who were collecting the money.\(^{56}\) The Vandersteen heirs did not share the underlying political message, and therefore went to court to obtain injunctive relief based on alleged copyright infringement.

Article 5(3)(k) of the Information Society Directive lists parody as an optional limitation on copyright protection without giving any indications as to how the concept of parody should be interpreted.\(^{57}\) Although Member States are not obliged to introduce such an exception, the CJEU still held that the term “parody,” as an autonomous concept of EU law, needs to be interpreted uniformly throughout the EU.\(^{58}\) The argument was that otherwise implementation would vary greatly between the Member States that decide to implement the parody exception.

In response to the referring Belgian court, which had suggested rather restrictive requirements for the concept of a parody, the CJEU advocated a broad definition of parody. The Court only accepted the essential characteristics as part

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\(^{53}\) This was the first case of this kind, even dating from before the Lisbon Treaty entered into force was *Promusicae v. Telefónica de España*, where the referring Spanish court explicitly relied on the intellectual property clause of the Charter and the Court responded by highlighting the need to balance the protection of intellectual property with the protection of personal data and private life as guaranteed by arts. 7 and 8 of the Charter. Case C-275/06, Promusicae v. Telefónica de España, 2008 E.C.R. I-271.

\(^{54}\) *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132.

\(^{55}\) In the U.S., the comics are known as “Willy and Wanda”, and in the UK, as “Spike and Suzy.” *Id.* at ¶ 2.


\(^{58}\) *Id.* at ¶ 16.
of a literal understanding of parody; namely, “first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery.” In contrast, the Court rejected any further requirements, including the need for parody to “display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work,” to be reasonably attributed to a person other than the author of the original work, and to mention the source of the parodied work.

Such a broad understanding of parody was not self-evident. In particular, as a general principle of interpretation, the Court seemed to confirm a principle of strict interpretation of exceptions to the copyright owner’s rights under the Information Society Directive. But “strict interpretation” was countered by the other guiding principle of guaranteeing the “effectiveness of the exception” in light of its objectives. In this regard, the Court recognized parody as “an appropriate way to express an opinion” and, hence, the need to reach a “fair balance” between the copyright owner’s property interest and the user’s freedom of expression.

Yet the Court did not explicitly rely on the provisions of the CFR, although copyright ownership is protected under Article 17(2) and the freedom of expression under Article 11(1) CFR. This can be explained by the fact that the rights of the parties weighed by the Court were also referred to in the recitals to the Directive.

Against the broad understanding of the parody concept, one would expect that the Court would give precedence to the person relying on the exception. Still, the Court gave the judgment another twist by also taking into account the right of non-discrimination based on grounds of race, color, or ethnic origin in Article 21(1) CFR. This seems astonishing in many regards. First, the persons who could invoke this right were not parties to the dispute. Second, the Court appeared to be taking sides in the political debate on immigration, whereas respect of freedom of expression should argue for political neutrality of the Court. And third, the Court seemed to be imposing a uniform understanding on how far the law should intervene in the control of political opinions, although attitudes among the Member States vary considerably in this regard.

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59. Id. at ¶ 20.
60. Id. at ¶ 21 (referring court had asked whether such additional characteristics are required for parody).
61. Id. at ¶ 22.
62. Id. at ¶ 23.
63. Id. at ¶ 25.
64. Id. at ¶¶ 26–27.
65. Id. at ¶ 25.
These counter-arguments however overlook an important aspect of the Court’s reasoning that brings the judgment back onto firmer grounds of copyright law: the Court relied upon Article 21(1) of the CFR to argue a “legitimate interest [of the author of the work] in ensuring that the work protected by copyright is not associated with such a message.” 68 Hence, the Court did not impose any opinion on the person relying on the parody exception. Rather, it aimed to protect the work against assimilation with a political opinion that the author of the work would not have supported. It is important to remember that the plaintiffs did not pursue any monetary interest, but rather, they sought a permanent injunction against the use of the work. Accordingly, beyond interpreting the parody concept, the Deckmyn judgment has to be considered a case on moral-rights protection under EU copyright law. 69 Of course, others could argue that the Court simply aimed at promoting the public interest in fighting discrimination, and was not recognizing moral rights. 70 Indeed, the judgment cannot be read as defining the scope of moral rights protection in the EU for all future cases. Still, the Court recognized the protection of moral rights in the framework of balancing the interests of the copyright holder with those of the alleged infringer who tried to rely on the parody exception. 71 With regard to the Charter’s right against discrimination, the judgment only shows that a right-holder has better chances of prevailing against the parody exception when the right-holder can rely on the general values of EU law and the rights of third persons, as enshrined in the Charter. The Deckmyn judgment also proves that reliance on the Charter does not help only the user or alleged infringer. It may go either way, especially if the rights of third parties enter the picture. Ultimately, the judgment did not provide much guidance to the referring court, since the CJEU left it to the referring court to decide whether the parody exception applied in the underlying case. 72 In addition, the CJEU’s criteria remain rather contradictory and, therefore, fail to provide clear guidance for national courts. On one hand, it seems that the broadly defined parody exception is fulfilled. But on the other hand, the Court seems to give particular weight to the legitimacy of the right-holder’s moral interest in preventing the use of the work.

68. Id. at ¶ 31.
69. This is also highlighted in Eleonora Rosati, Just a Laughing Matter? Why the Decision in Deckmyn is Broader than Parody, 52 COMMON MKT. L. REV. 511 (2015).
71. This is not a new development. Moral rights have been recognized in principle by the Court as part of the specific subject matter of protection of copyright law. See Case C-92/92, Phil Collins v. Imtrat Handelsgesellschaft, 1993 E.C.R. I-5145, at ¶ 20.
Copyright Liability of Internet Access Providers

For the purposes of this article, the most interesting cases so far concern the availability of injunctions against Internet access providers according to Article 8(3) of the Information Society Directive. This provision obliges Member States to ensure that right-holders “are in a position to apply for an injunction” against such intermediaries “whose services are used by a third party to infringe a copyright or related right.” The very wording of this provision hints at the need to balance the interests of different persons. On one hand, there is an obvious need for interpretation, since the provision does not specify the conditions for the availability of such injunctions. On the other hand, it is also clear that there have to be limits on the duties of access providers, who merely provide a service that others use for copyright infringements. And finally, even the rights of the direct infringers come into the picture with regard to their interest in protecting their private data.

Additionally, Article 8(3) of the Information Society Directive needs to be coordinated with other directives, namely, the Data Protection Directive of 1995, the Directive on Privacy and Electronic Communications, and the Electronic Commerce Directive. The latter excludes a general obligation of access providers to monitor the information they transmit, but still obligates Member States to allow for rapid adoption of measures to terminate or prevent infringements. Finally, the Enforcement Directive, which provides for the availability of effective, yet proportionate, measures and remedies for the protection of intellectual property also needs to be taken into account.

To date, the CJEU has decided three major cases regarding the availability of injunctive relief against Internet service providers: Promusicae, Scarlet Extended, and UPC Telekabel.

77. Id. at art. 15(1).
78. Id. at art. 18(1).
Promusicae related to a case where the access provider was asked to provide the names of alleged infringers. For such a claim the Court recognized that national courts are obligated to balance copyright protection with the protection of personal data of even alleged infringers, pursuant to Article 8 of the CFR, and according to the principle of proportionality.

In Scarlet Extended, the Court went a step further and also relied on the fundamental right of the access provider to conduct its business as guaranteed by Article 16 of the CFR. Indeed, in the case before the national court, the plaintiff sought an order against the access provider to install a filtering system to identify users of peer-to-peer file-sharing software, which would have been particularly burdensome and costly for the access provider, and was not limited in scope of time. Consequently, the CJEU held that the order sought by the plaintiff did not strike a “fair balance” between the protection of intellectual property and the freedom to conduct a business. The Court only cited the rights of the users of such software with regard to the protection of their personal data and their freedom to information (Articles 8 and 11 of the Charter) as an additional argument for rejecting the order. With regard to the latter rights, the Court stressed that the order would also prevent customers of the access provider from lawfully communicating over the Internet.

At first glance, the judgment in UPC Telekabel seems to conflict with Scarlet Extended. Although the CJEU still relied on the access provider’s freedom to conduct a business, it held that the national court has to engage in a weighing of interests that should result in an order against the access provider. The Court stressed that the injunction “must be sufficiently effective to ensure genuine protection” to intellectual property as a fundamental right. However, it would go too far to interpret this judgment as a departure from Scarlet Extended, since the Court still emphasized the need to achieve a “fair balance” between the rights of both the access provider and its customers. Moreover, the facts in UPC Telekabel differ from those in Scarlet Extended. In UPC Telekabel, the direct infringer was a clear copyright pirate operating a website for the mere purpose of illegally making available copyrighted movies to the public, whereas the order in

85. Id. at ¶24
86. Id. at ¶¶ 47–49.
87. Id. at ¶¶ 50–52.
88. Id. at ¶ 52.
90. Id. at ¶¶ 47, 63.
Scarlet Extended was designed to prevent many private users of file-sharing software from infringing copyright law. These users were also using the Internet for lawful purposes. Hence, in UPC Telekabel, the direct infringer specifically used the Internet for copyright infringements and the order sought against the access provider was targeted at this direct infringer, and was limited in time and, hence, it was less burdensome.

In sum, when faced with deciding the liability of Internet access providers, courts are confronted with overlapping and largely conflicting directives that fail to provide any guidance on how to coordinate their application. By relying on the fundamental rights of the CFR, the CJEU is able to cut the Gordian knot and to provide a solution that achieves a fair balance of the interests of all parties affected by claims for injunctive relief against access providers.

C. IP and Competition Law: The Case of Standard-Essential Patents

The Court’s reliance on the CFR for achieving a better balance of interests does not have to be limited to copyright cases or to the interpretation of secondary law. With regard to patent law, a need to balance the rights of patent owners with the interests of the users may arise when the latter invoke competition law provisions of primary EU law to gain access to the use of patents.

In cases regarding Internet access providers, the Court has relied on Article 16’s guarantee of freedom to conduct a business to justify a limitation to intellectual property where the person relying on this freedom was not the direct user of an IP right. Whether even a potential user can invoke the right to conduct a business, with the important effect of restricting the exclusivity of the IP right, may still be a very different question.

The CJEU was requested to decide on such a case in Huawei. The case concerned the availability of injunctive relief to the owner of a standard-essential patent who has committed to license at fair, reasonable, and non-discriminatory (FRAND) terms. For the technological standard in question—the fourth generation mobile phone (Long Term Evolution, LTE) standard—several patent owners hold numerous standard-essential patents. Consequently, individual owners of such patents could try to extract excessive royalty rates by claiming

92. See supra Part V.B.2.
93. Note, however, that the user’s fundamental rights were considered in the Deckmyn judgment, but in the form of freedom of expression. See Case C-201/13, Deckmyn v. Vandersteen, ECLI:EU:C:2014:2132, ¶¶ 27 (Sept. 3, 2014) (supporting a broad interpretation of the parody exception of EU copyright law); see also Voorhoof, supra note 82, at 346–47.
94. Case C-170/13, Huawei Technologies Co. Ltd. v. ZTE, Corp. (July 16, 2015).
injunctive relief against firms that have implemented the standard, although the latter are willing to negotiate FRAND-compliant royalty rates.96

In his opinion of November 20, 2014, AG Wathelet showed a good understanding of the economic foundations of the case.97 This did not prevent him from starting by identifying the fundamental rights of both the patent owner and the petitioner for a license against the backdrop of their fundamental rights guaranteed by the Charter in order to strike a balance between national patent law and EU competition law, on which the petitioner for the license relied as a defense.98 With regard to the rights of the petitioner for the patent, AG Wathelet found protection in the right to conduct a business under Article 16 CFR and concluded that the claim for injunctive relief would significantly restrict that freedom and distort competition.99

Ultimately, AG Wathelet advocated a solution that would enhance quick and effective implementation of technological standards, both in the interest of the potential users, and the general public.100

In its judgment of July 16, 2015, the Court accepts AG Wathelet’s solution for designing the duties that need to be fulfilled by the patent owner before bringing an action for injunctive relief as well as by the user to avoid such an action.101 Yet, in contrast to the Advocate General, the Court only stated the need to balance the principle of free competition with the fundamental rights of the patent owner—the intellectual property right under the right to effective judicial protection, guaranteed by Article 17(2) and Article 47 CFR.102 The judgment does not include any indication why the Court did not mention the user’s fundamental right to conduct a business. Hence, for the time being, AG Wathelet’s recognition of fundamental rights protection for a patent user who invokes competition law as a defense against an IP infringement claim still needs to be confirmed by the Court.

D. Summary of the Case Law

The analysis of the case law shows that the Charter’s fundamental rights can guide the interpretation of European IP law. The Court engages in a balancing approach by taking into account the guarantee of protection of intellectual

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96. On the underlying economic problem of patent hold-up and royalty stacking see Lemley & Shapiro, supra note 30.
98. Id. at ¶ 59.
99. Id.
100. Id. The approach of AG Wathelet is quite similar to that more recently taken by the U.S. Federal Circuit Court, which applied the so-called eBay rule of the Supreme Court to deny injunctive relief to limit the exclusivity of the standard-essential patent. See Apple Inc. v. Motorola, Inc., 757 F. 3d 1286 (Fed. Cir. 2014).
102. Id. at ¶ 42.
property pursuant to Article 16(2) of the CFR, as well as the fundamental rights of users, potential infringers, and third parties in order to achieve a fair balance of interests.

More concretely, two sets of cases can be distinguished so far: First, the CJEU uses the CFR to interpret vague terms of secondary IP legislation in the context of exceptions and limitations. Second, the Court balances the fundamental rights to create cohesion where different instruments of EU law pursuing conflicting objectives overlap. The fundamental-rights approach helps to coordinate IP protection with data protection and—at least according to AG Wathelet—competition law, in particular.

Recognition of the right to conduct a business is a major step forward. It has the potential to allow for universal application of the fundamental-rights approach. The CJEU initially recognized such a right as a countervailing right in favor of Internet service providers. In Huawei, AG Wathelet followed that reasoning also for commercial users of the IP right. Unfortunately, the Court refrained from citing the user’s right to conduct a business as a relevant balancing factor in its judgment.

Through this case law, the CJEU is emerging as a most active court. The Court is indeed reconstructing IP regulation by putting itself in kind of a pre-regulatory situation. The CJEU is developing European IP law in cases where vague legal provisions create room for interpretation and conflicting legal rules need coordination. Thereby, the CJEU enhances a fair balance of interests in IP law.

VI. CONCLUSION FOR INTERNATIONAL IP LAW

With regard to international IP law, the conclusion is rather depressing. The analysis of the emerging constitutional approach to structuring IP law in the EU lays open considerable defects of international IP law.

Above all, international law only creates incomplete IP law. International IP law is still based on the principle of minimum protection. While, in the past, this principle only created some multilateral minimum harmonization, the substantive rules, as enshrined in the interests of right-holders in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and more recent bilateral trade agreements, go much further and tend to export high standards of protection to emerging economies and developing countries. Consequently international IP law remains incomplete because it does not sufficiently take account of the need to balance the IP owner’s rights with appropriate exceptions and limitations. Although most IP treaties account for the need to adopt exceptions and limitations, such agreements usually only authorize states to implement such rules in the interest of the users of IP rights as part of their national legislation. These flexibilities—for instance, those in the multilateral TRIPS Agreement—can be negotiated away by bilateral agreements.
What can be done? International law should move from mere flexibilities regarding exceptions and limitations to mandatory ceilings. Although limited in scope, a first step in this direction has been taken in the Marrakesh Treaty on Visually Impaired People. This treaty still needs to enter into force, and it is unknown whether the World Intellectual Property Organization will manage to produce other agreements of a similar kind.

For the time being, multilateral IP agreements, and even less so IP provisions in bilateral trade agreements, are insufficient to establish a veritable international law of intellectual property. Intellectual property as property is still a matter of protection under national and supranational law. In view of its regulatory objectives, such property is in clear need of confinement. International IP rules do not provide for such confinement. On the contrary, they limit the flexibility of states to pursue their own policies in defining the scope of intellectual property protection.

Furthermore, a few recommendations can be formulated for the development of international law against the backdrop of the analysis of EU law, although it is also clear that it will be difficult to overcome the political resistance of right-holders.

In general, there is a need to promote all legal disciplines that help integrate rules that allow for a better balance of interests, especially on the international level. First, international dispute-settlement bodies, such as the World Trade Organization panels and World Trade Organization Appellate Body, in particular, should acknowledge the existence of conflicting interests when facing complaints concerning intellectual property. Also, in several of its provisions, TRIPS provides scope for an interpretation in light of the conflicting policy goals. Dispute-settlement bodies should also take account of, or be inspired by, existing agreements between the parties to the disputes that pursue the protection of such conflicting interests.

With regard to IP agreements, it is very important that states maintain their flexibilities in designing their own property systems. The current system does not provide sufficient safeguards to prevent them from negotiating away these flexibilities in bilateral agreements. Hence, agreements that provide for flexibilities should also implement rules limiting the contracting parties to give up such flexibilities in agreements with other countries. And finally, introduction of mandatory ceilings, especially as regards exceptions and limitations to IP law, should also be considered.

103. See supra note 16 and accompanying text.