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MATERIAL INTERESTS IN INTELLECTUAL PROPERTY RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

INTERESELE PATRIMONIALE ÎN DREPTURILE DE PROPRIETATE INTELECTUALĂ ÎN SISTEMUL CONVENȚIEI EUROPENE A DREPTURILOR OMULUI

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Section I.1.1.4.
he global and post-global period in Intellectual Property protection. Global and European developments

Subsection I.1.1.4.1.
Global developments

After the conclusion of the two Conventions, and despite the large number of adjacent international agreements that were signed, the harmonization of IP protection did not take place in an accelerated manner, especially given the political contexts of the pre-, inter-, and post-World War periods. After 1945, the international multilateral perspective was consecrated in the Bretton Woods organizations (the IMF and World Bank), the UN, the Marshall Plan aid, the 1947 conclusion of the General Agreement on Tariffs and Trade (GATT). Intellectual property law had firmly entered its global and post-global phase with the conclusion of the Marrakesh Agreement, establishing the World Trade Organization and adopting the TRPIS agreement[1].

This had the immediate consequence of including IPRs into the WTO system, making TRIPS-level IP protection mandatory for all of its 164 Member States. TRIPS' preamble explicitly states that "*intellectual property rights are private rights*"[2], however also recognizes that there are explicit "*underlying public policy objectives*"[3] for implementing national IPR protection systems, but throughout the Agreement, a clear expansion of ownership rights exists. For European countries (especially EU Member States) and for the U.S.A., the standards imposed by TRIPS are familiar, and were not as a profound shift in IPR protection as they were for developing countries eager to join the WTO agreement[4].

The TRIPS agreement generally incorporates other intellectual property conventions by reference and makes their standards binding for WTO-member states. This entails a smaller discretion afforded to states as far as IP protection is concerned and has been hailed as deeply concerning from a human rights

[1] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

[2] TRIPS preamble, par. 4.

[3] *Ibid*, par. 5.

[4] May and Sell, *op. cit.,* 163.

perspective[1]. Moreover, by including IPRs in the international trade mechanisms, the two most important general principles from this area will be applicable in such matters: national and most-favoured-nation treatment (TRIPS Articles 3 and 4). Most recently, TRIPS was amended in January 2017 in order to provide a legal basis for WTO members to grant special compulsory licences for the production and export of affordable generic medicines to other members.

The crux of the international IP protection system has resided, since 1970, with the WIPO. As mentioned, the secretariats of the Paris and Berne Conventions were merged in 1893, under the name of BIRPI. The idea of further yet transforming BIRPI came at a 1962 meeting of the Permanent Bureau of the Paris Union and of the Berne Union, especially given the ongoing decolonization process[2]. A second meeting of the Permanent Bureau took place in 1966, and at a diplomatic conference in Stockholm, the 1967 Convention Establishing the World Intellectual Property Organization was approved.

To conclude this incursion into the global history of IPRs, we see that intellectual property rights evolved from being unrecognized (or, at least, unrecognizable from today's shape) in the earliest parts of human history, to germinations of IPR protection that were indistinguishable from monopolies and private grants (which were eminently subjective and often depended on the good-will of the sovereign), to a various array of national laws, each justified according to the political, economic and technologic interests over time. IPRs then entered their international phase, in which the two pillars of international IPR protection were concluded, namely the Paris and Berne Conventions, still in force today. Later still, the global (and perhaps post-global) phase was characterized by the 1994 TRIPS Agreement and regional developments, most notably for the purpose of this work, in the European Union.

Subsection I.1.1.4.2.
European developments

After World War II, patent development in Europe was taken to a deeper level than on the international stage. The EPC came into force in 1978, after being signed in 1973, and it contains a harmonized patent system for its member states,

[1] Laurence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011), 52.

[2] Dutfield and Suthersanen, *op. cit.*, 29.

whereby a successful applicant to the European Patent Office is granted a national patent for each member state the applicant applied for.

The EPC is not a part of the EU system, although all EU Member States are parties to the EPC, and currently has a total of 38 member states. The EU has attempted to replace national patents with a single European patent since 1975, when the Community Patent Convention was signed in Luxembourg, but this Convention never came into force. Eventually, all EU Member States except for Croatia and Spain decided on a version of enhanced cooperation which will lead to the creation of unitary patent protection in those countries, and the creation of a single European Patent Court[1], however the Agreement hasn't entered into force yet. Several other EU initiatives relate to pharmaceutical inventions, inventions related to plant protection products, biotechnological inventions, their protection terms[2].

As regards trademarks, the EU has harmonized Member States' national laws through a series of Directives, the most recent being Directive 2015/2436 [3], and created a EU trademark system, currently codified in EU Council Regulation 207/2009[4]. The EU trademark system is currently operated by the European Union Intellectual Property Office (previously the Office for the Harmonization of the Internal Market), based in Alicante, Spain. Moreover, the EU also joined the Madrid system for the international registration of marks in 2004.

The same arrangement was put into place for industrial designs, albeit after more difficult negotiations: national law harmonization through Directive 98/71/EC[5], the creation of a single EU design created by Council Regulation 6/2002[6], and the joining of the Hague Agreement Concerning the International Deposit of Industrial Designs in 2008.

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[1] See Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection OJ L 361, 31.12.2012, p. 1–8

[2] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (Seventh edition, Oxford University Press 2013), 38.

[3] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336, 23.12.2015, p. 1–26

[4] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark OJ L 154, 16.6.2017, p. 1–99

[5] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, p. 28–35

[6] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24

The EU's action as regards copyright has been marred with significant difficulties and controversies. Certain facets have been addressed directly, such as databases[1], computer programs[2], rental and lending rights[3], resale rights[4], and yet other copyright related issues can be found in other EU legislation acts, such as the E-commerce Directive[5]. However, the most controversial EU law provisions on copyright are surely the so-called InfoSoc Directive of 2001[6] and the Directive on copyright and related rights in the Digital Single Market[7]. The latter has especially been criticized[8] by the entire spectrum of stakeholders, including from a Human Rights perspective, and its provisions will be analysed below in the appropriate sections. One can see that the EU approached copyright from both a vertical (pertaining to only certain aspects) and horizontal approach[9], and what it lacks in comprehensiveness it certainly makes up with broadness, which allowed the EU to join the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty in 2010.

[1] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996

[2] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16–22

[3] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28–35

[4] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28–35

[5] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19

[7] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125

[8] See, for example, João Quintais, "The New Copyright in the Digital Single Market Directive: A Critical Look" [2019] SSRN Electronic Journal, found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770, last checked by the author 21 April 2023.

[9] Torremans, *Holyoak and Torremans intellectual property law*, *cit. supra,* 40.

Moreover, an Intellectual Property Enforcement Directive[1] was adopted in 2004, with the intention to streamline enforcement mechanisms in each Member State's national legislation, with successful transposition[2].

Conclusions to Subchapter I.1.1.

To conclude, a historic analysis of IP protection systems shows that, as IPRs have grown in importance, so has the breadth of legal protection. Section I.1.1.1 showed how central questions adjacent to IPRs had already existed before their appearance and proliferation. Authorship, attribution, plagiarism, and intellectual theft were already extant issues at the time. Medieval society, as it existed at the time, was not conductive to the apparition of IPRs for two main reasons: firstly, from a social perspective, most of human knowledge was kept in a system specific to monastic churches. Secondly, there was no economic incentive to create IPRs at the time, since broad dissemination of knowledge and the industrial exploitation of ideas were still out of touch of the material conditions existent at the time.

Section I.1.1.2. traced IP's evolution from the invention of the printing press in the 1440s. As a cultural and economic powerhouse in 15th Century Europe, Venice was uniquely placed for incipient IPRs to appear it is cited as the first city which granted some shape of legal protection to inventors (which had to be useful, could be used by the city with immunity and were limited in time – traits similar to modern-day patents) and certain individuals were granted privileges to print books in Venice. The Venice moment in the history of IPR development shows that the flourishing of incipient IPRs could not have existed without the right socioeconomic conditions and that their apparition was not intimately tied to a "*romantic view*" of authorship, but rather to more pragmatic reasons.

In 16th Century England, the Stationers Company already had a monopoly on printing and publishing – a fact which shows that what we call copyright today has always been intimately tied with questions of freedom of expression and state censorship and its beginnings can hardly be considered a way to guarantee said freedom. Concurrently, similar grant systems (precursors of today's patents)

[1] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45–86

[2] See, generally, Flip Petillion (ed), *Enforcement of Intellectual Property Rights in the EU Member States:* (1st edn, Intersentia 2019).

were granted in Continental Europe as well. By the 17th Century, a different view on authorship had arisen, with authors such as Milton signing detailed contracts with their publishers. This change of perspective will be further highlighted in the subsequent analysis which will be made on the philosophical underpinnings of Intellectual Property Rights. In the 18th Century, IPR statutes had become more detailed, such as the 1710 Statute of Anne, which had a different focus point from preceding statutes – the accent was moved from censorship to trade-regulation. While encouraging the writing of new books by offering a term of protection for a number of years, it also provided sanctions for counterfeiting books which were registered. The Statute of Anne and the subsequent litigation existing in its wake heavily influenced the first American IPR statutes, culminating with Article 1, Section 1, Clause 8 of the United States Constitution, which heavily underlines the social role of intellectual property rights in the "*progress of science and useful arts*".

Finally, after passionate disputes, the post-revolutionary French IP laws settled on a robust duration of protection for authors, but under their obligation to register their work and under the understanding that, after the expiry of the protection, said work would pass into the public domain. Both the American and French view on patents also moved from the state-granted reward towards the more modern patent system in which the inventor is free to exploit his invention under certain conditions, for a limited time.

Subsection I.1.1.3. dealt with the international period in Intellectual Property protection, which coincided with the signing of the 1883 Paris Convention and the 1886 Berne Convention and the birth of their respective unions – later the United International Bureaux for the Protection of Intellectual Property. Their introduction of the principles of non-discrimination and their streamlining of the international recognition of IPRs marked a turning point in the international harmonization of IPR protection. Certainly, the two Conventions, as subsequently amended, do not amount to a substantial harmonization of IP provisions, but their utilitarian approach again shows that a main concern in international IPR protection at the time (and, one argues, today) is solving the free-riding problem, thereby preventing situations in which authors and inventors would be discouraged in their endeavours by the lack of protection in other countries. The Berne Convention's provisions which require Contracting States to ensure at least 50 years of copyright protection after the author's death is provided as a minimum and states have shown their propensity to ensure longer terms of protection. Moreover, the Convention priority right provided for by Article 4 of

the Paris Convention is regarded as a major breakthrough for applicants: by using the first filing date in one of the Contracting States as an effective filing date for another state in certain conditions, they can ensure international exploitation of industrial property, given the appropriate resources.

Finally, Subsection I.1.1.4. dealt with some subsequent developments in IP protection after the onset of the international systems put in place by the Paris and Berne Conventions. The TRIPS system has ensured a greater harmonization as regards international IPR protection: protecting computer programs as literary works under copyright law; extending patent protection to a minimum of 20 years counting from the filing date (TRIPS Art. 33). Notably, the TRIPS agreement incorporates the copyright provisions of the Berne Convention, with the exception of moral rights (TRIPS Art.9 that is, without Article 6*bis* of the Berne Convention). Moreover, this section highlighted the important number of IPR protection norms adopted at a regional European level: the EPC and the EU-system specifically.

Currently, a Member State of the Council of Europe that also is a member of the European Union applies at least three levels of IP protection: international agreements, such as TRIPS and the Paris and Berne Conventions, subsequent international agreements, regional protection systems, whether EU-related or not, and national legislation, which has been heavily harmonized in certain areas by EU norms[1]. If the ECHR is to be applied in an IP context, and the ECtHR's case law undoubtedly points to this conclusion, the Court must take into account not only this reality, but the convergent evolution of IPRs which led to it.

Furthermore, even this cursory analysis of the history of IPRs shows that, while issues of natural law, justness and concern with individual's rights have been of concern, they have never been singular in their justification of IPRs and their level of protection. On the contrary, no legal history of IPRs, no teleological interpretation of IPRs and indeed no human-rights-centred analysis of IPRs can exist without acknowledgment of the political and economic aspects of IP protection[2] – the fact that perhaps the most comprehensive international IP harmonization treaty, TRIPS, was concluded without harmonizing author's moral rights stands testament to this fact.

To conclude, we have shown that the history of IPR development has been intrinsically tied to the economic realities which have imposed their necessities.

[1] Torremans, *Holyoak and Torremans intellectual property law*, *cit. supra,* 41.

[2] May and Sell, *op. cit.,* 204.

While some preoccupation with the moral interests in IPRs has existed on a normative level, its importance is much diminished when compared with the preoccupation for the protection of material interests in IPRs. From a historic perspective, at least, protecting IPRs as property is a natural consequence of the realities outlined above. Moreover, while the historic trajectories of IPL and HRL are markedly different, it is safe to say that at this moment they are tangential, if not necessarily concurrent. A deeper analysis is necessary, in order to better understand the extraconventional justifications put forth for IP protection. This is the object of the following subchapter, which will further detail whether the philosophical and economic foundations that have been offered as justifications for the existence of IPRs are compatible with these findings.

Subchapter I.1.2.
A property-centred paradigm of Intellectual Property Rights as Human Rights. Philosophical and economic foundations of Intellectual Property Protection

Introduction to Subchapter I.1.2.

IPRs have been highly scrutinized given their important character, especially from an economic perspective[1], and there have been many justifications put forward for their existence. By a justification for intellectual property, one shouldn't imagine a theoretical model that proves correct (or just) every aspect of an IP regime, since such a justificatory model is likely to be impossible to devise[2]. To the contrary, given the diversity of IPRs themselves, and the multitude of aspects an IP regime has to address, it's likely that the existing law in the Council of Europe's Member States supports several theories of justification. Why then address them?

[1] See, for example, Joseph E Stiglitz, "Economic Foundations of Intellectual Property Rights" (2008) 57 Duke Law Journal, 1693; Rod Falvey and others, "Intellectual Property Rights and Economic Growth" (2006) 10 Review of Development Economics, 700.

[2] Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Georgetown Law Journal 287, 289.