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Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights

Christophe Geiger

Elena Izyumenko

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SHAPING INTELLECTUAL PROPERTY RIGHTS THROUGH HUMAN RIGHTS ADJUDICATION: THE EXAMPLE OF THE EUROPEAN COURT OF HUMAN RIGHTS*

Christophe Geiger and Elena Izyumenko **

ABSTRACT

In Europe, important developments such as the entering into force of the Treaty of Lisbon—which placed the Charter of Fundamental Rights of the European Union at the very top of the hierarchy of norms—and the direct applicability by national courts of the European Convention on Human Rights (ECHR) in private law disputes have been highly influential for the rise in human rights reasoning by courts deciding intellectual property (IP) issues. The envisaged E.U. accession to the ECHR is likely to increase this process further.

This article reflects on these developments by studying the role of the European Court of Human Rights (ECtHR or Strasbourg Court) in shaping European intellectual property standards. It presents an updated and modified version of the chapter entitled “Intellectual Property Before the European Court of Human Rights,” published by the authors in 2018, and provides the first comprehensive overview of ECtHR case law on IP from the court’s inception in January 1959 until today, March 2020. The article results from an analysis of more than ninety such cases, many of which have never been discussed before in the literature. Certain issues that are currently pending before the Strasbourg Court are also given exposure.

The article spans subjects from the protection of the rights of IP holders under the property provision of the ECHR to the possibility of restricting such protection on the basis of the right to freedom of expression and information often invoked by the users of IP-protected content. It also analyzes the situations in which freedom of expression was invoked by the (actual or potential) IP holders themselves in order, for instance, to insure

*This article is an extended and updated version of an earlier work published by the authors that appeared as Christophe Geiger & Elena Izyumenko, *Intellectual Property Before the European Court of Human Rights*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 9 (Christophe Geiger et al. eds., 2018).

**Christophe Geiger is a Professor of Law and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg (Strasbourg, France); Affiliated Senior Researcher at the Max Planck Institute for Innovation and Competition (Munich, Germany); and Spangenberg Fellow in Law & Technology at the Spangenberg Center for Law, Technology & the Arts at the Case Western Reserve University School of Law (Cleveland, US). Elena Izyumenko is a Researcher at the CEIPI at the University of Strasbourg (Strasbourg, France).

that their trademark applications are registered. The potential of the right to privacy to serve both as a defense against certain IP enforcement measures—such as search orders—and as a basis for the protection of moral rights of creators is likewise discussed. The article further reviews the most prominent IP disputes which raised questions under the right to non-discrimination and the right to a fair trial.

This comprehensive overview of the case law of the ECtHR shows the emergence of a human rights framework for the intellectual property system in Europe, which—in combination with the increasing use of fundamental rights by national courts to solve private-party disputes—is gaining coherence and relevance in framing the conception and use of IP law.

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I. INTRODUCTION

The ECtHR is a supranational European tribunal setting the standards of human rights (HRs) protection in Europe. All states that are members to the Council of Europe¹ are signatories of the European Convention on Human Rights (ECHR)² and, as a result, have to comply with the decisions of this court.³ In this sense, the ECtHR is comparable to the U.S. Supreme Court ruling on issues of federal law that apply to both the United States as a whole and to the fifty states individually. Unlike the U.S. Supreme Court, however, the ECtHR is a specialized human rights court, expressly concerned with Member States’ compliance with the rights set in the ECHR, rights such as freedom of expression, right to property, privacy, and fair trial. Human rights, as a branch of international law, are

¹ The Council of Europe is an international organization of forty-seven members whose purpose is to protect human rights, democracy, and the rule of law in Europe.

² European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, E.T.S. No. 5.

³ As of March 2020, Council of Europe counts forty-seven members.

much more influential in Europe than in the United States, which reluctantly accepts legal standards set outside of its own Congress or courts.⁴ Nevertheless, in the United States, the rights analogous to those found in the ECHR are often granted through the U.S. Constitution. For instance, Article 10 of the ECHR, which deals with freedom of expression, is comparable with the First Amendment of the U.S. Constitution. Similarly, Article 6 of the ECHR, guaranteeing fair trials, is consistent with the Due Process Clauses found in the Fifth and Fourteenth Amendments to the U.S. Constitution.

Human (or constitutional) rights and intellectual property have been and continue to be thought of as independent areas of the law that hardly interoperate, despite much literature detailing their numerous interactions over the past couple of decades.⁵ More recently, however, discussions on the impact of intellectual property law on human and constitutional rights (and vice versa) have spilled over into academic textbooks and articles. Notably, both legislators and courts have started to pay attention to the many facets of the interplay between human rights and IP—a phenomenon that has sometimes been characterized as the “constitutionalization” of the IP legal system.⁶

⁴ The United States, for example, has never proceeded with ratification of the American Convention on Human Rights—an American analogue of the ECHR. Another principal instrument of the international human rights protection, the International Covenant on Civil and Political Rights (ICCPR), albeit ratified by the United States in 1992, has faced so many reservations, understandings, and declarations that some have doubted its remaining ability to have any impact domestically. *See, e.g., Teaching Eleanor Roosevelt Glossary: Covenant on Civil and Political Rights*, ELEANOR ROOSEVELT PAPERS PROJECT, <https://www2.gwu.edu/~erpapers/teachinger/glossary/cov-civilpol-rights.cfm> [<https://perma.cc/GD8T-8ZXH>] (last visited Feb. 14, 2020).

⁵ *See, e.g.,* LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011); Daniel J. Gervais, *Human Rights and the Philosophical Foundations of Intellectual Property*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY* 89 (Christophe Geiger ed., 2015); Tuomas Mylly, *Intellectual Property and Fundamental Rights: Do They Interoperate?*, in *INTELLECTUAL PROPERTY BEYOND RIGHTS* 197 (Niklas Bruun ed., 2005); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 *GA. ST. U.L. REV.* 709 (2007); Christophe Geiger, “Constitutionalizing” *Intellectual Property Law?* *The Influence of Fundamental Rights on Intellectual Property in Europe*, 37 *INT’L REV. INTELL. PROP. & COMPETITION L.* 371 (2006) [hereinafter Geiger, “Constitutionalizing” *Intellectual Property Law?*]; Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property—An Update*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (Paul Torremans ed., 4th ed. forthcoming 2020) [hereinafter Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*]; Estelle Derclaye, *Intellectual Property Rights and Human Rights: Coinciding and Cooperating*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 133 (Paul Torremans ed., 2d ed. 2008).

⁶ For further discussion, *see* Geiger, “Constitutionalizing” *Intellectual Property Law?*, *supra* note 5; Mylly, *supra* note 5, at 103; Jens Schovsbo, *Constitutional Foundations and*

In the United States, the Supreme Court has rendered important decisions assessing compliance of the Copyright Term Extension Act and the subsequent Act restoring copyright protection to certain works that have already lapsed into the public domain under the First Amendment to the U.S. Constitution.⁷ Lately, certain trademark registration restrictions, contained in the Lanham Act, have even been found incompatible with the First Amendment.⁸ On a more fundamental level, the standards of intellectual property protection in the United States have frequently been assessed against the public interest goal set in the Intellectual Property Clause of the U.S. Constitution, Article I, Section 8, Clause 8, which famously states that “securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries” should be conditioned on the “promot[ion] [of] the Progress of Science and useful Arts”.⁹

In the European Union, important developments, such as the entering into force of the Treaty of Lisbon,¹⁰ placed human rights and

Constitutionalization of IP Law—A Tale of Different Stories?, 7 ZEITSCHRIFT FÜR GEISTIGES EIGENTUM INTELL. PROP. J. 383 (2015); Christophe Geiger & Elena Izyumenko, *The Constitutionalization of Intellectual Property Law in the E.U. and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. 282 (2020).

⁷ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003); see also *Golan v. Holder*, 565 U.S. 302 (2012).

⁸ See *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (invalidating, on First Amendment grounds, the Lanham Act's restrictions on the registration of the so-called “disparaging” and “immoral” or “scandalous” trademarks).

⁹ See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (“We have often recognized the monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and *must ultimately serve the public good.*”) (emphasis added); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to *advance public welfare* through the talents of authors and inventors in ‘Science and useful Arts.’”) (emphasis added); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, Marshall, Powell, & Rehnquist, JJ., dissenting) (recognizing that there are situations in which strict enforcement of copyright monopolies “would inhibit the very ‘Progress of Science and useful Arts’ that copyright is intended to promote”); *United States v. Line Material Co.*, 333 U.S. 287, 316 (1948) (Douglas, J., concurring) (“It is to be noted . . . that the reward to inventors is wholly secondary, the aim and purpose of patent statutes being limited by the Constitution to the promotion of the progress of science and useful arts.”); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942) (“The patentee, like these other holders of an exclusive privilege granted in furtherance of a public policy [trademark and copyright holders], may not claim protection of his grant by the courts where it is being used to subvert that policy.”).

¹⁰ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306/01).

fundamental freedoms at the very top of the hierarchy of norms.¹¹ Since then, there has been a considerable rise in the use of human rights arguments in decisions on matters of intellectual property law in the Court of Justice of the European Union (CJEU or Luxembourg Court).¹²

¹¹ On the consequences for intellectual property, see Christophe Geiger, *Intellectual “Property” After the Treaty of Lisbon: Towards a Different Approach in the New European Legal Order?*, 32 EUR. INTEL. PROP. REV. 255 (2010); Christophe Geiger, *The Construction of Intellectual Property in the European Union: Searching for Coherence*, in 1 CONSTRUCTING EUROPEAN INTELLECTUAL PROPERTY: ACHIEVEMENTS AND NEW PERSPECTIVES 5 (Christophe Geiger ed., 2013).

¹² In the field of copyright and related rights, see: Case C-469/17, Funke Medien NRW GmbH v. Bundesrepublik Deutschland (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=203686>; Case C-476/17, Pelham GmbH v. Hütter (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216552&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1950544>; Case C-516/17, Spiegel Online GmbH v. Beck (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1951971>; Case C-161/17, Land Nordrhein-Westfalen v. Renckhoff (Aug. 7, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=204738&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1952679>; Case C-484/14, McFadden v. Sony Music Entm’t Germany GmbH (Sept. 15, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1953592>; Case C-160/15, GS Media BV v. Sanoma Media Netherlands BV (Sept. 8, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1954218>; Case C-201/13, Deckmyn v. Vandersteen (Sept. 3, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157281&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1955429>; Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH (Mar. 27, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1955995>; Case C-360/10, SABAM v. Netlog (Feb. 16, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1956594>; Case C-277/10, Luksan v. Petrus van der Let (Feb. 9, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119322&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1957212>; Case C-145/10, Painer v. Standard Verlags GmbH, 2011 E.C.R. I-12533; Case C-70/10, Scarlet Extended v. SABAM, 2011 E.C.R. I-11959; Case C-275/06, Promusicae v. Telefónica de España SAU, 2008 E.C.R. I-00271.

In the field of trademarks, see: Case C-240/18 P, Constantin Film Produktion GmbH v. European Union Intellectual Property Office [EUIPO] (Feb. 27, 2020), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=223843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2550080>; Case C-580/13, Coty Germany GmbH v. Stadtparkasse Magdeburg (July 16, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165900&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1974194>; Case T-587/13, Schwerdt v. OHIM - Iberamigo (cat&clean) (Jan. 21, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161548&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1975061>; Case T-106/12, Cytochroma Development, Inc. v. OHIM (July 3, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139072&pageIndex=>

In addition, an accession of the E.U. to the ECtHR is envisaged,¹³ making ECtHR case law highly relevant for the E.U. This is important since the ECtHR has a longer tradition of applying human rights to intellectual property.¹⁴ As a result, European judges have already started to actively rely

0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1975452; Case T-542/10, XXXLutz Marken v. OHIM, (June 13, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=123788&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1980694>; Case T-526/09, PAKI Logistics GmbH v. OHIM, 2011 E.C.R. II-00346; Case T-232/10, Couture Tech Ltd. v. OHIM, 2011 E.C.R. II-06469.

In the field of patents, see: Case C-170/13, Huawei Technologies Co. v. ZTE Corp. (July 16, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1983272>; Case C-147/13, Spain v. Council of the European Union (May 5, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164093&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1984326>; Case C-34/10, Brüstle v. Greenpeace eV, 2011 E.C.R. I-09821; Case C-127/00, Hässle AB v. Ratiopharm GmbH, 2003 E.C.R. I-14781; Case C-377/98, Netherlands v. Parliament and Council, 2001 E.C.R. I-07079.

For an overview of CJEU case law touching on the intersection of fundamental rights and intellectual property, see Geiger, “*Constitutionalising Intellectual Property Law?*,” *supra* note 5; Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*, *supra* note 5, at 115; Mylly, *supra* note 5, at 103; Jonathan Griffiths, *Taking Power Tools to the Acquis—The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 144 (Christophe Geiger et al. eds., 2018); Stijan van Deursen & Thom Snijders, *The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework*, 49 *INT’L REV. INTEL. PROP. & COMPETITION L.* 1080 (2018).

¹³ See Treaty on European Union art. 6(2), Feb. 7, 1992 as amended by Treaty of Lisbon art. 1(8), Dec. 13, 2007, 2007 O.J. (C306); European Convention on Human Rights (ECHR) art. 59(2), Nov. 4, 1950, as amended by Article 17 of Protocol No. 14 to the ECHR. Although the CJEU rejected the latest draft agreement of the E.U. accession to the ECHR (Opinion 2/13 of Dec. 18, 2014, EU:C:2014:2454), this only delayed the accession, which remains binding on the E.U.

¹⁴ To give only a few examples of the amplitude of the phenomenon, the ECtHR has tested the grant of a compulsory license for a patented drug for its compliance with the Convention’s property provision in *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 44 *Eur. Comm’n H.R. Dec. & Rep* 70 (1990), <http://hudoc.echr.coe.int/eng?i=001-738>. The court assessed the proportionality of the requirement to pay damages for a short news broadcast of copyrighted works with regards to a television channel’s right to freely communicate information in *Société Nationale de Programmes FRANCE 2 v. France*, App. No. 30262/96 (*Eur. Comm’n on H.R. Jan. 15, 1997*) (available only in French), <http://hudoc.echr.coe.int/eng?i=001-28411>. And finally, the court considered whether an unauthorized reproduction of the portrait and name of an ancestor in a brewery’s trademark was sufficient to cause distress by encroaching on the private and family life in *ECtHR, Vorsina v. Russia* (dec.), no. 66801/01, Feb. 5, 2004, CE:ECHR:2004:0205DEC006680101.

The ECtHR has also examined the circumstances under which a non-authorized posting of the copyright-protected materials online can be shielded by the “infringers” right to communicate information (and by the corresponding right of the public to receive it) in *ECtHR, Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908 (available only in French) and *ECtHR, Kolmisoppi v.*

on the case law of the ECtHR when deciding intellectual property cases,¹⁵ and this tendency can only be expected to increase.

This article reflects on these important developments through an examination of the ECtHR's role in shaping European intellectual property standards. Surprisingly, most of the decisions rendered by the ECtHR have received relatively little comment, with the exception of a handful of cases.¹⁶

Sweden (*The Pirate Bay*) (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712.

In the procedural context of the right to a fair trial, a violation of a reasoned judicial decision was established by the ECtHR in the national court's failure to address the applicant's argument relating to her trademark's priority in ECtHR, *Balani v. Spain*, no. 18064/91, Dec. 9, 1994, CE:ECHR:1994:1209JUD001806491, whereas, the proceedings decisive for the registration of the applicant's design that lasted almost four years amounted to a violation of a reasonable time requirement in view of the total duration of protection of five years, counted from the date of filing an application in *Denev v. Sweden*, App. No. 25419/94 (Eur. Comm'n on H.R. Jan. 14, 1998), <http://hudoc.echr.coe.int/eng?i=001-46116>.

For a comprehensive overview of the intellectual property decisions of the ECtHR, see Christophe Geiger & Elena Izyumenko, *Intellectual Property Before the European Court of Human Rights*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 9 (Christophe Geiger et al. eds., 2018).

¹⁵ See, e.g., *Ashdown v. Telegraph Group Ltd.*, Cours d'appel [CA] [regional court of appeal] July 18, 2001, [2001] EWCA Civ. 1142 (Fr.); *Hugo v. Plon SA*, Cour de cassation [Cass.] [supreme court of judicial matters] 1e civ., Jan. 30, 2007, Bull. civ. I, No. 04-15.543 (Fr.), https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_98_50.html; *Metall auf Metall*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 2016, 1 BvR 1585/13, DE:BVerfG:2016:rs20160531.1bvr158513 (Ger.); *Peter Klasen v. Alix Malka*, Cour de cassation [Cass.] [supreme court of judicial matters] 1e civ., May 15, 2015, Bull. civ. I, No. 13-27391 (Fr.), <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030600576>; *Bauret v. Koons*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Mar. 9, 2017, No. 15-01086 (Fr.); *Brussels Commercial Court, Moët Hennessy Champagne Servs v. BVBA Cedric Art, Rechtbanken van Koophandel [Kh.]* [commerce tribunal] Brussels, Apr. 12, 2018, No. A/17/02627, <https://static1.squarespace.com/static/578b3fa715d5db22cadfadd3/t/5b360b61575d1f7d68e23004/1530268520602/damnp+perignon.pdf>.

¹⁶ Those concern, principally, a few cases on the protection of IP under the human right to property (in particular, ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901) and a number of decisions on the intersection of copyright protection with freedom of expression (notably, *Société Nationale de Programmes FRANCE 2 v. France*, App. No. 30262/96 (Eur. Comm'n on H.R. Jan. 15, 1997), <http://hudoc.echr.coe.int/eng?i=001-28411> (available only in French); ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908 (available only in French); and ECtHR, *Kolmisoppi v. Sweden (The Pirate Bay)* (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712). For comments on some of those cases, see, e.g., Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008) [hereinafter Helfer, *The New Innovation Frontier?*]; Bernd Hugenholtz, *Copyright and Freedom of Expression in Europe*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 343 (Rochelle Dreyfuss,

The lack of attention is partially due to the fact that the court delivers some of its decisions, including in the sphere of IP, only in French. Despite the relative lack of doctrinal attention, the ECtHR's concern regarding the conformity of IP standards with Europe's catalogue of human rights and fundamental freedoms continues to grow.¹⁷ An increased involvement of the ECtHR in IP regulation has already influenced both national judges¹⁸ and another supranational European tribunal, the Court of Justice of the E.U. (CJEU),¹⁹ which calls for closer scrutiny of the Strasbourg Court's approach to resolving IP disputes. Indeed, the case law of the Strasbourg Court provides important guidance on how the conflicts pertaining to the IP-human rights intersection can be adjudicated by the lower courts.

et al. eds. 2001); Bogdan Dragos, *Intellectual Property in the Case-Law of the European Court of Human Rights*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE CKS-CERDOCT DOCTORAL SCHOOLS, CHALLENGES OF THE KNOWLEDGE SOCIETY, BUCHAREST 93 (2011); Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 INT'L REV. INTELL. PROP. & COMPETITION L. 316 (2014); Dirk Voorhoof, *Freedom of Expression and the Right to Information: Implications for Copyright*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 331 (Christophe Geiger ed., 2015).

¹⁷ See Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*, *supra* note 5, at 115; see also Christophe Geiger, *Copyright's Fundamental Rights Dimension at EU Level*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 27 (Estelle Derclaye ed., 2009).

¹⁸ See, e.g., Metall auf Metall, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 2016, 1 BvR 1585/13, DE:BVerfG:2016:rs20160531.1bvr158513 (Ger.); Klases v. Malka, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., May 15, 2015, Bull. Civ. I, No. 13-27391 (Fr.), <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030600576>; HR april 3, 2015, NJ 2015/183, m.nt. BB (GS Media BV/Sanoma Media Netherlands BV) (Neth.), paras. 5.2.5-5.2.6, <https://e-justice.europa.eu/ecli/NL001/nl/ECLI:NL:HR:2015:841.html?index=0&ascending=false&lang=en>; England and Wales High Court (Chancery Division), Rocknroll v. News Group Newspapers Ltd., [2013] EWHC (Ch) 24 [42] (Eng.); GHDHA Amsterdam 4 mei 2011, KG ZA 11-294 2011 389526 (Plesner/Louis Vuitton Malletier SA) (Neth.), paras. 4.2-4.3.

¹⁹ See, e.g., Case C-469/17, Funke Medien NRW GmbH v. Bundesrepublik Deutschland, para. 74 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=203686>; Case C-516/17, Spiegel Online GmbH v. Beck, para. 58 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1951971>; Case C-280/15, Nikolajeva v. Multi Protect OÜ, para. 43 (June 22, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=180686&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2285791>; Case T-106/12, Cytochroma Development, Inc. v. OHIM, para. 46 (July 3, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139072&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1975452>.

This article provides the first attempt to give a comprehensive overview of the ECtHR case law on IP.²⁰ It starts with the right to a property framework for intellectual property and the protection it affords to the economic interests of IP holders (Part II). The article then proceeds to the instances of alleged interference of IP protection with other rights guaranteed by the Convention. This includes, first and foremost, the right to freedom of expression and information, frequently invoked by the user community as a counterweight to certain over-expansionist tendencies in IP protection (Part III). It will be demonstrated, however, that freedom of expression can serve as a basis not only for the claims of the so-called “infringers,” but also for those of the (actual or potential) IP holders themselves. The most salient examples are freedom of expression claims of trademark applicants regarding the restrictions on the registration of trademarks that are considered immoral, offensive, or otherwise against public order. Part IV, subsequently, focuses on the rarer examples of IP interaction with the right to privacy and is mainly reduced to questions of exercising remedies for IP infringement and certain, largely theoretical, arguments supporting the protection of moral rights under the scope of privacy rights. Furthermore, the right to non-discrimination—which gave rise to disputes involving restrictions imposed on some types of business by national broadcasting and copyright legislation and disputes concerning the different nature of patent appeal proceedings—merits a separate examination in Part V. A range of procedural guarantees, such as the right of access to courts, finality of court decisions, the tribunal’s independence and impartiality, reasonable duration of proceedings, and many others that had been considered by the ECtHR in IP proceedings, are analyzed in the last Part of the article (Part VI). Lastly, this article ends with some concluding observations.

II. THE HUMAN RIGHT TO PROPERTY AS A BASIS FOR THE

²⁰ Those (not many) doctrinal sources devoted to the ECtHR’s jurisprudence on IP matters often concentrate on a specific Convention right of relevance for IP protection, such as the right to property, see Helfer, *The New Innovation Frontier?*, *supra* note 16, or the right to freedom of expression and information, see Hugenholtz, *supra* note 16. Other sources, even when examining several Convention provisions of relevance for IP, do not cover them all, providing an analysis only from the perspective of IP owners (and not users), see Dragos, *supra* note 16; David S. Welkowitz, *Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles*, 46 AKRON L. REV. 675 (2013), or concentrating on the impact of Convention rights on a particular jurisdiction, see Timothy Pinto, *The Influence of the European Convention on Human Rights in Intellectual Property Rights*, 24 EUR. INTEL. PROP. REV. 209, 217 (2002).

PROTECTION OF ECONOMIC INTERESTS OF IP HOLDERS

As mentioned already, in the United States, intellectual property is subject to the “Progress of Science and Useful Arts” clause of Article 1, Section 8, Clause 8 of the U.S. Constitution. In this sense, the U.S. Constitution’s approach to intellectual property is similar to that taken in the international instruments for human rights protection such as the Universal Declaration of Human Rights (UDHR)²¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²² Notably, both Article 27 of the UDHR and Article 15(1) of the ICESCR place intellectual property protection within the context of the freedom of the arts and sciences.²³

Neither the Progress of Science and useful Arts clause of the U.S. Constitution nor Article 27 of the UDHR and Article 15(1) of the ICESCR explicitly mention the right to property, arguably making other means of protection equally conceivable.²⁴ By contrast, the European system of human rights protection unequivocally subjects intellectual property to the *property* regime. The E.U. Charter of Fundamental Rights,²⁵ for instance, explicitly places intellectual property within the general provision on the

²¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3.

²³ For further analysis of these provisions, see, e.g., ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 110 (2007); Caterina Sganga, *Right to Culture and Copyright: Participation and Access*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 560; Lea Shaver and Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT’L L.J. 637 (2010). Additionally, see the two consecutive reports by Farida Shaheed (the U.N. Special Rapporteur in the field of cultural rights) on intellectual property policies and the right to science and culture, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) and U.N. Doc. A/70/279 (Aug. 4, 2015). For an examination of domestic and international approaches to constitutional protection of intellectual property via its inclusion within, for example, the general right to property, freedom of the arts and sciences, or even freedom of expression, see Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 661.

²⁴ See U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She Is the Author, para. 10, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006); see also Christophe Geiger, *Fundamental Rights as Common Principles of European (and International) Intellectual Property Law*, in COMMON PRINCIPLES OF EUROPEAN INTELLECTUAL PROPERTY LAW 223, 227 (Ansgar Ohly ed., 2012).

²⁵ Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391-407.

right to property in Article 17 of the Charter.²⁶ Although the ECHR makes no mention of IP, the ECtHR and its former Commission of Human Rights²⁷ have been gradually attaching different IP rights to the ECHR's property provision in Article 1 of Protocol No. 1.²⁸ Moreover, not only was the acquired intellectual property title deemed protected but so were the applications for its registration.²⁹ An overview of the Convention case law on the right to property makes it possible to distinguish three categories of cases: IP disputes originating from a direct state action (Section II.A); IP disputes between private parties that can still be attributed to the state by virtue of the Convention's horizontal effect (Section II.B); and claims against international organizations, notably, the European Patent Office (EPO) (Section II.C).³⁰

A. Negative Aspect: Direct State Interference with the Exercise of IP

²⁶ On the IP clause of the E.U. Charter, see Christophe Geiger, *Intellectual Property Shall Be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope*, 31 EUR. INTELL. PROP. REV. 113 (2009); Geiger, *Intellectual "Property" After the Treaty of Lisbon*, *supra* note 11.

²⁷ The European Commission of Human Rights (Eur. Comm'n H.R.) was the ECHR body abolished in 1998 and had been, until then, entrusted with decisions on the admissibility of applications to the Strasbourg Court. See Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 1994 E.T.S. 155.

²⁸ In the field of patent law, see: *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 44 Eur. Comm'n H.R. Dec. & Rep. 70 (1990), <http://hudoc.echr.coe.int/eng?i=001-738>; *Lenzing AG v. United Kingdom*, App. No. 38817/97, 94-B Eur. Comm'n H.R. Dec. & Rep. 136, 145, para. 2 (1998), <http://hudoc.echr.coe.int/eng?i=001-4408>.

In the field of copyright, see: *A.D. v. Netherlands*, App. No. 21962/93, para. 3 (Eur. Comm'n on H.R. Jan. 11, 1994), <http://hudoc.echr.coe.int/eng?i=001-2600>; *Aral v. Turkey*, App. No. 24563/94, para. 4 (Eur. Comm'n on H.R. Jan. 14, 1998), <http://hudoc.echr.coe.int/eng?i=001-4064>; ECtHR, *Dima v. Romania* (dec.), no. 58472/00, May 26, 2005, CE:ECHR:2005:0526DEC005847200 (available only in French); ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, July 5, 2005, CE:ECHR:2005:0705DEC002874303, para. 3; ECtHR, *Bălan v. Moldova*, no. 19247/03, Jan. 29, 2008, CE:ECHR:2008:0129JUD001924703, para. 34; ECtHR, *SC Editura Orizonturi SRL v. Romania*, no. 15872/03, May 13, 2008, CE:ECHR:2008:0513JUD001587203 (available only in French), para. 70; ECtHR, *SIA AKKA/LAA v. Latvia*, no. 562/05, July 12, 2016, CE:ECHR:2016:0712JUD000056205, para. 41.

In the field of trademarks, see: ECtHR, *Anheuser-Busch, Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901, para. 72; ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05, 21770/05, Sept. 18, 2007, CE:ECHR:2007:0918DEC002537904, para. 1.

²⁹ ECtHR, *Anheuser-Busch, Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901, para. 78.

³⁰ For an excellent analysis of the ECHR's law on the right to property in its application to intellectual property, see Helfer, *The New Innovation Frontier?!*, *supra* note 16.

Rights

The first category of property-as-a-basis-for-IP cases is the most “traditional” insofar as this category pertains to allegations of interference with the applicants’ intellectual property rights *directly* attributable to states (the only parties accountable under the Convention). In the IP context, the following types of disputes originating in a direct state action were brought to the attention of Convention organs: non-recognition of (Section II.A.1) or refusal to restore the applicant’s IP entitlement (Section II.A.2) and a more specific issue pertaining to compulsory licensing (Section II.A.3).

1. Non-Recognition of an Applicant’s IP Entitlement

The first type of dispute resulting from a direct state action—non-recognition of the applicant’s IP entitlement under the domestic legal system—was considered at length for the first time in 2005 in the case of *Dima v. Romania*.³¹ The applicant in that case was a graphic designer who had worked in the studio of Plastic Arts of the Romanian Defense Ministry. After the fall of the communist regime in December 1989, Romanian authorities decided to adopt a new state emblem, and a public competition was launched. The design project prepared by the applicant was chosen over many other submissions, and the applicant was appointed to work with two other experts in history and heraldry on the model of a new emblem. Approved by the Romanian Parliament, the design proposed by the applicant was ratified by the Law on the State Emblem and Seal and published in the Official Journal of Romania. The applicant’s name appeared in that journal, bearing the mention “graphic designer.” For an unspecified reason, the applicant had never, however, been remunerated for his work.

Seeking to obtain compensation and to assert copyright in his design, the applicant brought several lawsuits against the companies that had reproduced and distributed the state emblem and seal—namely, the two private companies and one state enterprise responsible for the minting of Romanian coins. The applicant’s claims were, nevertheless, rejected in all instances on the grounds that copyright in the design subsisted in the Romanian Parliament who had commissioned the work and that, in any event, the state emblem and seal could not be subject to copyright. The trial and appellate courts relied on the new Copyright Law of 1996, which, unlike the law in force at the time of the design’s creation, explicitly excluded state symbols from copyrightable subject matter. The applicant appealed to the

³¹ ECtHR, *Dima v. Romania* (dec.), no. 58472/00, May 26, 2005, CE:ECHR:2005:0526DEC005847200 (available only in French). For an assessment of this case, see Helfer, *The New Innovation Frontier?*, *supra* note 16, at 14–18; Dragos, *supra* note 16, at 96, 100–01.

Romanian Supreme Court of Justice on points of law, challenging the retroactive application of the 1996 Law to his situation. The Romanian Supreme Court dismissed the appeal, essentially basing its argument—unlike the lower courts—on the 1956 Decree on Copyright that was in force at the time the models were designed by the applicant. It reasoned that, even in the absence of explicit exclusion of state symbols from copyrightable subject matter, the 1956 Decree did not provide that the state emblem and seal could be copyrighted because the Decree used the positive enumeration technique in defining the scope of protection.

The applicant contested the Romanian Supreme Court's finding before the ECtHR. Relying on Article 1 of Protocol No. 1 (protection of property) to the Convention, he complained that the domestic courts' interpretation of national copyright laws deprived him of his copyright in the design of the state emblem and seal and from the income he could have obtained by exploiting his work as an author. He maintained that his copyright arose from the moment he created the design or, at the latest, from the moment he was mentioned as an author in the Official Journal of Romania. He further asserted that even in the event of a qualifying contract, this would not prevent the creation of a work and copyright ownership.

The Strasbourg Court first stated that intellectual property was covered by Article 1 of Protocol No. 1 to the Convention and, therefore, found it appropriate to examine whether the applicant had, in this respect, "possession" or at least a "legitimate expectation" of acquiring "possession."³² Concerning the latter point, the Strasbourg Court, nonetheless, abstained from interfering with the domestic courts' reasoning and declared the applicant's complaint inadmissible *ratione materiae*—that is, due to the applicant's failure to prove that the right claimed by him was recognized, at least arguably, under Romanian law.³³ The Strasbourg Court noted that it was for the national courts to determine the disputes on the existence or scope of copyright, stressing in particular that at no point in the domestic proceedings did those courts find in favor of the applicant.³⁴ Nor was there any favorable case law allowing the applicant to prove that it was possible to acquire copyright in the designs of the state emblem and seal.³⁵ Moreover, the Romanian Supreme Court's interpretation of national copyright laws excluded that possibility. It, therefore, followed that the applicant did not have "possession" or at least a "legitimate expectation" of acquiring "possession" in terms of the Convention.³⁶ In particular, no

³² ECtHR, *Dima v. Romania* (dec.), no. 58472/00, May 26, 2005, CE:ECHR:2005:0526 DEC005847200 (available only in French).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

“legitimate expectation” could be said to arise where there was a dispute as to the correct interpretation and application of domestic law, and the applicant’s submissions were subsequently rejected by the national courts.³⁷ In this light, with regard to the limited power of the Strasbourg Court to review alleged errors of fact or law committed by the national courts, the court found that Romanian Supreme Court’s decision in the applicant’s case did not appear arbitrary.³⁸

However, in a similar dispute three years later, the Strasbourg Court reached an opposite conclusion. The case at issue, *Bălan v. Moldova*,³⁹ concerned the refusal of Moldovan courts to compensate the applicant for unauthorized use of a photograph by the Ministry of Internal Affairs as a background for national identity cards. Unlike *Dima*, in *Bălan*, the applicant’s authorship was acknowledged by the domestic courts that also awarded him some compensation.⁴⁰ Yet, the applicant’s request for a contract for future use of the photograph and the claim for compensation for the continued unlawful use of it were, after a series of court decisions, rejected by the country’s supreme court.⁴¹ The Moldovan Supreme Court reasoned that the applicant had failed to request the prohibition of any further use and that identity cards, as official documents, could not be subject to copyright.⁴²

The Strasbourg Court, to which the case was referred thereafter, found that the refusal of the domestic courts to award the applicant compensation following the breach of his copyright amounted to a violation of Article 1 of Protocol No. 1 to the ECHR.⁴³ First, the Strasbourg Court took note of the fact that the applicant’s rights in the photograph had been recognized by the domestic courts in a final judgment and, therefore, constituted a “possession” within the meaning of the ECHR’s property provision.⁴⁴ As to the supreme court’s argument that identity cards could not be subject to copyright, the Strasbourg Court pointed to the distinction in the relevant national law between the authors’ rights with respect to their works and the property rights over the material object in which their creation

³⁷ *Id.*

³⁸ *Id.*

³⁹ ECtHR, *Bălan v. Moldova*, no. 19247/03, Jan. 29, 2008, CE:ECHR:2008:0129JUD001924703. For a discussion of this case, see HELFER & AUSTIN, *supra* note 5, at 212-13; Dragos, *supra* note 16, at 105; Henning Grosse Ruse-Khan, *Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 70, 80-82, 87.

⁴⁰ ECtHR, *Bălan v. Moldova*, no. 19247/03, para. 48.

⁴¹ *Id.* paras. 15-16.

⁴² *Id.* para. 17.

⁴³ *Id.* para. 46.

⁴⁴ *Id.* paras. 34-36.

was embodied.⁴⁵ Since the Moldovan Supreme Court only referred to identity cards, and not to the photograph taken by the applicant, its finding that identity cards could not be subject to copyright had no bearing on the applicant's copyright as applied to his photograph.⁴⁶

Insofar as it concerned the applicant's failure to ask the courts to prohibit the use of his work, the Strasbourg Court believed that the impugned use of the photograph, even in the absence of the applicant's petition, posed an interference with his right.⁴⁷ This was because the illegal character of the unauthorized use was not conditioned in law by any particular act of the copyright owner, "such as the request for a court injunction against such use."⁴⁸ Finally, on the subject of proportionality, the Court concluded that the applicant's interest in the protection of his copyright outweighed the community interest in issuing identity cards, as the latter aim could have been reached in a variety of ways not involving the breach of the applicant's IP rights.⁴⁹

An additional case concerning the non-recognition of an applicant's IP entitlement has recently come up before the Strasbourg Court; this time in the context of trademark protection. The case of *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.Ş. v. Turkey*, decided in April 2019,⁵⁰ concerned a Turkish media company. In 1999, a company affiliated with the applicant began publishing a newspaper, *Özlenen Gazete Vatan*, after having registered the name as a trademark.⁵¹ However, soon after, it closed for financial reasons. In 2002, another company, *Bağımsız Gazetecilik Yayincilik A.Ş.*, began publishing a newspaper called *Vatan*, which is what prompted the affiliated company to initiate the trademark infringement proceedings. The trademark was later transferred to the applicant company and thus it became a party to the proceedings.⁵²

The first-instance court rejected the applicant's trademark protection claim, arguing that the newspaper *Vatan* had been published since 1975 and had become well-known prior to the applicant company's application for its registration as a trademark.⁵³ The court further relied on

⁴⁵ *Id.* para. 35.

⁴⁶ *Id.*

⁴⁷ *Id.* paras. 38–40.

⁴⁸ *Id.* para. 38.

⁴⁹ *Id.* para. 45. Note that a similar type of claim on the alleged violation by public authorities of the applicant's copyright on the design drawings for the National Bank's commemorative coins is currently pending before the Strasbourg Court. ECtHR, *AsDAC v. Republic of Moldova*, no. 47384/07, communicated on Jan. 17, 2013.

⁵⁰ ECtHR, *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.Ş. v. Turkey*, no. 19965/06, Apr. 16, 2019, CE:ECHR:2019:0416JUD001996506.

⁵¹ *Id.* paras. 5–6.

⁵² *Id.* paras. 9–10.

⁵³ *Id.* para. 12.

section 31(2) of the Turkish Patent Institute Act, which came into force during the proceedings in November 2003.⁵⁴ According to that law, publishers of periodicals could not be prevented from publishing on the basis of trademark protection. The judgment was upheld on appeal.⁵⁵ Separately, the Turkish Constitutional Court, in 2008, annulled section 31(2) of the Patent Institute Act, finding that it did not conform to the property rights guaranteed by the Turkish Constitution.⁵⁶

Before the Strasbourg Court, relying on Article 1 of Protocol No. 1 (protection of property), the applicant company complained of an unlawful restriction on the use of its trademark because of the retroactive application of section 31(2) of the Turkish Patent Institute Act, which had protected the other party in the dispute.⁵⁷ The Strasbourg Court held that the applicant company had had possession within the meaning of the Convention and not just a legitimate expectation of obtaining a property right.⁵⁸ There had also been an interference with that possession due to the application of section 31(2) of the Turkish Patent Institute Act.⁵⁹ In addition, the subsequent annulment of this provision by the Turkish Constitutional Court rendered the protection of trademarks meaningless, was not in the public interest, and violated the applicant's right to property.⁶⁰ The Turkish government failed to make any arguments supporting the existence of a legitimate aim for the piece of legislation in question.⁶¹ Nor could it put forward any justification on general interest grounds for the way the legal dispute between the companies had been settled by the retroactive application of the law.⁶² Accordingly, the government could not prove that the interference with the applicant company's property rights had served a public interest. As a result, there was a violation of Article 1 of Protocol No. 1 (protection of property) to the Convention.⁶³

2. Refusal to Restore an IP Title

The state's refusal to restore a previously recognized IP title, as a second instance of direct state action, was at stake in the case of *University of Illinois Foundation v. Netherlands*.⁶⁴

⁵⁴ *Id.*

⁵⁵ *Id.* paras. 13–15.

⁵⁶ *Id.* para. 17.

⁵⁷ *Id.* para. 13.

⁵⁸ *Id.* paras. 37–38.

⁵⁹ *Id.* para. 42.

⁶⁰ *Id.* para. 48.

⁶¹ *Id.* para. 50.

⁶² *Id.*

⁶³ *Id.* paras. 51–52.

⁶⁴ *Univ. of Ill. Found. v. Netherlands*, App. No. 12048/86 (Eur. Comm'n on H.R. May 2, 1988), [https://hudoc.echr.coe.int/eng#{"fulltext":\["12048/86"\],"itemid":\["001-221"\]}](https://hudoc.echr.coe.int/eng#{).

The case concerned the lapse of a patent granted by the Dutch Patent Council as a result of the applicant's failure to pay a patent maintenance fee on time. The Dutch representative had failed to notify the applicant, an American corporate body, that the annual fee had not been paid due to a technical error and to remind them to pay it within a six-month period after the deadline. By the time the applicant discovered the oversight, the patent had already lapsed. The Dutch Patent Council rejected the applicant's request for restoration of the patent due to a provision in the Dutch Patent Act, which prevented applicants from requesting restoration when the loss of rights resulted from late payments and an extended payment period existed.

Relying on Article 1 of Protocol No. 1 (protection of property) of the ECHR, the applicant complained that it had been deprived of its possessions and that the public interest involved in the lapse of its patent was not proportionate to the applicant's interest. This assertion was, however, rejected by the European Commission of Human Rights. It reasoned that the right to have the patent restored had no legal basis in either Dutch patent law or in the ECHR itself.⁶⁵ Accordingly, its recognition "would essentially entail a right to acquire property,"⁶⁶ which [was] not guaranteed by Article 1 of Protocol No. 1."⁶⁷ The ruling of the Commission might seem quite radical. Nevertheless, it is rather old (rendered in 1988), and the position of the court might be different today if a similar case were brought before it. As the ECtHR has made clear on numerous occasions, the ECHR is a "living instrument which must be interpreted in the light of present-day conditions."⁶⁸ A recent example from Belgium is instructive in this regard. In 2014, the Belgian Constitutional Court found that revoking a patent due to a failure to provide a translation within the strict three-month deadline and without the possibility of restoration was a disproportionate deprivation of property in view of the legislators' aim to inform the public on the scope of the patent and a non-justified damage to the right to property of the patent holder.⁶⁹ Such a sanction was, accordingly, held to be contrary to the Belgian Constitution's property provision (Article 16) when read in conjunction with Article 1 of the First Protocol to the ECHR.

⁶⁵ *Id.* para. 1.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ECtHR, *Selmouni v. France* [GC], no. 25803/94, July 28, 1999, CE:ECHR:1999:0728JUD002580394, para. 101; *see also* ECtHR, *Mathews v. United Kingdom* [GC], no. 24833/94, Feb. 18, 1999, CE:ECHR:1999:0218JUD002483394, para. 39; ECtHR, *Zolotukhin v. Russia* [GC], no. 14939/03, Feb. 10, 2009, CE:ECHR:2009:0210JUD001493903, para. 80.

⁶⁹ *BioPheresis Techs. Inc. v. Belgium*, Cour Constitutionnelle [CC] [Constitutional Court], No. 3/2014 (Jan. 16, 2014) (Belg.) (available in French), <https://www.const-court.be/public/f/2014/2014-003f.pdf>.

3. *Compulsory Licensing*

A different category of disputes involving direct state action revolved around the grant of compulsory licenses for the use of protected works. The question of whether such a grant amounts to an unjustified interference with the rightsholder's possessions was raised before Convention institutions twice.

The first case, *Smith Kline v. Netherlands*,⁷⁰ dates back to 1990. It concerned a grant of a compulsory license by the Dutch Patent Office for the applicant company's (the dominant patent holder) patented drug to the owner of a dependent patent after the former refused to grant such a license.

Although the Commission found that the decisions of the Dutch Patent Office conferring a compulsory license for the applicant's patent constituted a control of the use of property,⁷¹ the Commission nevertheless considered that such control was lawful and pursued the legitimate aim of encouraging technological and economic development.⁷² As for proportionality, the Commission observed that:

[T]he provision only comes into effect where such licence is necessary for the working of a patent of the same or later date and the licence should be limited to what is required for the working of the patent. Further, the owner of the dominant patent is entitled to royalties in respect of each compulsory licence granted under the legislation and receives reciprocal rights under the dependent patent. While the Commission recalls that the Patent Office is not required to investigate in each particular case whether the grant of the compulsory licence is necessary in the general interest, the Commission finds that the framework imposed by the legislation is intended to prevent abuse of monopoly situations and encourage development and that this method of pursuing that aim falls within the margin of appreciation accorded to the Contracting State. The Commission accordingly finds that the control of use in the circumstances of this case did not fail to strike a fair balance between the interests of the applicant company and the general interest and is in accordance with the requirements of Article 1 of Protocol No. 1 . . . to the Convention.⁷³

⁷⁰ *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. 70 (1990), [https://hudoc.echr.coe.int/eng#{"fulltext":\["12633/87"\], "itemid":\["001-738"\]}](https://hudoc.echr.coe.int/eng#{). For a discussion of this case, see Helfer, *The New Innovation Frontier?*, *supra* note 16, at 12-13, 27-28, 32-35; Grosse Ruse-Khan, *supra* note 39, at 12.

⁷¹ *Smith Kline & French Lab. Ltd.*, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. at 70.

⁷² *Id.*

⁷³ *Id.*

The second occasion on which compulsory licensing was tested for its compliance with the Convention's property provision arose very recently—in July 2016—and concerned the Latvian collective rights management organization (SIA AKKA/LAA). The SIA AKKA/LAA filed a complaint⁷⁴ because it was ordered by national courts to conclude licensing agreements for the use of musical works of the authors it represented with two domestic broadcasters.⁷⁵ According to the applicant organization, the national courts' orders amounted to an unjustified restriction on the exclusive rights of the authors represented by SIA AKKA/LAA, which violated Article 1 of Protocol No. 1 (protection of property) to the ECHR.⁷⁶

The ECtHR disagreed, holding that there had been no violation of the named provision.⁷⁷ It first rejected the Latvian Government's contention that the applicant organization could not claim to be a victim of a measure that infringed the rights guaranteed by the ECHR to its members.⁷⁸ According to the court, once the domestic legal order attributed the protection of the authors' rights to an organization founded by the authors for this purpose and vested the organization with independent rights transferred from the authors, that organization must be regarded as a victim of a measure affecting these rights.⁷⁹ Next, the ECtHR established that SIA AKKA/LAA was disposed of its "possessions"—that is, the rights transferred to it by its members⁸⁰—and that those possessions had been interfered with by the domestic courts.⁸¹

⁷⁴ ECtHR, *SIA AKKA/LAA v. Latvia*, no. 562/05, July 12, 2016, CE:ECHR:2016:0712JUD000056205. For more on this case, see PRESS UNIT OF THE ECtHR, *FACTSHEET—NEW TECHNOLOGIES 19* (Feb. 2020), http://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf [<https://perma.cc/3W3V-8EN3>].

⁷⁵ ECtHR, *SIA AKKA/LAA v. Latvia*, no. 562/05, July 12, 2016, CE:ECHR:2016:0712JUD000056205, para. 38. When concluding that it was within their competence to set the royalty rate, the national courts relied on Article 11bis of the Berne Convention (setting out provisions on broadcasting and related rights), section 5 of the Latvian Civil Procedures Law of October 14, 1998 (providing that a judge must be guided by the general principles of law and justice when a court is called upon to adjudicate on its own discretion or when exceptional circumstances have to be taken into account), and section 41 of the Latvian Copyright Law of April 6, 2000 (*Autortiesību likums*) (part three of this section providing that if the license agreement does not set out the royalty rate, the latter shall be decided by the domestic courts). *Id.* para. 64. Latvian Civil Procedures and Copyright Laws are available, with English translation by the World Intellectual Property Organization (WIPO), at: <http://www.wipo.int/wipolex/en/profile.jsp?code=LV> [<https://perma.cc/5FPV-67GW>].

⁷⁶ ECtHR, *SIA AKKA/LAA v. Latvia*, no. 562/05, July 12, 2016, CE:ECHR:2016:0712JUD000056205, para. 38.

⁷⁷ *Id.* para. 81.

⁷⁸ *Id.* paras. 43, 46, 50.

⁷⁹ *Id.* para. 49.

⁸⁰ *Id.* para. 55.

⁸¹ *Id.* para. 59.

As to the lawfulness of such interference, the court was satisfied that the domestic courts' competence to deal with the issue had some basis in domestic and international copyright law.⁸² The court also found that the measures at issue pursued a legitimate aim, as they served both the radio stations' interest in obtaining a license to legally broadcast the musical works in question and the public interest in having access to those works.⁸³ In reaching this conclusion, the court took into account that "over an extended period of time protected works were being broadcast without a valid licence, and that this situation was to a certain extent due to the applicant organisation's limited efficiency in carrying out negotiations with the defendants."⁸⁴

Finally, on the question of proportionality, the court considered whether the national courts had struck a fair balance between a legitimate aim and the rights of the collective society to equitable remuneration. In this regard, the court first noted that, in setting the royalty rate, the domestic courts relied on the terms already negotiated by the parties who had some time to reach an agreement.⁸⁵ Second, it noted that banning the broadcast would not have suited the interests of copyright holders seeking to obtain maximum profit from the exploitation of musical works.⁸⁶ The third and final consideration for the ECtHR was the fact that the domestic courts' orders for the parties to enter into a licensing agreement were limited in scope and time.⁸⁷

* * *

This overview of Convention cases pertaining to direct state interference in the exercise of IP rights demonstrates that the ECtHR leaves Member States considerable discretion in regulating intellectual property disputes.⁸⁸ Unless IP rights are given domestic recognition in the form of a legislative act or a court decision, the ECtHR will be reluctant to accept that the claimed right falls within the Convention's property provision. In other words, the court will hesitate to find that any substantive interest protected by the Convention is conferred on the applicant. In such cases, the IP claim brought under Article 1 of the First Protocol is likely to be rejected *ratione*

⁸² *Id.* paras. 64–66.

⁸³ *Id.* paras. 69–71.

⁸⁴ *Id.* para. 70.

⁸⁵ *Id.* para. 77.

⁸⁶ *Id.* para. 78.

⁸⁷ *Id.* para. 79.

⁸⁸ See Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 132.

materiae. This, as has been shown, was the case in *Dima v. Romania*⁸⁹ and *University of Illinois Foundation*.⁹⁰

Even if the claimed interest has a substantive basis, and an interference with the applicant's IP right can be established, a wide margin of appreciation is left to Member States to decide how they will balance their interest in protecting IP with other interests of general importance for society. This would include encouraging technological and economic development or wider access to musical works, as was the case, respectively, in *Smith Kline* and *SIA AKKA/LAA*.

It is important to bear in mind that the Convention's property protection is far from absolute⁹¹ and that the Strasbourg Court rarely interferes with the findings of the national courts. Only in situations of blatant violations or retroactive applications of law, such as those in *Bălan v. Moldova*⁹² and *Kamoy Radyo Televizyon Yayınılık ve Organizasyon A.Ş. v. Turkey*⁹³ respectively, might the court hold Article 1 of the First Protocol infringed. For those claims to succeed, however, it is important that the applicants clearly substantiate their property claims (as they have the burden of proof) and that the recognition of their rights can be at least somewhat traced to the national level.

B. Positive Aspect: State Failure to Regulate IP Disputes Between Private Parties

Although the Strasbourg Court may not, as a general rule, receive applications against private parties, "the obligation to secure the effective exercise of Convention rights may involve positive obligations of a State, and . . . these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves."⁹⁴ This extension of the Convention's reach to disputes between private actors (also known as

⁸⁹ ECtHR, *Dima v. Romania*, no. 58472/00, Nov. 16, 2006, CE:ECHR:2006:1116JUD005847200.

⁹⁰ *Univ. of Ill. Found. v. Netherlands*, App. No. 12048/86 (Eur. Comm'n on H.R. May 2, 1988), [https://hudoc.echr.coe.int/eng#{"fulltext":\["12048/86"\],"itemid":\["001-221"\]}](https://hudoc.echr.coe.int/eng#{).

⁹¹ See Christophe Geiger, *The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law*, in *METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY* 153-76 (Graeme B. Dinwoodie ed., 2013); Geiger, *supra* note 23.

⁹² ECtHR, *Bălan v. Moldova*, no. 19247/03, Jan. 29, 2008, CE:ECHR:2008:0129JUD001924703.

⁹³ ECtHR, *Kamoy Radyo Televizyon Yayınılık ve Organizasyon A.Ş. v. Turkey*, no. 19965/06, Apr. 16, 2019, CE:ECHR:2019:0416JUD001996506.

⁹⁴ *J.S. v. United Kingdom*, App. No. 19173/91 (Eur. Comm'n on H.R. Jan. 8, 1993), <http://hudoc.echr.coe.int/eng?i=001-1477>.

a “horizontal effect” of the Convention⁹⁵) may take place, for example, when the national legislation does not meet the requirements of Article 1 of Protocol No. 1 to the Convention or when the losses of one of the parties to the (essentially private) proceedings are caused by arbitrary determinations of the state’s judicial bodies. In both types of cases, the national judicial decisions are regarded as a form of state action.⁹⁶

In relation to intellectual property proceedings, the Strasbourg Court and its former Commission had to consider allegations of Article 1 Protocol No. 1 violations in three categories of cases originating in private-party litigation: contractual disputes (Section II.B.1), infringement disputes and claims for royalties (Section II.B.2), and disputes over ownership of an IP title (Section II.B.3).

1. Contractual Disputes

A contractual intellectual property dispute—the first in the private-party type of conflict—was the subject of the case of *Aral v. Turkey*.⁹⁷ The case concerned a copyright infringement suit over artistic material created by the applicants for certain magazines. The trial court decided that all financial rights over the artistic material created by the applicants during their contract with the initial owner of the magazines belonged to the entrepreneur who subsequently purchased those magazines (H.E.A.), and, as a result, those materials could not be published without H.E.A.’s permission. The decision was based on the applicants’ contract with H.E.A.’s predecessor and on the relevant provisions of the Turkish Law on Intellectual and Artistic Works,⁹⁸ which, at the material time, recognized a certain form of the work for hire doctrine. In particular, article 8, paragraph 2 of that Law provided that “[u]nless otherwise understood by special contract between them or the content of the work, the owner of the financial rights of the works created by the officials, servants and workers in conduct of their job is the person employing or assigning them.”⁹⁹ Nevertheless, the

⁹⁵ See JEAN-FRANCOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, HUMAN RIGHTS HANDBOOKS, NO. 7, at 14–15 (2007), <https://rm.coe.int/168007ff4d> [<https://perma.cc/B79B-FZVF>].

⁹⁶ See Helfer, *The New Innovation Frontier?*, *supra* note 16, at 28.

⁹⁷ *Aral v. Turkey*, App. No. 24563/94 (Eur. Comm’n on H.R. Jan. 14, 1998), <http://hudoc.echr.coe.int/eng?i=001-4064>. For commentary on this case, see Helfer, *The New Innovation Frontier?*, *supra* note 16, at 28–29; Dragos, *supra* note 16, at 97–98.

⁹⁸ Turkish Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works (last amended by Law No. 4110 of 7 June 1995) (English translation from Turkish by the WIPO), http://www.wipo.int/wipolex/en/text.jsp?file_id=129904 [<https://perma.cc/96L3-WASD>].

⁹⁹ *Id.* Note that the current version of this law no longer contains this provision. See Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works (amended up to Law No. 6552 of 10 September 2014) (English translation by the WIPO), http://www.wipo.int/wipolex/en/text.jsp?file_id=440050 [<https://perma.cc/9WRK-47P7>].

trial court allowed the applicants to continue using their characters in other magazines and newspapers but limited such use to other subjects and stories. The applicants' subsequent attempts to overturn this decision were unsuccessful.

In response to the applicants' challenge of the domestic courts' refusal to recognize the applicants' ownership in the artistic material, the European Commission of Human Rights observed that:

[T]here is no interference with the right to peaceful enjoyment of possessions when, pursuant to the domestic law and a contract regulating the relationship between the parties, a judge orders one party to that contract to surrender a possession to another, unless it arbitrarily and unjustly deprives that person of property in favour of another¹⁰⁰

Turning to the circumstances of the case before it, the Commission noted that:

[T]he domestic courts interpreted the domestic law in the light of the contract between the applicants and H.E.A. They decided that the owner of the artistic materials, in particular, the pictures, cartoons, films etc., which were published or which were unpublished but held in the archives of the magazines 'Girgir' and 'Firt', was H.E.A. Furthermore, the courts decided that the applicants could continue to draw the same characters which they had drawn and published in the two magazines during the period of their contract, but in association with other subjects and stories, in other magazines or newspapers.¹⁰¹

On this basis, the Commission found "no element in the case which would allow it to conclude that the courts acted in an arbitrary or unreasonable manner."¹⁰² Accordingly, the Commission did not establish any shortcomings attributable to the State in this respect.¹⁰³

Just a few months later, the Commission again had to resolve a contractual dispute. This time, the dispute involved a civil claim brought by applicants who owned legally protected industrial property and construction secrets in Germany. The applicants sought damages from an Italian company to which they licensed their trade secrets. The applicants alleged a breached licensing contract and unauthorized use of transferred knowledge.¹⁰⁴ The domestic courts dismissed the claim on the grounds of

¹⁰⁰ Aral v. Turkey, App. No. 24563/94, para. 4 (Eur. Comm'n on H.R. Jan. 14, 1998), <http://hudoc.echr.coe.int/eng?i=001-4064>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (holding that the complaint must be rejected because it was "manifestly ill-founded").

¹⁰⁴ G.D. & M. v. Germany, App. No. 29818/96 (Eur. Comm'n on H.R. May 20, 1998), <http://hudoc.echr.coe.int/eng?i=001-4256>.

intentional deception, finding that the applicants had been aware of the impossibility of obtaining legal protection of the technology at stake in Italy. The applicants appealed the dismissal to the ECtHR, claiming that the domestic courts' decisions amounted to a breach of their property rights, arguing that trade secrets of a high commercial value had been transferred to the defendant.

The Commission found that, in the course of the domestic judicial proceedings, the applicants failed to prove that their license had any commercial value.¹⁰⁵ Accordingly, and insofar as their property claim had never been recognized by the domestic courts, the impugned decisions of the German courts "could not have the effect of depriving [the applicants] of a possession which they owned."¹⁰⁶ Consequently, "the applicants ha[d] not shown that they ha[d] the right referred to," and their complaint under Article 1 of Protocol No. 1 had to be rejected as manifestly ill-founded.¹⁰⁷

Despite the brevity of the Commission's analysis in the above cases, they nevertheless demonstrate the capability of the Convention organs to horizontally extend (even if cautiously) the scope of human-rights review to private-party disputes pertaining to contractual transfer of IP ownership.

Occasionally, however, the Strasbourg Court has rejected applications that alleged a violation of the Convention's property provision without directly involving state actors. For example, it refused to examine the merits of an Article 1 Protocol No. 1 claim concerning non-enforcement of a judgment that obliged a private company that was previously owned by the state to pay royalties to a patent holder.¹⁰⁸ According to the court, since the debtor enterprise was a private company, the state was absolved of responsibility for its acts:

The Court has no jurisdiction to consider applications directed against private individuals or businesses [I]n this particular case the judgment against the enterprise could not be enforced due to the enterprise's lack of funds and its subsequent bankruptcy. However, the State is not answerable under the Convention for that.¹⁰⁹

2. Infringement Disputes and Claims for Royalties

In the second type of property dispute between private parties—those pertaining to infringement claims and claims for royalties—the

¹⁰⁵ *Id.* para. 1.

¹⁰⁶ *Id.* para. 2.

¹⁰⁷ *Id.*

¹⁰⁸ ECtHR, *Mihăilescu v. Romania* (dec.), no. 47748/99, Aug. 26, 2003, CE:ECHR:2003:0826DEC004774899.

¹⁰⁹ *Id.* (rejecting the complaint as "manifestly ill-founded").

Strasbourg Court was similarly cautious to intervene in domestic courts' interpretation of intellectual property issues. One example is the case of *Melnychuk v. Ukraine*.¹¹⁰ In that case, the applicant complained about the refusal of the local newspaper, which published critical reviews of his book, to also publish the applicant's reply to that criticism. Arguing that the newspaper's refusal raised an issue under Article 10 (freedom of expression) of the ECHR, Mr. Melnychuk also maintained that the critical reviews infringed his copyright. However, he did not advance any possible basis for this claim, and, consequently, the national courts dismissed the claim as "unsubstantiated." The applicant appealed to the ECtHR—relying, in addition to Article 10, on Article 1 of Protocol No. 1 to the ECHR—but, once again, without explaining in what way the ECHR's property provision was breached.

The ECtHR declared the applicant's complaint inadmissible as manifestly ill-founded.¹¹¹ Having reiterated that intellectual property is protected in principle by Article 1 of Protocol No. 1, the court, nevertheless, noted that the mere "fact that the State, through its judicial system, provided a forum for the determination of the applicant's rights and obligations does not automatically engage its responsibility under Article 1 of Protocol No. 1."¹¹² Referring to the applicant's failure to substantiate his copyright infringement claim, the ECtHR observed that "the national courts proceeded in accordance with domestic law, giving full reasons for their decisions" to dismiss the applicant's complaint.¹¹³ "Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1."¹¹⁴

Unlike *Melnychuk*, an interference with the Convention's property provision was established two years later in a dispute over the registration of domain names that allegedly violated the trademark rights of others.¹¹⁵ In that case, the applicant company, Paeffgen GmbH, was engaged in e-commerce and held several thousand internet domain names registered by the competent authority. According to the terms of the domain contracts with the registration authority, it was up to the domain holder to verify whether the registration and use of the domains infringed the rights of others. Subsequently, other companies and private individuals brought

¹¹⁰ ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, July 5, 2005, CE:ECHR:2005:0705DEC002874303. For a discussion of this case, see Helfer, *The New Innovation Frontier?*, *supra* note 16, at 29–30.

¹¹¹ ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, July 5, 2005, CE:ECHR:2005:0705DEC002874303, para. 3.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05, 21770/05, Sept. 18, 2007, CE:ECHR:2007:0918DEC002537904. For more on this case, see Dragos, *supra* note 16, at 105.

several sets of proceedings against the applicant, claiming that Paeffgen's registration and use of certain domains breached their trademark rights and/or their rights to a business name.

In all of those cases, the domestic courts found that the applicant company had unfairly taken advantage of the plaintiffs' well-known denominations. As a result, the applicant was ordered to refrain from using or disposing of the domains in question and apply for their cancellation—a decision that Paeffgen further contested before the ECtHR. Paeffgen argued that the absolute prohibition on using the domain names and the duty to apply for their cancellation, instead of a duty to merely refrain from a specific infringement of the plaintiffs' rights, disproportionately interfered with Paeffgen's right to property under Article 1 of Protocol No. 1 to the ECHR.

The Strasbourg Court agreed that the measure in question amounted to an interference with Paeffgen's "possessions," thereby recognizing that domain names benefit from the protection of Article 1 of Protocol 1 to the ECHR.¹¹⁶ It observed, however, that such interference served to protect the trademark rights or other rights of third parties by effectively preventing unauthorized use to the detriment of the rightsholders.¹¹⁷ Although the domestic courts did not consider less restrictive measures to be sufficient, the Strasbourg Court found that the applicant company failed to demonstrate limited ways of using the domains in question without risking interference with the rights of others.¹¹⁸ The court observed that the applicant was aware that the domain name registration did not imply freedom from third-party claims.¹¹⁹ It also noted that, at the time of the domestic court proceedings, the applicant company had hardly used its domains.¹²⁰ Thus, it followed that the domestic judicial orders were proportionate and had not excessively burdened the applicant.¹²¹

Like the other types of disputes discussed above, the Strasbourg Court is likely to reject an applicant's property claim originating from royalty claims if, at no point in domestic proceedings, domestic courts recognized that claim. It is on these grounds that the Strasbourg Court declined, for example, an action concerning a claim for royalties—which domestic courts had failed to decide for more than twelve years—from a limited liability

¹¹⁶ ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05, 21770/05, Sept. 18, 2007, CE:ECHR:2007:0918DEC002537904, para. 1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (rejecting the complaint as "manifestly ill-founded").

company for a furniture line the company had designed.¹²² In response to the applicant's allegation that he was unable to use his property—the royalties due by the defendant—as a result of the domestic courts' failure to decide on his action, the ECtHR found that the claims, not determined by a final court decision, did not amount to “possessions” attracting the guarantees of the Convention's property provision.¹²³ Accordingly, just as in the case of *Dima* discussed above, the complaint was declared inadmissible *ratione materiae*.¹²⁴

As can be seen, ECHR rulings concerning disputes in the sphere of IP infringement and claims for royalties have not provided adequate opportunities to determine how these types of cases can be approached from an Article 1 of Protocol No. 1 perspective. Such analysis can, however, be expected soon in the pending case of *Safarov v. Azerbaijan*. The case concerns an unauthorized reproduction of the applicant's book by a youth non-governmental organization (NGO) on the website of the NGO's project on the history of Azerbaijan.¹²⁵ When the applicant was informed of the infringement and requested the removal of his book from the website (which was done immediately), the book had already been downloaded 417 times. The applicant brought a civil claim against the NGO, asking for pecuniary and non-pecuniary damages to compensate the loss he incurred as a result of the unauthorized reproduction of his book.

The trial court dismissed the applicant's claims by referring to Article 18 of the Azerbaijani Copyright Law,¹²⁶ which permits the reproduction of copyrighted materials by libraries, archives, and educational institutions. The court further noted that the book had been removed from the website upon the applicant's demand, and the applicant failed to prove that he had suffered pecuniary or non-pecuniary damage. The applicant lodged an appeal against this decision, arguing that the trial court had failed to refer to any of the purposes exhaustively listed in Article 18 of the Azerbaijani Copyright Law.

The appellate court rejected the applicant's claim, repeating the reasoning of the first-instance court. The applicant's appeal to the Azerbaijani Supreme Court was likewise dismissed. The supreme court reiterated the lower instances' reasoning and additionally referenced Article 15(3) of the Copyright Law, which states that once the lawfully published

¹²² ECtHR, *Rapos v. Slovakia*, no. 25763/02, May 20, 2008, CE:ECHR:2008:0520JUD002576302.

¹²³ *Id.* para. 40.

¹²⁴ *Id.*

¹²⁵ ECtHR, *Safarov v. Azerbaijan*, no. 885/12, communicated on May 18, 2017.

¹²⁶ Law of the Republic of Azerbaijan on Copyright and Related Rights of 5 June 1996 (amended up to Law No. 636-IVQD of 30 April 2013) (English translation by the WIPO), <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/az/az102en.pdf> [https://perma.cc/926Z-JU8W].

copies of a book are sold, those copies can be further distributed without the author's consent and without paying royalty to the author.

The applicant then complained to the ECtHR, raising claims about the domestic court's reasoning of their decisions under Article 6(1) (fair trial) of the ECHR and about the state's failure to protect his copyright, in alleged violation of Article 1 of Protocol No. 1 (protection of property) to the ECHR. In May 2017, both claims were communicated to the Azerbaijani Government, which is an indication that the case is likely to be examined on the merits, instead of being rejected at the point of admissibility review.

3. Disputes over Ownership of An IP Title

The final type of the private-party disputes originated in claims of competing ownership of an intellectual property right. Without a doubt, the most prominent example is the case of *Anheuser-Busch*, which, to date, is also the sole intellectual property dispute that has made it to the ECtHR's highest body, the Grand Chamber.¹²⁷

The applicant, an American company selling beer in the United States under the brand name "Budweiser," decided to enter European markets and sell beer under the same trademark. In 1981, it applied for a trademark registration for "Budweiser" in Portugal.¹²⁸ A Czech company, Budějovický Budvar, which also produced beer under the name "Budweiser," opposed the application.¹²⁹ It argued that "Budweiser Bier" had already been registered in its name as an appellation of origin under the 1958 Lisbon Agreement.¹³⁰ Following the breakdown of negotiations that

¹²⁷ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901. For a discussion of this case, see Klaus Dieter Beiter, *The Right to Property and the Protection of Interests in Intellectual Property—A Human Rights Perspective on the European Court of Human Rights' Decision in Anheuser-Busch Inc. v. Portugal*, 39 INT'L REV. INTEL. PROP. & COMPETITION L. 714 (2008); Burkhardt Goebel, *Trade Marks are "Possessions," as are Applications*, 2 J. INTEL. PROP. L. & PRAC. 197 (2007); Jennifer W. Reiss, *Commercializing Human Rights: Trademarks in Europe After Anheuser-Busch v. Portugal*, 14 J. WORLD INTEL. PROP. 176 (2011); Dragos, *supra* note 16, at 101–02, 106; Helfer, *The New Innovation Frontier?*, *supra* note 16, at 3–4, 12–13, 18–28, 30–32; Andreas Rahmatian, *Trade Marks and Human Rights*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS 335, 346–47 (Paul L. C. Torremans ed., 2008); Welkowitz, *supra* note 20, at 701–07.

¹²⁸ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901, para. 16.

¹²⁹ The term "Budweiser" came from Budweis, a German name for the town of České Budějovice in Bohemia, in the Czech Republic, where Budějovický Budvar produced its beer.

¹³⁰ The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration was signed in Lisbon on October 31, 1958, revised in Stockholm on July 14, 1967, and amended on September 28, 1979. The Lisbon Agreement enables

took place throughout the 1980s between the two companies, they moved to the courts. In 1995, the applicant company succeeded in claiming that the product to which the Czech company's registration referred was not an appellation of origin, and that its registration should, accordingly, be cancelled.¹³¹ The applicant then obtained a registration certificate for the "Budweiser" trademark.¹³²

Budějovický Budvar appealed the issuance of the certificate, invoking a 1986 Bilateral Agreement between Portugal and Czechoslovakia on the reciprocal protection of appellations of origin.¹³³ The trial court dismissed the appeal, finding that the only intellectual property eligible for protection under Portuguese law and the Bilateral Agreement was the "Českobudějovický Budvar" appellation of origin, and not the German translation of this phrase into "Budweiser Bier."¹³⁴

This decision was, however, overturned by the appellate court in a judgment subsequently affirmed by the Portuguese Supreme Court, which held that the protection under the 1986 Agreement between the two states extended to cover translations of names of their respective national products. The applicant company's registration of "Budweiser" as a trademark was, therefore, refused.¹³⁵ In a last bid to defend its interests, the American company appealed to the ECtHR, claiming that the Portuguese Supreme Court's application of a bilateral treaty that came into force after it had filed its application to register the trademark and ultimately caused the application's rejection, disproportionately interfered with its right to the protection of intellectual property, contrary to Article 1 of Protocol No. 1 to the ECHR.

The case was first considered by the Strasbourg Court's Chamber, which, in a judgment of October 11, 2005, held that there had been no violation of the applicant company's (intellectual) property rights.¹³⁶ This was because the company had failed to obtain a final registration of its trademark

Contracting States to request other Contracting States to protect appellations of origin of certain products, if the appellations were recognized and protected as such in the country of origin and registered at the International Bureau of the WIPO. Both Portugal and the Czech Republic, as a successor to Czechoslovakia, were parties to this Agreement.

¹³¹ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901, para. 18.

¹³² *Id.* para. 19.

¹³³ This was the agreement between the governments of the Portuguese Republic and the Czechoslovak Socialist Republic, on the Protection of Indications of Source, Appellations of Origin, and Other Geographical and Similar Designations, which was signed in Lisbon on January 10, 1986 and came into force on March 7, 1987, after publication in the Official Gazette.

¹³⁴ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901, para. 21.

¹³⁵ *Id.* para. 24.

¹³⁶ *Id.* para. 53.

(and not the application for the registration of a trademark), which could only be regarded as “possessions” within the meaning of the ECHR.¹³⁷ The Chamber clarified that the applicant company had had a hope for—but not a legally protected legitimate expectation of—acquiring such a “possession.”¹³⁸ Accordingly, Article 1 of Protocol No. 1 was held to be inapplicable to the mere applications for trademark registration.¹³⁹

Upon the applicant company’s request, the case was then referred to the Grand Chamber. The Grand Chamber considered the bundle of financial rights and interests that derived from an application for trademark registration, which, notwithstanding its conditional character, provided a substantial financial value for the applicant company.¹⁴⁰ The Grand Chamber, thus, noted that the applicant owned a set of proprietary rights recognized by domestic law in connection with its trademark application, which was to be examined under Article 1 of Protocol No. 1.¹⁴¹

Nonetheless, no violation of that provision was recognized by the Grand Chamber.¹⁴² As to the issue of the alleged retrospective application of the 1986 Agreement, it noted that the applicant company did not have an effective registration in existence when the impugned legislation took effect.¹⁴³ Concerning the applicant company’s allegation of violation of the right of priority of its trademark application, the ECtHR reiterated that its role was not to review domestic courts’ interpretation of relevant legislation.¹⁴⁴ Accordingly, the court concluded that the Portuguese Supreme Court’s judgment did not interfere with the applicant company’s right to the peaceful enjoyment of its possessions.¹⁴⁵

* * *

One important conclusion arising from an overview of Convention cases on IP disputes between private parties is that many essentially private disputes can still be attributed to the state. An exception is the case of *Mihăilescu v. Romania*¹⁴⁶ discussed above. However, for the horizontal effect of the Convention to come into play, courts hearing such disputes must do more than “provide[] a forum for the determination of the applicant’s rights.”¹⁴⁷ There must also be a reasonable suspicion of

¹³⁷ *Id.* paras. 50–52.

¹³⁸ *Id.* para. 52.

¹³⁹ *Id.* para. 53.

¹⁴⁰ *Id.* para. 76.

¹⁴¹ *Id.* para. 78.

¹⁴² *Id.* para. 87.

¹⁴³ *Id.* para. 84.

¹⁴⁴ *Id.* para. 85.

¹⁴⁵ *Id.* para. 87.

¹⁴⁶ ECtHR, *Mihăilescu v. Romania* (dec.) no. 47748/99, Aug. 26, 2003, CE:ECHR:2003:0826DEC004774899.

¹⁴⁷ ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, July 5, 2005, CE:ECHR:2005:0705DEC002874303, para. 3.

arbitrariness or unfairness on the part of the domestic judiciary or a lack of proportionality in the domestic judiciary's approach towards balancing the applicant's interests. If the domestic courts interpret national law in a manner that is inconsistent with the Convention's requirements—including, by application of legislation which contradicts the guarantees of Article 1 of Protocol No. 1—the horizontal effect of the ECHR arises. This is a positive phenomenon, as it extends the safeguards of human rights review to the private-party level.

In general, the principles on which the Strasbourg Court decides private IP disputes are hardly different from those that have already been outlined above in relation to claims originating from a direct state action. The claimed IP entitlement must find some recognition at the national level for the issue to arise under Article 1 of Protocol No. 1 to the ECHR. Once such recognition is established, the questions of whether there was an interference with the applicant's possessions and whether it was in accordance with law, served a legitimate aim, and was proportionate to that aim will be left to the wide discretion of the Member States to the ECHR.

As discussed above, the first criterion (recognition of the property right by the domestic legal system) was not met in *Rapos v. Slovakia*, where the claims in a design dispute that was not determined by a final court decision could not qualify as a possession for the purposes of Article 1 of Protocol No. 1 to the ECHR.¹⁴⁸ In cases where the applicants' property claim fell within the scope of Article 1 of the First Protocol, no violation was recognized either due to the applicants' failure to properly substantiate their claims (*G.D. & M. v. Germany*¹⁴⁹ and *Melnychuk v. Ukraine*¹⁵⁰) or due to the wide discretion accorded to domestic courts in balancing the applicants' intellectual property rights with other competing interests (*Aral*,¹⁵¹ *Paeffgen Gmbh*,¹⁵² and *Anheuser-Busch*¹⁵³). Notably, most such cases were rejected as manifestly ill-founded and, therefore, were not even adjudicated on the merits.¹⁵⁴

¹⁴⁸ ECtHR, *Rapos v. Slovakia*, no. 25763/02, May 20, 2008, CE:ECHR:2008:0520JUD002576302, para. 40.

¹⁴⁹ *G.D. & M. v. Germany*, App. No. 29818/96 (Eur. Comm'n on H.R. May 20, 1998), <http://hudoc.echr.coe.int/eng?i=001-4256>.

¹⁵⁰ ECtHR, *Melnychuk v. Ukraine*, no. 28743/03, July 5, 2005, CE:ECHR:2005:0705DEC002874303, para. 1.

¹⁵¹ *Aral v. Turkey*, App. No. 24563/94 (Eur. Comm'n on H.R. Jan. 14, 1998), <http://hudoc.echr.coe.int/eng?i=001-4064>.

¹⁵² ECtHR, *Paeffgen Gmbh v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05, 21770/05, Sept. 18, 2007, CE:ECHR:2007:0918DEC002537904, para. 1.

¹⁵³ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, Jan. 11, 2007, CE:ECHR:2007:0111JUD007304901.

¹⁵⁴ Of all the cases reviewed in this section (Section II.B), only *Anheuser-Busch* was decided on the merits. All other cases were rejected at the level of admissibility review—the majority of cases were manifestly ill-founded for either lack of interference with the applicant's right

C. Claims Against International Organizations (EPO)

Alongside Article 1 Protocol No. 1 cases on IP resulting out of direct state action and those originating from private-party litigation, a separate category of applications arose out of complaints against international organizations, notably, the European Patent Office (EPO). In a number of referrals to the ECtHR, the applicants claimed that structural deficiencies of EPO proceedings resulted in the loss of their patent rights—mainly through revocation—by the Contracting States to the European Patent Convention, all of which were also parties to the ECHR.¹⁵⁵ The Commission and the Strasbourg Court have, however, steadily rejected such allegations, holding that they were not competent to examine complaints against international organizations that were not parties to the ECHR in their own right. The ECHR courts acknowledged that the transfer of powers from an ECHR State to an international organization (such as the EPO) did not altogether exclude that State’s responsibility under the ECHR, making the State’s responsibility dependent on the level of fundamental rights protection provided by that organization. Given that the European Patent Convention provided, according to the Commission and the Strasbourg Court, “equivalent protection” as the ECHR,¹⁵⁶ any transfer of powers to the EPO was compatible with the ECHR.

The ensuing lack of human rights (or other judicial control) over the EPO was critically assessed by some commentators who expressed concerns that, while “the national patent laws of European’s [sic] various nations must all operate in accordance with principles of human rights[,] . . . no such check is placed upon the operations of the European Patent Office itself.”¹⁵⁷ In the latest of the ECtHR decisions on the EPO, however, the

or for no appearance of arbitrariness or unfairness on the part of domestic courts involved in the proportionality analysis. Most of the cases discussed in Section II.A (on state direct action) were similarly rejected at the admissibility stage, with only *Bălan* and *SIA AKKA/LAA* reaching examination on the merits.

¹⁵⁵ *Heinz v. Contracting States Party to the European Patent Convention Insofar as They Are High Contracting Parties to the European Convention on Human Rights*, App. No. 21090/92 (Eur. Comm’n on H.R. Jan. 10, 1994), <http://hudoc.echr.coe.int/eng?i=001-2593>; *Reber v. Germany*, App. No. 27410/95 (Eur. Comm’n on H.R. Apr. 12, 1996), <http://hudoc.echr.coe.int/eng?i=001-2868>; *Lenzing AG v. Germany*, App. No. 39025/97 (Eur. Comm’n on H.R. Sept. 9, 1998), <http://hudoc.echr.coe.int/eng?i=001-4410>; *Lenzing AG v. United Kingdom*, App. No. 38817/97 (Eur. Comm’n on H.R. Sept. 9, 1998), <http://hudoc.echr.coe.int/eng?i=001-4408>; ECtHR, *Rambus Inc. v. Germany* (dec.), no. 40382/04, June 16, 2009, CE:ECHR:2009:0616DEC004038204.

¹⁵⁶ On the observance of human rights in the EPO’s practice, see Agnieszka Kupczok, *Human Rights in the Case Law of the EPO Boards of Appeal*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 311.

¹⁵⁷ Jeremy Phillips, *EPO Not Bound by Human Rights Convention*, IPKAT (Nov. 23, 2004), <http://ipkitten.blogspot.fr/2004/11/epo-not-bound-by-human-rights.html> [<https://perma.cc/37CD-HXFV>]. More generally, for a criticism of the lack of judicial review

ECtHR emphasized that the presumption of “equivalent protection” can be rebutted if, in the circumstances of a particular case, it is found that the protection of Convention rights is manifestly deficient.¹⁵⁸

III. FREEDOM OF EXPRESSION AND INFORMATION AS A COUNTERWEIGHT TO IP PROTECTION (BUT ALSO AS GROUNDS FOR IT?)

In addition to the right to property protection for intellectual property, the ECHR safeguards a series of other fundamental rights of relevance for IP, which have equal—if not higher—value¹⁵⁹ and against which IP rights must be balanced. The first of these rights is, without doubt, the right to freedom of expression and information guaranteed under Article 10 of the ECHR and is sometimes called the European First Amendment.¹⁶⁰ Claims of users form the vast majority of disputes brought to the Convention organs under this right. On a few occasions, however, Article 10 of the ECHR was invoked by the rightsholders themselves either as grounds for

of EPO decisions, see Jochen Pagenberg, *The ECJ on the Draft Agreement for a European and Community Patent Court—Hearing of May 18, 2010*, 41 INT’L REV. INTELL. PROP. & COMPETITION L. 695, 700–05 (2010).

¹⁵⁸ ECtHR, *Rambus Inc. v. Germany* (dec.), no. 40382/04, June 16, 2009, CE:ECHR:2009:0616DEC004038204, para. 1.

¹⁵⁹ On the hierarchy of the ECHR rights, see Peggy Ducoulombier, *Interaction Between Human Rights: Are All Human Rights Equal?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 39, 45–46, observing in particular that the “strength” of ECHR rights can be determined based on the scope of the margin of appreciation allocated to states in relation to each such right and noting that, following this logic, the ECHR’s property provision, “in respect of which the margin usually deploys its full effect,” is inferior to, among others, the right to freedom of expression and the right to the protection of private life “for which the margin plays an important albeit variable role.” The freedom of expression specifically, indeed, benefits from a privileged position in the European constitutional order, constituting, according to the Strasbourg Court, “one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.” ECtHR, *Handyside v. United Kingdom*, no. 5493/72, Dec. 7, 1976, CE:ECHR:1976:1207JUD000549372, para. 49.

¹⁶⁰ Dirk Voorhoof, *Het Europese “First Amendment”: de vrijheid van expressie en informatie en de rechtspraak van het EHRM betreffende art. 10 EVRM (1994-1995)*, 1995 MEDIAFORUM (Amsterdam) 11; CHRISTOPHE GEIGER, DROIT D’AUTEUR ET DROIT DU PUBLIC A L’INFORMATION, APPROCHE DE DROIT COMPARE 166 (2004).

stronger protection of their essentially economic interests¹⁶¹ or to justify the right to express oneself via trademark registration.¹⁶²

The only two areas of IP law which have, so far, given rise to proceedings under the ECHR's right to freedom of expression are copyright (Section III.A) and trademarks (Section III.B), although a claim on a potential violation of freedom of expression and information in the field of trade secrets is currently (as of March 2020) pending before the Strasbourg Court.¹⁶³

A. The Impact of the Convention's Right to Freedom of Expression on Copyright Law

The oldest type of conflict between IP and human rights faced by the ECtHR concerns copyright and freedom of expression.¹⁶⁴ Already in

¹⁶¹ See the *AEPI* case discussed *infra* Section III.A.3. There is also the idea that, insofar as copyright is “the engine of free expression,” freedom of expression could support, in theory, a protection claim. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)). However, it is likely that the “engine” argument is more suitable as a justification for the protection of the rights of users than those of copyright holders, as this argument explains the rationale for (or goal of) the grant of protection. It does not address the nature of the right at stake. Thus, property protection for IP may well be argued to ultimately advance freedom of expression interests. This is, essentially, what stands behind the utilitarian theories on the justification of copyright protection. It is in this spirit, for instance, that the protection of arts and sciences is understood in the U.S. Constitution as the purpose behind the grant of economic (most frequently property) rights to the holders of copyrights and patents. U.S. CONST. art. I, § 8, cl. 8.

¹⁶² See the cases discussed *infra* Section III.B.2.

¹⁶³ ECtHR, *Diasamidze v. Georgia*, nos. 49071/12, 51940/12, communicated on September 14, 2016.

¹⁶⁴ For a comparative analysis of the approaches taken by the ECtHR and another supranational court in Europe—the CJEU—towards resolving the conflicts between copyright and freedom of expression, see Elena Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective*, 19 J. WORLD INTELL. PROP. 115 (2016); Alain Strowel, *Pondération entre liberté d'expression et droit d'auteur sur Internet: de la réserve des juges de Strasbourg à une concordance pratique par les juges de Luxembourg*, 100 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 889 (2014). Most recently, the CJEU faced the conflict of copyright and freedom of expression in three decisions in the intersection of copyright, freedom of artistic expression, and freedom of the press. See Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=203686>; Case C-476/17, *Pelham GmbH v. Hütter* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216552&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1950544>; Case C-516/17, *Spiegel Online GmbH v. Beck* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1951971>.

For commentary on these important decisions, see Geiger & Izyumenko, *supra* note 6; Caterina Sganga, *A Decade of Fair Balance Doctrine, and How to Fix It: Copyright*

1968, some ten years after the Convention's enforcement mechanism—the ECtHR—was incepted, the Convention institutions had to decide on the compatibility of copyright protection for compilations of television programs with Article 10 of the Convention.¹⁶⁵ Over the years, the conflict has developed from being more or less ignored by the Convention institutions (Section III.A.1) to becoming fully acknowledged in the wake of the expansion of copyright protection and its enforcement mechanisms in the digital environment (Section III.A.2). Furthermore, as already mentioned, Article 10 was scrutinized for not only its potential to further widen public access to protected works, but also from the standpoint of its capacity to provide an even stronger protection to the exclusive rights of IP holders (Section III.A.3).

1. Emergence of A Conflict: Copyright's Monopoly on Information and the Freedom of Expression of "Infringers"

The first Convention case on copyright and freedom of expression (and on the conflict of IP and human rights in general), *N.V. Televizier v. Netherlands*,¹⁶⁶ arose out of a complaint filed by Televizier, the Dutch

Versus Fundamental Rights Before the CJEU From Promusicae to Funke Medien, Pelham and Spiegel Online, 11 EUR. INTELL. PROP. REV. 683 (2019); Thom Snijders & Stijn van Deursen, *The Road Not Taken—the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework—A Case Note on the Pelham, Spiegel Online and Funke Medien Decisions*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 1176 (2019), <https://doi.org/10.1007/s40319-019-00883-0> [<https://perma.cc/B8PW-KAUT>]; Bernd Justin Jütte & João Pedro Quintais, *Sample in My Song, Can They Tell Where You Are From? The Pelham Judgment—Part I*, KLUWER COPYRIGHT BLOG (Nov. 6, 2019), <http://copyrightblog.kluweriplaw.com/2019/11/06/sample-sample-in-my-song-can-they-tell-where-you-are-from-the-pelham-judgment-part-i/> [<https://perma.cc/H2PJ-VBXJ>]; Bernd Justin Jütte, *CJEU Permits Sampling of Phonograms Under a de Minimis Rule and the Quotation Exception*, 14 J. INTELL. PROP. L. & PRAC. 827 (2019); see also Christophe Geiger & Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*, 41 EUR. INTELL. PROP. REV. 131 (2019); Jonathan Griffiths, *European Union Copyright Law and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) Funke Medien, (C-476/17) Pelham GmbH and (C-516/17) Spiegel Online*, 20 ERA FORUM 35 (2019); Daniël Jongsma, *AG Szpunar on Copyright's Relation to Fundamental Rights: One Step Forward and Two Steps Back?*, 2019 IPRINFO 1 (2019); Bernd Justin Jütte & João Pedro Quintais, *Advocate General Turns Down the Music—Sampling is Not a Fundamental Right Under EU Copyright Law*, 41 EUR. INTELL. PROP. REV. 654 (2019).

¹⁶⁵ See *N.V. Televizier v. Netherlands*, App. No. 2690/65, 1968 Y.B. Eur. Conv. on H.R. 782 (Eur. Comm'n on H.R.), <http://hudoc.echr.coe.int/eng?i=001-73428> (discussed *infra* text accompanying notes 166–173). The ECtHR was established on January 21, 1959, when the first members of the court were elected by the Consultative Assembly of the Council of Europe. COUNCIL OF EUROPE, THE COURT IN BRIEF, http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf [<https://perma.cc/NAX4-UENR>] (last visited Mar. 9, 2020).

¹⁶⁶ *N.V. Televizier*, App. No. 2690/65, 1968 Y.B. Eur. Conv. on H.R. 782. For more on this case, see Harvard Law Review Ass'n, *International Law—European Convention on Human*

publisher of a weekly magazine which contained details on forthcoming radio and television programs of the country's five broadcasting corporations. In response to *Televizier's* publications of these programs, those broadcasters and an organization which periodically made compilations of their programs called *Centraal Bureau voor den Omroep in Nederland* (Dutch Central Broadcasting Office) instituted civil proceedings against *Televizier*.

In those proceedings, it was alleged that the applicant, when publishing information about forthcoming radio and television programs, had made use of the compilations of the Broadcasting Office in violation of the Dutch Copyright Act of 1912.¹⁶⁷ Pursuant to section 10 of that Act, copyright protection extended even to works that were not of a distinctive or personal character.¹⁶⁸ After a series of court decisions, the Supreme Court of the Netherlands eventually affirmed the Broadcasting Office's (but not the corporations') copyright in the compilations by finding that copyright in a text lacking personal character could be violated not only by a literal reproduction of the text but also by its reproduction in a revised form.¹⁶⁹

Televizier contested this finding before the European Commission of Human Rights, maintaining that, as a consequence of the Dutch Supreme Court's decision, broadcasting corporations that also published weekly magazines or had financial interest in such magazines had an unjustifiable monopoly over the news services on forthcoming radio and television programs in the Netherlands.¹⁷⁰ This amounted, in the applicant company's opinion, to a violation of Article 10 (freedom of expression) of the Convention.¹⁷¹

The European Commission of Human Rights declared the application admissible as it gave rise to a number of important issues regarding the interpretation of the Convention and held that the applicant company was a "victim" within the meaning of the Convention.¹⁷² However, the court never reached the merits of the case because an out-of-court settlement was reached between the parties.¹⁷³ *Televizier* was absorbed into one of the five broadcasting corporations and was thereafter allowed to publish the complete programs of all broadcasting organizations.

Rights—Commission Decides to Consider Dutch Copyright Decision Challenged on Freedom of Expression Grounds, 80 HARV. L. REV. 1798 (1967); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1185 (1970).

¹⁶⁷ *N.V. Televizier*, App. No. 2690/65, 1968 Y.B. Eur. Conv. on H.R. at 784.

¹⁶⁸ The Dutch Copyright Act (Vevam) (2015), <https://www.vevam.org/wp-content/uploads/2016/09/Dutch-Copyright-Act-2015.pdf> [<https://perma.cc/VMZ8-6ZYT>].

¹⁶⁹ HR 25 juni 1965, NJ 1966, 116 (*Televizier/Netherlands*) (Neth.).

¹⁷⁰ *N.V. Televizier*, App. No. 2690/65, 1968 Y.B. Eur. Conv. on H.R. at 785.

¹⁷¹ *Id.*

¹⁷² *Id.* at 786.

¹⁷³ *Id.* at 787.

Furthermore, the relevant provisions of the Dutch Copyright Act of 1912, on which the proceedings against the applicant company were based, were replaced by new legislation—namely, the new Broadcasting Act of 1967 and the Royal Decree of 1969. The Broadcasting Act of 1967, in particular, envisaged that the newly created coordinating broadcasting authority—Netherlands Broadcasting Foundation (*Nederlandse Omroep Stichting*, NOS)—was to compile the complete program listings on information supplied by various licensed broadcasting organizations. It then had to make available those listings to all broadcasting organizations for reproduction and publication in their own program magazines. In addition, short summaries of the lists were to be sent to daily newspapers, those appearing at least three times a week, and certain foreign publishers. Pursuant to Article 22 of the Broadcasting Act of 1967, any other reproduction or publication of these lists without the consent of the broadcasting authority constituted an infringement of copyright and entailed civil liability.

Thus, the new legislative arrangement did not completely solve the problem from which the *Televizier* application to the ECtHR arose. This subsequently resulted in a challenge of the new legislation and the Dutch Supreme Court's interpretation of the 1912 Copyright Act in *Televizier* by another company on analogous grounds. This time, the challenge involved the publisher of weekly “general interest” magazines in the Netherlands—De Geillustreerde Pers N.V. (D.G.P.N.V.)—whose petition for distributing complete lists of television and radio program data was refused because of the Broadcasting Act of 1967 and the Royal Decree of 1969.¹⁷⁴ The Royal Decree of 1969, in particular, distinguished between publishers of daily and three-times-weekly papers and weekly “general interest” magazines, such that the former were permitted to publish a summary of program data whereas the latter were not. The applicant company brought its case before the European Commission of Human Rights complaining that such a refusal constituted an unjustified interference with its right to freely receive and impart information as guaranteed by Article 10 of the ECHR.¹⁷⁵

¹⁷⁴ D.G.P.N.V. v. Netherlands, App. No. 5178/71, 44 Eur. Comm'n H.R. Dec. & Rep. 13 (1976). On this case, see Hugenholtz, *supra* note 16, at 12; HELFER & AUSTIN, *supra* note 5, at 261–63, 273, 277–79; and Christoph Beat Graber, *Copyright and Access—A Human Rights Perspective*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 71, 85 (Christoph Beat Graber et al. eds., 2005).

¹⁷⁵ On the conflict between copyright and freedom of information as protected by Article 10 of the ECHR, see generally GEIGER, *supra* note 160; Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A Complex Relationship*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW 24 (Fiona Macmillan ed., 2007); Hugenholtz, *supra* note 16; Alain Strowel & François Tulkens, *Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 287 (Jonathan Griffiths & Uma Suthersanen eds., 2006); Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era*, *supra*

Even though the European Commission of Human Rights declared the application admissible as “rais[ing] substantial issues of law and of fact,”¹⁷⁶ it nevertheless found no violation of the Convention. It first considered that the freedom to impart information of the kind at issue could only be granted to “the author, the originator or otherwise the intellectual owner.”¹⁷⁷ As a result, there had been no interference with the applicant company’s rights since it had been prevented from publishing the information which it did not yet possess.¹⁷⁸ The Commission further noted that the free flow of such information had not been jeopardized in any way since the general public could inform itself about the program schedule through a variety of other sources.¹⁷⁹ Finally, the Commission held that the mere commercial interest of the applicant company, which might have been compromised by its competitive disadvantage to other magazines, did not fall within the scope of Article 10 of the ECHR.¹⁸⁰

As Professor Hugenholtz observed in his seminal work on “Copyright and Freedom of Expression in Europe,” the “Commission’s conclusion that third parties may never invoke Article 10 freedoms with respect to ‘single-source’ data is obviously erroneous,” as “[f]reedom of expression under Article 10 is not confined to speech that is original with the speaker.”¹⁸¹

Nevertheless, the Commission’s pronouncement on the conflict of copyright with freedom of information in *De Geillustreerde Pers N.V.* remained the sole authority on the subject for around twenty years. It was not until the end of the 1990s when the conflict was brought up again, this time in the context of a claim by the French public national television channel, *France 2*.¹⁸²

note 164. For further references to numerous sources exploring the relationship between copyright and freedom of expression, see Yin Harn Lee, *Copyright and Freedom of Expression: A Literature Review* (CREATE Working Paper No. 2015/04, 2015), <https://zenodo.org/record/18132/files/CREATE-Working-Paper-2015-04.pdf> [<https://perma.cc/A5J6-Q5KQ>].

¹⁷⁶ *D.G.P.N.V.*, App. No. 5178/71, 44 Eur. Comm’n H.R. Dec. & Rep. 13, 24.

¹⁷⁷ *De Geillustreerde Pers N.V. v. the Netherlands*, App. No. 5178/71, para. 84 (Eur. Comm’n on H.R. July 6, 1976), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%225178/71%22%2C%22itemid%22%3A%22001-95643%22%7D>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* para. 86.

¹⁸⁰ *Id.* paras. 87–88.

¹⁸¹ Hugenholtz, *supra* note 16, at 12.

¹⁸² *Société Nationale de Programmes FRANCE 2 v. France*, App. No. 30262/96 (Eur. Comm’n on H.R. Jan. 15, 1997) (available only in French), <http://hudoc.echr.coe.int/eng?i=001-28411>. On this case, see Hugenholtz, *supra* note 16, at 12–13; Strowel & Tulkens, *supra* note 175, at 306–07; HELFER & AUSTIN, *supra* note 5, at 263–64; Geiger & Izyumenko, *Copyright on the Human Rights’ Trial*, *supra* note 16, at 332–33; Graber, *supra* note 174, at 85–86.

In November 1988, as part of a theatrical news television program devoted to a famous actress, France 2 broadcasted an information report on the restoration of a theatre on the Champs-Élysées. In that report, the camera filmed for a few moments (forty-nine seconds) the wall frescoes by the painter Edouard Vuillard. On those grounds, the painter's assigns filed, via the copyright collecting society SPADEM (Société de la Propriété Artistique et des Dessins et Modèles), a claim for damages for the broadcast of works without payment of royalties.

The High Court of Paris first found against the painter's estate¹⁸³ on the grounds that the presentation of the paintings amounted to a "brief quotation"¹⁸⁴ justified by the critical or informatory nature of the television report in which they were incorporated. This judgment was, however, overturned on appeal,¹⁸⁵ and France 2 was ordered to pay 12,000 francs in damages. According to the appellate court, since some of the painter's frescoes were shown in their entirety, their representation could not amount to a "brief quotation." Finding that the frescoes were not part of the decor of the theatre whose restoration was the topic of the broadcast, the appellate court held that the communication of the frescoes of Vuillard to the public was not justified on this occasion by the informational character of the work in which their representation was incorporated. The applicant's subsequent appeal to the French Supreme Court was equally unsuccessful.¹⁸⁶ The supreme court found that the integral representation of a work, whatever its form and duration, could not be regarded as a brief quotation within the meaning of the French Intellectual Property Code. France 2 then appealed to the European Commission of Human Rights, arguing that the supreme court's decision, which precluded the television channel from exercising the right of quotation in artistic matters, violated its right to freedom of expression.

The Commission first noted that "the facts complained of by the applicant constitute[d] an interference with the applicant's right to freely communicate information."¹⁸⁷ It then established, without difficulty, that the

¹⁸³ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 5, 1991 (Fr.).

¹⁸⁴ Within the meaning of an internal exception to copyright envisaged in Article 41(3) of the French Law on Literary and Artistic Property of March 11, 1957, which was, since July 1, 1992, incorporated in Article L. 122-5(3)(a) of the French Intellectual Property Code of July 1, 1992, http://www.wipo.int/wipolex/en/text.jsp?file_id=322949 [<https://perma.cc/ZK3X-H5SG>] (available only in French).

¹⁸⁵ Cour d'appel [CA] [regional court of appeal] Paris, July 7, 1992 (Fr.).

¹⁸⁶ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 4, 1995, Bull. Civ. I, no. 296 (Fr.).

¹⁸⁷ Société Nationale de Programmes FRANCE 2 v. France, App. No. 30262/96 (Eur. Comm'n on H.R. Jan. 15, 1997) (available only in French and translation by authors), <http://hudoc.echr.coe.int/eng?i=001-28411>.

interference was prescribed by law—namely, the national copyright law provisions on the rights of exploitation—and that the text of those provisions was “adequately accessible” and easily foreseeable by the applicant, “a television channel, whose activity is directly related to the legislation on intellectual property.”¹⁸⁸ As to the purpose of interference, the Commission considered that it was “intended to protect the rights of others, in particular the rights of authors of literary and artistic works.”¹⁸⁹ The core of the analysis then centered, as is often the case, on the question of proportionality. In this regard, the European Commission pointed out that:

[I]t is not required to decide whether the decision was consistent with domestic law, but to consider it with reference to Article 10 . . . of the Convention. The Commission is not therefore required to decide on the interpretation of the notion of ‘brief quotation’. It also recalls that it is normally not for the Convention organs to resolve, under paragraph 2 of Article 10 . . . , the conflicts which may arise between, on the one hand, the right to freely communicate information and, on the other hand, the right of authors whose works are communicated. The Commission must assess whether there is a proportional link between the limitation to the above-mentioned freedom of the applicant and the interests protected by this limitation.

The Commission notes that the applicant was ordered to pay damages because of the absence of the payment of royalties due to the author of the frescoes, which have been fully disseminated. Given the circumstances of the case, the Commission considers that it was reasonable for the relevant domestic courts, in the interest of the author and his assigns, to take account of the rights of these latter over the works, which have been after all freely disseminated by the applicant. Consequently, the Commission considers that the restriction or penalty at issue constituted a measure necessary in a democratic society to protect the rights of others.¹⁹⁰

Like the *De Geillustreerde Pers N.V.* ruling, the Commission’s reasoning in *France 2* has been criticized in the literature, this time for the Commission’s excessive cautiousness in intervening in the area of copyright from an external freedom of expression perspective.¹⁹¹ However, when compared to the first two decisions on copyright and freedom of expression involving broadcasting organizations’ monopoly in television listings, the analysis in *France 2* might appear as a step forward. This is because in

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Hugenholtz, *supra* note 16, at 13; Graber, *supra* note 174, at 86.

France 2, the Commission admitted that copyright regulation constitutes an “interference” with the right to freedom of expression and information and hence is not immune, as it is often argued, from an external human rights review.¹⁹² A real breakthrough in the court’s treatment of the free expression and copyright conflict, however, did not occur until recently when the ECtHR faced the problems posed by the enforcement of copyright on the free flow of information in the new digital environment.

2. Further Development of the “Infringers” Argument in the Digital Environment: File-Sharing on the Internet and Website Blocking

As mentioned above, the latest developments in the Convention’s copyright and freedom of expression case law all concern, unsurprisingly, the measures of copyright enforcement online.¹⁹³ In the past few years, the court has addressed the questions of potentially excessive copyright enforcement techniques and their effects on the Convention right to freedom of expression and information on three occasions.

The first two cases, decided almost simultaneously in early 2013, pertained to the issues of unauthorized dissemination of copyright-protected works on the internet. One of the cases, *Donald v. France*,¹⁹⁴

¹⁹² In fact, for a long time, courts in Europe, the United States, and elsewhere have been very reluctant to admit any freedom of expression defense in copyright law, considering that any potential conflict has already been internally addressed by legislatures through the legal boundaries of the exclusive right. *See, e.g., Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (finding no need to expand the fair use doctrine “[i]n view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”); *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (“[C]opyrights are categorically immune from challenges under the First Amendment.”); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (“The first amendment is not a license to trammel on legally recognized rights in intellectual property.”); *Television New Zealand Ltd. v. Newsmonitor Servs. Ltd.* [1994] 2 NZLR 91 (N.Z.); Cour de cassation [Cass] [supreme court for judicial matters] 1e civ., July 4, 1995, 167 RIDA 259 (Fr.); *CB-Infobank I*, Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 16, 1997, GRUR 459 (1997) (Ger.); *Karikaturwiedergabe*, Oberster Gerichtshof [OGH] [Supreme Court] Dec. 9, 1997, GRUR INT. 896 (1998) (Austria).

¹⁹³ *See* Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era*, *supra* note 164 (analyzing the influence of the right to freedom of expression and information on European copyright law in the digital context).

¹⁹⁴ ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908 (available only in French). For an assessment of this case, see Geiger & Izyumenko, *Copyright on the Human Rights’ Trial*, *supra* note 16; Dirk Voorhoof & Inger Høedt-Rasmussen, *ECHR: Copyright vs. Freedom of Expression*, KLUWER COPYRIGHT BLOG (Jan. 25, 2013), <http://copyrightblog.kluweriplaw.com/2013/01/25/echr-copyright-vs-freedom-of-expression/> [<https://perma.cc/47TP-48QL>]; Paul

concerned a conviction for copyright infringement in France by three fashion photographers, one of whom had taken photographs of Paris fashion shows and posted them on a website of the applicants' online fashion magazine. Since the pictures were published without authorization from the fashion houses concerned, the fashion houses, together with the French Fashion Federation, filed a suit for copyright infringement. The three photographers based their defense on Article 10 of the ECHR and Article L. 122-5 9° of the French Intellectual Property Code (an internal copyright exception allowing the reproduction of artistic works for news reporting). The photographers, however, ultimately lost in national proceedings, as the national courts considered Article L. 122-5 9° inapplicable to the creations of designers and fashion houses, even though the latter were also protected under French copyright law. As a result, the photographers were ordered to pay fines and damages totaling more than 250,000 euros.

In the wake of that national court's decision, the photographers applied to the Strasbourg Court, insisting that the fashion photographs contained information of general public interest and that their posting on a website, even for sale, amounted to a proportionate exercise of freedom of expression.

A similar issue of conflicting copyright and freedom of expression rights arose almost simultaneously before the ECtHR in another high-profile dispute by two co-founders of the notorious "The Pirate Bay" (TPB) file-sharing service. The co-founders were criminally charged in Sweden for contributing, through their service, to the infringement of copyrights on music, films, and computer games.¹⁶⁵ As in the case with the French photographers, the national proceedings ended unfavorably for the TPB co-founders, who received prison sentences of ten and eight months respectively, together with joint liability for damages amounting to

L.C. Torremans, *Ashby Donald and Others v. France*, Application 36769/08, ECtHR, 5th section, Judgment of 10 January 2013, 4 QUEEN MARY J. INTELL. PROP. 95 (2014); Strowel, *supra* note 164; Fabien Marchadier, *Le conflit entre le droit d'auteur et la liberté d'expression devant la Cour Européenne des Droits de l'Homme*, 304 LÉGIPRESSE 221 (2013); Alain Zollinger, *Droit d'auteur et liberté d'expression: le discours de la méthode (Commentaire CEDH, 10 janv. 2013, n° 36769/08, Ashby Donald et a. c/ France)*, 5 PROP. INTELL. 7 (2013).

¹⁶⁵ ECtHR, *Kolmisoppi v. Sweden (The Pirate Bay)* (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712. For comments on this case, see Geiger & Izyumenko, *Copyright on the Human Rights' Trial*, *supra* note 16; Dirk Voorhoof & Inger Høedt-Rasmussen, *ECHR: Copyright vs. Freedom of Expression II (The Pirate Bay)*, KLUWER COPYRIGHT BLOG (Mar. 20, 2013), <http://copyrightblog.kluweriplaw.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/> [<https://perma.cc/47TP-48QL>]; J. Jones, *Internet Pirates Walk the Plank with Article 10 Kept at Bay: Neij and Sunde Kolmisoppi v. Sweden*, 35(11) EUR. INTELL. PROP. REV. 695 (2013); Strowel, *supra* note 164.

approximately five million euros. According to the Swedish courts, TPB had furthered illegal file-sharing in such a way that the persons responsible for the website became criminally liable.¹⁹⁶

Like the applicants in *Ashby Donald*, the TPB co-founders sought justice in the ECtHR. They maintained that Article 10 of the ECHR enshrined the right to offer an automatic service of transferring unprotected material between users—in line with the basic principles of freedom of communication on the internet—and convicting persons responsible for that service for the acts committed by its users ran afoul of those principles.

In each case, the ECtHR held that the applicants' convictions constituted an interference with Article 10 of the ECHR. Although the court ultimately found no violation of that provision, it engaged in an elaborate analysis of the proportionality of interference with the aim of copyright protection, thereby departing from its previous reluctance expressed in *France 2* to resolve “the conflicts which may arise between, on the one hand, the right to freely communicate information and, on the other hand, the right of authors whose works are communicated.”¹⁹⁷

According to the ECtHR, the factors that stood against the applicants were the commercial character of their expression¹⁹⁸ and the fact that the information contained in the shared material did not contribute—unlike what the applicants in *Donald* had claimed—to the general debate of public interest¹⁹⁹ and, therefore, “[could not] reach the same level [of protection] as that afforded to political expression and debate.”²⁰⁰ Furthermore, restrictions on Article 10 were all the more justified by the fact that the proprietary interests of copyright holders were equally protected by the Convention by virtue of the applicability to intellectual property of Article 1 of Protocol No. 1 to the ECHR (protection of property).²⁰¹ The

¹⁹⁶ Notably, the court of appeals pointed out that the TPB had created the possibility of uploading and storing Torrent files, which is a database and a tracker-function, and thus had not merely offered data transfers or caching. The court of appeals also noted that the defendants had committed intentional offenses and had not taken any precautionary measures, and the torrent files, which referred to copyright-protected material, had not been removed despite warnings and requests for removal.

¹⁹⁷ See *Société Nationale de Programmes FRANCE 2 v. France*, App. No. 30262/96 (Eur. Comm'n on H.R. Jan. 15, 1997) (available only in French and translation by authors), <http://hudoc.echr.coe.int/eng?i=001-28411>.

¹⁹⁸ Compare ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908, para. 39 (available only in French), with ECtHR, *Kolmisoppi v. Sweden (The Pirate Bay)* (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712.

¹⁹⁹ ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908, para. 39 (available only in French).

²⁰⁰ ECtHR, *Kolmisoppi v. Sweden (The Pirate Bay)* (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712.

²⁰¹ See *supra* Part II.

court also emphasized the “nature and severity of the penalties imposed”²⁰² on the applicants but held that, in neither case, could those penalties be regarded as disproportionate.²⁰³

The court’s analysis in *Donald* and *The Pirate Bay* denoted a prominent and important shift. Through these cases, the ECtHR made it clear that even *illegal* and *profit-making* sharing of copyright-protected material was not devoid of freedom of expression guarantees, and, in certain circumstances, it was simply impossible to ignore the freedom of expression checks to assess the impact of the copyright framework on the enjoyment of human rights in Europe.²⁰⁴ The eagerness of the court to give more scrutiny from external human rights perspective to internal copyright regulation was demonstrated again in another Article 10 decision, rendered one year after the cases discussed above. *Akdeniz v. Turkey*²⁰⁵ concerned blocking access to the websites *myspace.com* and *last.fm* in Turkey, at the request of the Professional Union of Phonogram Producers, on the grounds that the websites were disseminating musical works in violation of copyright. The applicant—who had applied to the ECtHR as a regular user of the websites in question—complained about the collateral effects of blocking and argued that it amounted to a disproportionate response in light of Article 10 of the ECHR.

Like in *Donald* and *The Pirate Bay*, the ECtHR engaged in the proportionality evaluation, providing certain guidance on how this type of conflict can be approached from the freedom of expression standpoint. Although the application was declared inadmissible for the applicant’s lack of victim status,²⁰⁶ the ECtHR implied that the outcome might have been

²⁰² ECtHR, *Kolmisoppi v. Sweden (The Pirate Bay)* (dec.), no. 40397/12, Feb. 19, 2013, CE:ECHR:2013:0219DEC004039712.

²⁰³ In *The Pirate Bay* case, the court took into consideration that “the domestic courts found that the applicants had not taken any action to remove the torrent files in question, despite having been urged to do so. Instead they had been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB.” *Id.* In regards to the French photographers in *Donald*, the court reasoned, rather surprisingly, that the applicants “ha[d] not produced any evidence” to prove that the substantial criminal fines imposed on them had “financially strangled” them. ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908, para. 43 (available only in French and translated in 45 INT’L REV. INTELL. PROP. & COMPETITION L. 354 (2014)).

²⁰⁴ For a joint analysis of the *Donald* and *The Pirate Bay* rulings, see Geiger & Izyumenko, *Copyright on the Human Rights’ Trial*, *supra* note 16.

²⁰⁵ ECtHR, *Akdeniz v. Turkey* (dec.), no. 20877/10, Mar. 11, 2014, CE:ECHR:2014:0311DEC002087710 (available only in French). On this case, see Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT’L L. REV. 43 (2016); Strowel, *supra* note 164, at 890–95, 909.

²⁰⁶ ECtHR, *Akdeniz v. Turkey* (dec.), no. 20877/10, Mar. 11, 2014, CE:ECHR:2014:0311DEC002087710, para. 29 (available only in French).

different depending on how the website was used (actively or passively),²⁰⁷ the collateral effects of blocking on legitimate content,²⁰⁸ the value of the blocked information in terms of its contribution to matters of general interest,²⁰⁹ the availability of alternative means of accessing that information,²¹⁰ and the comparative importance of IP as a human right against which the rights of internet users had to be balanced.²¹¹

*3. Freedom of Expression as a Restriction to Access: Article 10
Invoked on the Part of the Rightsholders*

As stated in the introduction to this section, freedom of expression was not always invoked before the ECtHR as a justification for broader access to protected works. Quite to the contrary, on certain occasions, Article 10 was raised by rightsholders in an attempt to further strengthen and broaden protection. For example, in the case of *AEPI S.A.*,²¹² the lack of protection for all musical works administered by the Greek collecting society—AEPI (Hellenic Society for the Protection of Intellectual Property)—when it could not secure an approval from the Ministry of Culture was challenged by AEPI on freedom of expression grounds. AEPI complained that, while its request for approval was pending before the Ministry of Culture, it was unable to sue on behalf of its members and ensure that their works were not disseminated without royalty payments. AEPI maintained that artistic expression, including music, was an integral part of the rights protected by Article 10 of the ECHR, and this protection encompassed the right of the creator of a literary or artistic work to exercise “total control over such work, as desired.”²¹³ According to the AEPI, it followed that “no one [could] break by whatever means the link between the creator and his work, for example, by disseminating the work without the rightsholder’s permission.”²¹⁴ The ECtHR rejected this overbroad reading of Article 10, not because of the substance of the applicant organization’s complaint, but rather because the court did not consider the applicant—a legal entity—eligible to raise this sort of action. The court explained:

The Court does not lose sight of the fact that the applicant, as a legal entity, does not purport to be itself a victim of a violation of the right guaranteed by Article 10, since the restrictions referred

²⁰⁷ *Id.* para. 27.

²⁰⁸ *Id.* para. 28.

²⁰⁹ *Id.* para. 26.

²¹⁰ *Id.* para. 25.

²¹¹ *Id.* para. 28.

²¹² ECtHR, *AEPI S.A. v. Greece* (dec.), no. 48679/99, May 3, 2001, CE:ECHR:2001:0503DEC004867999 (available only in French).

²¹³ *Id.* para. 3 (translated from French by the authors).

²¹⁴ *Id.*

by it—namely the dissemination of musical works without appropriate authorization—affected the artist members of the AEPI but not the AEPI itself. It also notes that Law no. 2121/1993 [on Copyright, Related Rights and Cultural Matters] itself distinguishes between property rights (Article 3 of the Law) and moral rights (Article 4) of the creators of works of art. Articles 54 and 55 of this Law entrust organisations such as the applicant the management of only the property rights of the artists, and not their moral rights, which are closely related to the creators' personality. Moreover, Article 12 § 2 of Law no. 2121/1993 provides that the moral right cannot be transferred. The applicant cannot, therefore, be considered a victim of a violation of Article 10 in this case.²¹⁵

It is noteworthy, however, that the court did not exclude the possibility for the *authors* to raise the claim under Article 10 in order to restrict access to their works in circumstances analogous to those surrounding the claim by AEPI.

B. Freedom of Expression in the Trademark Context

In addition to copyright, another intellectual property right with which the right to freedom of expression comes into potential conflict is the right to the protection of trademarks. So far, the interplay of trademarks and free speech gave rise to two types of disputes before the Convention institutions: those pertaining to unauthorized use of trademarks by third parties for socially important purposes, including parodic criticism (Section III.B.1), and claims coming from potential trademark holders challenging the refusals of their applications for trademark registration (Section III.B.2).

1. Unauthorized Trademark Use and Its Justifiability on the Basis of Free Expression

The use of a trademark for parodic criticism was tested on freedom of speech grounds before the Convention organs only once. This was on application in the beginning of the 1990s to the European Commission by an Austrian anti-smoking association and its chairman.²¹⁶ As part of an advertising campaign against smoking, the association sold pamphlets,

²¹⁵ *Id.*

²¹⁶ Österreichische Schutzgemeinschaft für Nichtraucher v. Austria, No. 17200/90 (Eur. Comm'n on H.R. Dec. 2, 1991), [https://hudoc.echr.coe.int/eng#{"fulltext": \["no%2017200/90"\],"itemid":\["001-124510"\]}](https://hudoc.echr.coe.int/eng#{). On this case, see WOLFGANG SAKULIN, TRADEMARK PROTECTION AND FREEDOM OF EXPRESSION—AN INQUIRY INTO THE CONFLICT BETWEEN TRADEMARK RIGHTS AND FREEDOM OF EXPRESSION UNDER EUROPEAN LAW 284–86 (2011).

posters, and stickers depicting the caricature of a skeleton riding a camel and holding a cigarette in front of the camel. Underneath this picture, the following slogan was written: “ONLY A CAMEL WALKS MILES FOR A CIGARETTE.”²¹⁷ Subsequently, an international tobacco company filed a lawsuit against the applicants, demanding that they discontinue the use of the slogan and pay compensation. According to the company, the publicity distorted its advertising slogan, “I walk miles for a CAMEL,”²¹⁸ in a satirical and ironic manner, which could be understood as a disparagement of the company’s products.

After a series of lower court decisions, the Austrian Supreme Court held against the applicants, imposing a prohibition on using the slogan, the picture, and the words “KAMEL” or “CAMEL” in the applicants’ anti-smoking publicity.²¹⁹ In particular, the supreme court found that a considerable part of the general public would understand the applicants’ publicity to be a clear allusion to the plaintiff’s cigarettes as being especially strong and unhealthy, and the applicants had not been entitled to select the plaintiff’s trademark in order to criticize tobacco products in general.

The applicants contested the impugned prohibition before the Commission of Human Rights, arguing that their rights under Article 10 of the ECHR had been violated. The Commission confirmed that the tobacco industry had to tolerate a public debate concerning the risks of smoking even if information about health risks was presented in an ironical or satirical manner.²²⁰ Nevertheless, it found no justification for applicant’s use of the plaintiff’s particular cigarette brand, agreeing with the domestic courts’ balancing of the plaintiff’s reputation, the applicants’ rights, and the public interest in the dissemination of the slogan and caricature in question.²²¹ According to the Commission, by using the CAMEL trademark, “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 trademarks and its advertising

²¹⁷ In German, the slogan read: NUR EIN KAMEL GEHT MEILENWEIT FÜR EINE ZIGARETTE. “In German language, ‘Kamel’ is a pejorative term for a person acting in a foolish or stupid manner.” *Österreichische Schutzgemeinschaft für Nichtraucher v. Austria*, No. 17200/90 (Eur. Comm’n on H.R. Dec. 2, 1991), [https://hudoc.echr.coe.int/eng#{"fulltext":\["no%2017200/90"\],"itemid":\["001-124510"\]}](https://hudoc.echr.coe.int/eng#{).

²¹⁸ “Ich gehe meilenweit für eine CAMEL,” in German.

²¹⁹ *Oberster Gerichtshof [OGH] [Supreme Court]*, Jan. 9, 1990, 4 Ob 168/89, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19900109_OGH0002_0040OB00168_8900000_000/JJT_19900109_OGH0002_0040OB00168_8900000_000.pdf (Austria).

²²⁰ *Österreichische Schutzgemeinschaft für Nichtraucher v. Austria*, No. 17200/90 (Eur. Comm’n on H.R. Dec. 2, 1991), [https://hudoc.echr.coe.int/eng#{"fulltext":\["no%2017200/90"\],"itemid":\["001-124510"\]}](https://hudoc.echr.coe.int/eng#{).

²²¹ *Id.*

slogans.”²²² The Commission, therefore, concluded that “the Austrian court decisions, in particular the Supreme Court’s decision . . . , did not go beyond the margin of appreciation left to the national authorities in assessing the proportionality of an interference with the freedom of expression in accordance with Article 10 . . . of the Convention.”²²³

About fifteen years later, the French Supreme Court took an opposite position in an identical dispute that also involved the CAMEL trademark and its use in a parody by an anti-smoking association. Unlike the European Commission of Human Rights, the French court was ready to fully engage in the external evaluation of the compatibility of trademark law with freedom of expression and came to the conclusion that freedom of expression justified the use of a trademark for the purposes of criticism.²²⁴ Similarly, in other jurisdictions, starting in the early 2000s, courts began giving preference to freedom of expression in cases on parodic use—for social criticism—of rightsholders’ well-known brands.²²⁵

Nevertheless, in the 1990s, the Commission of Human Rights was of the opinion that only in exceptional circumstances could a trademark owner be obliged to accept a breach of his rights resulting from unauthorized trademark use. This position was confirmed less than one year after the decision in CAMEL—another case concerning trademark use for socially important purposes—this time in drug prescriptions.²²⁶

The applicants were a physician, a pharmacist, and a medical insurance fund and wanted to proceed with a specific manner of prescribing drugs. They planned to recommend the use of the drug Tanderil “or equivalent other product” from an agreed list of drugs that were medically and pharmaceutically considered equivalent. The list was drawn up by a

²²² *Id.*

²²³ *Id.*

²²⁴ *CNMTR v. Société JT*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 19, 2006, Bull. civ. II, No. 1601 (Fr.). For an overview of a number of other French decisions that allowed freedom of expression to prevail in cases of trademark parodies, see Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT’L REV. INDUS. PROP. & COPYRIGHT L. 268 (2004); Christophe Geiger, *Trade Marks and Freedom of Expression—The Proportionality of Criticism*, 38 INT’L REV. INDUS. PROP. & COPYRIGHT L. 317 (2007).

²²⁵ See, on the parodic reproduction of a brewery’s trademark on T-shirts for the purpose of criticizing racial exploitation: *Laugh It Off Promotions CC v. S. African Breweries Int’l (Finance) B.V. t/a Sabmark Int’l* 2005 (8) BCLR 743 (CC) at 35–36 (S. Afr.), and, on artistic use of Louis Vuitton’s design in a painting that is critical of society’s consumerism: GHDHA 4 mei 2011, KG ZA 11-294 2011, 389526 m.nt. (Nadia Plesner/Louis Vuitton Malletier SA) (Neth.).

²²⁶ *Nijs v. Netherlands*, App. No. 15497/89 (Eur. Comm’n on H.R. Sept. 9, 1992), <https://hudoc.echr.coe.int/eng#%7B%22docname%22:%5B%22Nijs%20v.%20Netherlands%22%2C%22itemid%22:%5B%22001-1355%22%5D%7D>. For more on this case, see SAKULIN, *supra* note 216, at 259–61.

designated Dutch authority—the Netherlands Commission Information Drug Prices²²⁷—and consisted of registered brand names and names of generic drugs. The applicants requested Ciba-Geigy, a pharmaceutical company that owned the trademark and name Tanderil in the Benelux, to provide them with a declaration that this procedure for prescribing drugs (to which the applicants sought to give publicity) was not contrary to the law and that the company would refrain from legal proceedings challenging it. Following Ciba-Geigy’s refusal to agree, the applicants initiated court proceedings seeking a declaratory judgment on the same issue. Their claim, however, was rejected in all instances.

Domestic courts based their decisions on the Benelux Court’s interpretation of the relevant provision of the Uniform Benelux Trademark Act. The courts stated that the use of a trademark in such a way that its owner would suffer damages was only permitted if such use could be justified by exceptional circumstances, which were not present in the case at hand.

The applicants complained before the European Commission of Human Rights that the domestic courts’ decision not to declare the drug prescription procedure lawful was contrary to Article 10 of the ECHR. As in the French case involving Camel and an anti-smoking association, the Commission rejected the challenge, finding that “the applicants could achieve their aim of reducing medical costs by phrasing medical prescriptions in such a way that the rights of trademark owners are respected, namely by the mere use of generic names in medical prescriptions.”²²⁸ Accordingly, “the fact that it was not permissible for the applicants to use and recommend the particular manner of drafting prescriptions [was] to be regarded as a proportionate restriction prescribed by law and [could] therefore be considered necessary in a democratic society for the protection of the rights of others.”²²⁹

As with the first ECHR cases on copyright and freedom of expression, the above-discussed approach of the Commission in Article 10 decisions involving trademarks did not face a positive response in the literature.²³⁰ It is, however, notable that, in the Camel case, the ECtHR admitted that “[t]he decision of the Austrian courts prohibiting the applicants from using the words ‘CAMEL’ or ‘KAMEL’ as well as a particular slogan and picture in their publicity against smoking *constitute/d/*

²²⁷ See Jonathan P. Man et al., *De Commissie Voorlichting Prijzen Geneesmiddelen*, 114 PHARMACEUTISCH WEEKBLAD SCI. EDITION 671 (1979).

²²⁸ *Nijs v. Netherlands*, App. No. 15497/89, para. 1 (Eur. Comm’n on H.R. Sept. 9, 1992), <https://hudoc.echr.coe.int/eng#%7B%22docname%22:%5B%22Nijs%20v.%20Netherlands%22%2C%22itemid%22:%5B%22001-1355%22%5D%7D>.

²²⁹ *Id.*

²³⁰ See SAKULIN, *supra* note 216, at 259–61, 284–86.

*an interference with their right to freedom of expression.*²³¹ The court had, therefore, allowed the freedom of expression defense as an external limit to trademark law.

Furthermore, although the Convention institutions found no violation in the free speech and trademark cases, nowadays, the court could decide similar disputes differently. This would be in line with the idea that the Convention is a “living instrument which must be interpreted in the light of present-day conditions.”²³² New realities might require paying greater attention to freedom of expression interests in the context of unauthorized trademark use than was considered necessary at the beginning of the 1990s. One factor pointing in this direction is the change in the judiciary’s position on the relationship between trademarks and freedom of expression in several jurisdictions. As noted above, national courts (for example, the French Supreme Court) are no longer reluctant to reconsider the scope of trademark protection through recourse to external freedom of expression checks and balances.

2. Refusal of Trademark Registration—A Challenge to the Trademark Applicant’s Freedom of Expression?

Unauthorized use is not the sole instance in which trademark protection might impact freedom of expression. A quite separate issue arises when national trademark offices refuse to register the marks of potential trademark holders on grounds that such signs are either “contrary to public policy or to accepted principles of morality”²³³ or considered to be deceptive.²³⁴ In this context, trademark applicants usually claim freedom of expression to support their freedom to use the signs as trademarks.²³⁵ With

²³¹ Österreichische Schutzgemeinschaft für Nichtraucher v. Austria, No. 17200/90 (Eur. Comm’n on H.R. Dec. 2, 1991), [https://hudoc.echr.coe.int/eng#{"fulltext":\["no%2017200/90"\],"itemid":\["001-124510"\]}](https://hudoc.echr.coe.int/eng#{).

²³² See, e.g., ECtHR, *Matthews v. the United Kingdom* [GC], no. 24833/94, Feb. 18, 1999, CE:ECHR:1999:0218JUD002483394, para. 39.

²³³ On the E.U. level, this ground for refusing trademark registration is enshrined in Commission Regulation (EU) No. 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (Text with EEA relevance), art. 7(1)(f), 2017 O.J. (L 154) 1, [hereinafter Commission Regulation 2017/1001] and Article 4(1)(f) of the Directive (EU) No. 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 (Text with EEA relevance), 2015 O.J. (L 336) 1 [hereinafter Directive (EU) No. 2015/2436].

²³⁴ Commission Regulation No. 2017/1001, *supra* note 233, art. 7(1); Directive (EU) No. 2015/2436, *supra* note 233, art. 4(1)(g).

²³⁵ See Christophe Geiger & Leonardo M. Pontes, *Trade Mark Registration, Public Policy, Morality and Fundamental Rights*, in 20 YEARS OF THE BOARDS OF APPEAL AT EUIPO, ANNIVERSARY BOOK, CELEBRATING THE PAST, LOOKING FORWARD TO THE FUTURE 96 (Alicante ed., 2017), <https://ssrn.com/abstract=3009170> [https://perma.cc/E4WE-PWRV];

respect to deceptive marks, the Strasbourg Court recently considered whether the refusal to register deceptive marks violates the freedom of expression of trademark applicants. The case concerned the figurative sign “CRUCIFIX,” sought to be registered in Romania.²³⁶ The mark was a combination of a drawing²³⁷ and the word “crucifix” in a design intended to cover legal services. The National Trademark and Patent Office of Romania (OSIM) refused registration on the grounds that the mark was deceptive²³⁸ and contrary to public order and morality.²³⁹ With regards to the mark’s deceptiveness, OSIM observed that the church enjoyed a high level of public trust, and because of this trust, the use of the “CRUCIFIX” mark for legal services could mislead the public into believing that such services were provided by this religious organization. Regarding public order requirement, OSIM found that the mark’s registration would have infringed provisions of the National Law on Manufacture and Marketing of Religious Objects,²⁴⁰ according to which the church alone had a monopoly on the manufacturing and marketing of crucifixes.

The applicant challenged OSIM’s decision before the County Court of Bucharest, alleging a violation of freedom of expression. He also claimed that he was discriminated against insofar as OSIM had accepted the registration of other marks containing similar graphic elements. The county

Jonathan Griffiths, *Is There a Right to an Immoral Trademark?*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 423 (Paul L.C. Torremans ed., 2008); Lisa P. Ramsey, *A Free Speech Right to Trademark Protection?*, 16 TRADEMARK REP. 797 (2016); Enrico Bonadio, *Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademarks*, 19 MARQ. INTELL. PROP. L. REV. 39 (2015); Susan Snedden, *Immoral Trade Marks in the UK and at OHIM: How Would the Redskins Dispute be Decided There?*, 11 J. INTELL. PROP. L. & PRAC. 270 (2016).

²³⁶ ECtHR, *Dor v. Romania* (dec.), no. 55153/12, Aug. 25, 2015, CE:ECHR:2015:0825DEC005515312 (available only in French).

²³⁷ The drawing depicted a stylized cross with floral elements, placed on a base that read “CRUCIFIX.” The cross was surrounded by a crown in the shape of the letter “C,” representing stylized laurel leaves.

²³⁸ Romanian Law No. 84/1998 of April 15, 1998, on Trademarks and Geographical Indications, art. 5(1)(f), http://www.wipo.int/wipolex/en/text.jsp?file_id=207374 [<https://perma.cc/R35N-VKMJ>] (English translation by the WIPO).

²³⁹ *Id.*, art. 5(1)(i). Note that the European Union’s First Trademarks Directive—First Council Directive 89/104 of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1—had not yet been transposed into Romanian law at the time of the proceedings in the applicant’s case. Article 3(2)(b) of that Directive stated that “[a]ny Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that . . . the trade mark covers a sign of high symbolic value, in particular a religious symbol.” This provision can be currently found in Article 4(3)(b) of Directive (EU) No. 2015/2436, *supra* note 233.

²⁴⁰ Romanian Law No. 103/1992 on Manufacture and Marketing of Religious Objects, § 1(2) (1992).

court held for the applicant and ordered registration of the mark.²⁴¹ It concluded that the Law on Manufacture and Marketing of Religious Objects was not applicable in the present case since it concerned only the manufacture and marketing of objects of worship. Consequently, the registration of the mark did not violate any of the social values defended by public policy. With regard to the alleged misleading character of the mark by OSIM, the court found that the mark, combined with the legal services for which its registration was sought, was not likely to mislead the public as to the nature, origin, or quality of these services.

OSIM lodged an appeal. It argued that the provisions of the Law on Manufacture and Marketing of Religious Objects were part of public policy and, therefore, the owner of the mark could mislead the public into believing that there was a connection between the applicant and the church. In the final judgment of the case, the Bucharest Court of Appeal dismissed the action.²⁴² The court of appeals, after examining the drawing accompanying the mark, found that the “average reference” consumer perceived its religious character as a priority and could, therefore, believe that a link existed between the church and the owner of the mark. Given the broad involvement of religious institutions in charitable and aid activities in various fields, it was possible, in the court’s opinion, that religious organizations could also provide legal assistance to their believers. Thus, the court concluded that the trademark applicant could benefit from public confidence in the church, which made the mark deceptive, and it was, therefore, unnecessary to examine the conformity of the mark with public order and morality. Finally, the Bucharest Court of Appeal found that the refusal to register the trademark did not infringe ECHR provisions on freedom of expression and non-discrimination. On the latter point, the court noted that examples cited by the applicant were irrelevant since those marks contained compound words and complex drawings, which departed from religious symbols.²⁴³

The applicant complained to the Strasbourg Court that the choice of the name and graphic representation of the mark “CRUCIFIX” was a matter of his freedom of thought, conscience and religion (Article 9 of the ECHR), and, by refusing his application, the domestic authorities infringed

²⁴¹ County Court of Bucharest, judgment of June 8, 2010 (Rom.) (cited in ECHR, *Dor v. Romania* (dec.), no. 55153/12, Aug. 25, 2015, CE:ECHR:2015:0825DEC005515312, para. 18).

²⁴² Bucharest Court of Appeal, judgment of June 21, 2011 (Rom.).

²⁴³ One of the judges on the panel dissented and argued in favor of dismissing the appeal. He considered that the application for registration could be rejected only if it was contrary to public order or morality. Recalling that public order concerns the functioning of the state apparatus and that Romania is a secular state where religion is separated from the state, the dissenting judge held that religious symbols could not be part of the public order calculus.

on his freedom of expression (Article 10 of the ECHR). Because the court observed at the outset that the present case should be examined solely under Article 10 of the Convention as concerning the commercial use of a mark, the ECtHR rejected the applicant's claim under this provision as manifestly ill-founded.²⁴⁴ It held that the dismissal of the application for trademark registration amounted to an interference with the applicant's right to freedom of expression insofar as the mark constituted an important element of the applicant's advertising strategy,²⁴⁵ as advertising is one of the forms of commercial speech protected by the Convention. However, such interference was in accordance with the law because the relevant ground of refusal was provided in Romania's National Law on Trademarks and Geographical Indications,²⁴⁶ pursued a legitimate aim (protection of the public against false advertising),²⁴⁷ and was proportionate to this aim. Regarding the proportionality of the measure, the ECtHR observed the applicant had:

in no way demonstrated the existence of a link between the legal services which it intended to provide to the public under the contested mark and the religious symbol of the crucifix. On the contrary, he confined himself to asserting that such a choice related to his freedom of thought, conscience and religion, as well as his freedom of expression.²⁴⁸

In these circumstances, taking into account the particularly wide margin of discretion which the national authorities enjoy in regulating commercial and advertising speech, the national judges were justified in rejecting the applicant's claim.²⁴⁹

The ECtHR has also recently addressed the potential implications of refusing to register trademarks contrary to public policy and morality on the trademark applicants' freedom of expression.²⁵⁰ The case at issue, *Csibi*

²⁴⁴ ECtHR, *Dor v. Romania* (dec.), no. 55153/12, Aug. 25, 2015, CE:ECHR:2015:0825DEC005515312, para. 57 (available only in French).

²⁴⁵ *Id.* para. 42.

²⁴⁶ *Id.* paras. 45–46.

²⁴⁷ *Id.* para. 47.

²⁴⁸ *Id.* para. 53, translated in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 58 (Christophe Geiger et al. eds., 1992).

²⁴⁹ *Id.* paras. 51, 54, 56.

²⁵⁰ For possible implications of this ground for refusal on freedom of expression rights not of the trademark applicant, but of the *user*, see Case E-5/16, *Municipality of Oslo* (Eur. Free Trade Association (EFTA) Court, Apr. 6, 2017), [https://report.eftacourt.int/2017/e516/\[https://perma.cc/E6SD-TGF8\]](https://report.eftacourt.int/2017/e516/[https://perma.cc/E6SD-TGF8]). In this case, the court sought to use the public-policy-morality ground for refusal to protect from “appropriation,” by means of trademark registration, works in the public domain (notably, works of art). Although the court, in principle, accepted that the ground for refusal due to morality and public policy can, in certain situations, achieve the goal of keeping works in the public domain, it also confirmed that this ground for refusal does not provide protection to works in the public domain. In

v. Romania,²⁵¹ concerned the Romanian trademark registration authority's refusal to register the applicant's trademark that read "Szekely Land is not Romania!"²⁵² According to the Romanian trademark office, claiming that Szekely Land (an unofficial territory name for three Romanian counties) was not part of Romania could lead to the idea of territorial separation. The trademark office found this to be contrary to the constitutional provisions on the unitary character of the Romanian State and, consequently, to the national trademark law that does not allow the registration of trademarks contrary to public order.²⁵³

The applicant contested the office's reasoning, which was subsequently affirmed by the courts, before the ECtHR, contending that the domestic authorities had unlawfully restricted the voicing of the applicant's strong belief contained in the expression at issue on public order grounds.²⁵⁴ According to the applicant, his statement concerned a fictitious land that could be defined only historically and ethnographically, not politically.²⁵⁵

The Strasbourg Court, however, was not persuaded and found that the interference with the applicant's right was justified under the national trademark law provision excluding trademarks that are contrary to public order or good morals from protection and registration. The court reasoned that such an interference pursued the legitimate aims of protecting Romania's territorial integrity, national security, and public order.²⁵⁶

order to be excluded from registration on this ground, works of art have to pass the threshold of "enjoy[ing] a particular status as prominent parts of a nation's cultural heritage." *Id.* para. 92. However, the court made no reference to the right to freedom of expression. The argument of "the general interest in protecting creations of the mind from commercial greed" was used instead, with reference also to the freedom of the arts. *Id.* para. 65. For comments on this judgment, see Martin Senftleben, *Vigeland and the Status of Cultural Concerns in Trade Mark Law—The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain*, 48 INT'L REV. INTELL. PROP. & COMPETITION L. 683 (2017); Thomas H. Nicholson, *EFTA and EEA: Is a (Famous) Work of Art Contrary to Accepted Principles of Morality or Public Policy Under Article 3 of the Trade Mark Directive?*, KLUWER TRADEMARK BLOG (Sept. 4, 2017), <http://trademarkblog.kluweriplaw.com/2017/09/04/efta-eea-famous-work-art-contrary-accepted-principles-morality-public-policy-article-3-trade-mark-directive/> [https://perma.cc/CBS7-SXXT]. More generally, on the insufficiency of current trademark protection of the general interest in keeping public domain works free, see Lotte Anemaet, *The Public Domain is Under Pressure—Why We Should Not Rely on Empirical Data When Assessing Trade Mark Distinctiveness*, 47 INT'L REV. INTELL. PROP. & COMPETITION L. 303 (2016); Geiger & Pontes, *supra* note 235.

²⁵¹ ECtHR, *Csibi v. Romania* (dec.), No. 16632/12, 4 June 2019, CE:ECHR:2019:0604DEC001663212.

²⁵² "Szekelyfold nem Románia!" in Hungarian.

²⁵³ ECtHR, *Csibi v. Romania* (dec.), no. 16632/12, June 4, 2019, CE:ECHR:2019:0604DEC001663212, para. 7.

²⁵⁴ *Id.* para. 8.

²⁵⁵ *Id.* para. 35.

²⁵⁶ *Id.* para. 41.

Concerning the necessity of such an interference, the ECtHR refused to “speculate whether the applicant aimed in reality to use the trademark in question in order to promote his campaign for the creation of a Szekler state.”²⁵⁷ The court observed that the applicant’s complaint “[did] not relate to political speech but only refer[red] to the proceedings related to the domestic authorities’ refusal to register a trademark” and that “the applicant limited his application to these proceedings, . . . [and] the arguments related to his alleged political activities were only raised by the Government after the communication of his application.”²⁵⁸

The court further noted that “the applicant was involved in a commercial activity and had used on several types of products the text for which he had sought registration as a trademark.”²⁵⁹ Thus, the ECtHR appeared to accord particular weight to the fact that the object of the applicant’s complaint was the refusal of his trademark “to be used in a commercial activity,”²⁶⁰ and not in any other type of speech meriting elevated Article 10 protection, such as political or other general interest speech.

In view of this consideration, the ECtHR found that “the domestic judges did not overstep their broad margin of appreciation when they found that public reasons outweighed the applicant’s eventual right to freedom of expression.”²⁶¹ It also ruled that “the applicant has not proved that the refusal to register the trademark in question had had any impact on his possible commercial activities.”²⁶² The court, therefore, concluded that “the refusal of registration was . . . proportionate in the circumstances of the present case, which disclose no appearance of a violation of Article 10 of the Convention” and rejected the application as manifestly ill-founded.²⁶³

Nonetheless, the seemingly prudent stance of the Strasbourg Court on the impact of trademark-registration refusals on the free speech rights of trademark applicants might not be a final say on the issue, at least not for all trademark registrations, particularly, insofar as “immoral” trademarks (rather than trademarks contrary to public order) are concerned. Indeed, the Strasbourg Court’s case law generally suggests greater tolerance towards speech that “offend[s], shock[s] or disturb[s].”²⁶⁴ According to the court, “[s]uch are the demands of that pluralism, tolerance and broadmindedness

²⁵⁷ *Id.* para. 42.

²⁵⁸ *Id.*

²⁵⁹ *Id.* para. 43.

²⁶⁰ *Id.*

²⁶¹ *Id.* para. 44.

²⁶² *Id.* para. 45 (citing ECtHR, *Dor v. Romania* (dec.), no. 55153/12, Aug. 25, 2015, CE:ECHR:2015:0825DEC005515312, para. 55).

²⁶³ *Id.* para. 46.

²⁶⁴ ECtHR, *Handyside v. United Kingdom*, no. 5493/72, Dec. 7, 1976, CE:ECHR:1976:1207JUD000549372, para. 49.

without which there is no ‘democratic society.’”²⁶⁵ Hence, at least in theory, any future challenge of registration refusals of “immoral” rather than criminal-law-violative trademarks before the ECtHR might lead to a radically different outcome than that reached in the *Csibi* case.

For instance, in one of its recent pronouncements on the permissibility of restrictions on commercial speech on public-morals grounds, the ECtHR found in favor of the “speaker.”²⁶⁶ In particular, the court held that the imposition of a fine on a clothing company²⁶⁷ for using images of Jesus and Mary in its advertising campaign was not sufficiently justified.

Then again, it is unlikely that the ECtHR will rule that offensive trademarks should always be registered, as the court usually adheres to a case-by-case approach. The ECtHR is also unlikely to allow the registration of trademarks that can be deemed to undermine other values protected by the Convention—as might be the case regarding, for example, racist signs or messages. Hence, there are many reasons to suggest that, in Europe, the approach to the freedom of expression implications of the refusal to register trademarks on morality or public policy grounds is likely to be far less “radical” than that recently taken up by the U.S. Supreme Court in *Matal v. Tam*²⁶⁸ and *Iancu v. Brunetti*.²⁶⁹ In those cases, the U.S. Supreme Court found that refusing to register the so-called “disparaging,” “scandalous,” or “immoral” trademarks violates trademark applicants’ free speech rights, protected under the First Amendment to the U.S. Constitution.

Lately, the CJEU has also addressed the issue. Until recently, the General Court of the CJEU—one of the two courts of the judicial branch of the European Union alongside the CJEU itself—had always rejected applicants’ free expression arguments for “immoral” trademarks. The General Court reasoned that such applicants had either failed to properly argue that the refusal of their application was not covered by limitations on freedom of expression provided in Article 10(2) of the ECHR,²⁷⁰ or that the

²⁶⁵ *Id.*

²⁶⁶ ECtHR, *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, Jan. 30, 2018, CE:ECHR:2018:0130JUD006931714.

²⁶⁷ The company was fined under the Lithuanian Law on Advertising that prohibited advertising contrary to public morals.

²⁶⁸ *Matal v. Tam*, 137 S. Ct. 1744 (2017).

²⁶⁹ *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

²⁷⁰ Case T-232/10, *Couture Tech Ltd v. Office for Harmonisation in the Internal Market [OHIM]*, para. 71 (July 2, 2019), <https://op.europa.eu/en/publication-detail/-/publication/69cc3bfd-9f24-44c9-9995-dd2ed51e5709/T-232/10>. This case involved the OHIM’s refusal to register the Soviet coat of arms as a Community trademark because of the ban on former USSR symbols in certain E.U. Member States.

refusal did not prevent the applicants from continuing to market their products with the signs in question as non-registered marks.²⁷¹

The latest in the line of such cases decided by the Court of Justice in February 2020 has, however, changed this trend.²⁷² The case concerned the refusal by the E.U. Intellectual Property Office (EUIPO) to register the word-sign “Fack Ju Göhte” as contrary to the accepted principles of morality because the word “fack ju” (identical to the English expression “fuck you”) was expected to be perceived as shocking and vulgar by the German public.²⁷³ The sign referred to the title of a successful German comedic film produced by the applicant, the Constantin Film Produktion company. In a decision from January 2018, the CJEU’s General Court habitually rejected the trademark applicant’s freedom of expression claim, adding that “a constant concern to preserve freedom of expression” which is present “in the field of art, culture and literature . . . does not exist in the field of trade marks.”²⁷⁴ The Court of Justice, where the case was appealed, has, however, explicitly discarded the General Court’s argument.²⁷⁵ According to the Court of Justice, “freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, must . . . be taken into account when applying Article 7(1)(f) of Regulation No 207/2009 [the ground for refusal related to public policy or to accepted principles of morality].”²⁷⁶

²⁷¹ See Case T-417/10, Cortés del Valle López v. OHIM, para. 26 (Mar. 9, 2012), <http://curia.europa.eu/juris/celex.jsf?celex=62010TJ0417> (available only in French and Spanish) (noting that OHIM’s refusal to register the figurative mark, “¡Que bueno ye! Hijoputa,” was perceived as an inherently offensive and shocking expression by the Spanish public of the E.U.); Case T-54/13, Eflag Trade Mark Co. v. OHIM, para. 44 (Nov. 14, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144483&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=2750488> (available only in French and German) (OHIM’s refusal to register a figurative sign with the words “FICKEN LIQUORS” as it is considered to be a vulgar and obscene term in German).

²⁷² Case C-240/18 P, Constantin Film Produktion GmbH v. European Union Intellectual Property Office [EUIPO] (Feb. 27, 2020), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=223843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2550080>.

²⁷³ This was the general ground for refusal of Article 7(1)(f) of the E.U. Trademark Regulation No. 207/2009, in effect at the material time (currently Article 7(1)(f) of Commission Regulation 2017/1001).

²⁷⁴ Case T-69/17, Constantin Film Produktion GmbH v. European Union Intellectual Property Office [EUIPO] (Jan. 24, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198722&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=2550306> (appeal before the Court of Justice) (available only in French and German).

²⁷⁵ Case C-240/18 P, Constantin Film Produktion GmbH v. European Union Intellectual Property Office [EUIPO], para. 56 (Feb. 27, 2020), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=223843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2550080>.

²⁷⁶ *Id.*

This was also the position of the Advocate General who, in his opinion on this case, found that “[f]reedom of expression does indeed play a role in trade mark law.”²⁷⁷ Hence, to regard freedom of expression as irrelevant to the field of trademarks (as held by the General Court) is “clearly incorrect.”²⁷⁸

Nonetheless, by apparently suggesting that the free speech rights of trademark applicants must be balanced against the need to preserve public morals or other competing interests in each particular case, both the Advocate General and, following him, the Court of Justice appear to have taken a more cautious position than that adopted by U.S. courts. Thus, no automatic restriction on free speech can be imposed on trademark law provisions prohibiting registrations of immoral marks and other marks contrary to public policy.²⁷⁹ The Advocate General has also suggested that “although freedom of expression, as well as other fundamental rights potentially at stake, must be taken into account in the overall balancing exercise, the protection of freedom of expression is not the primary goal of trade mark protection.”²⁸⁰

The CJEU’s position can, thus, be characterized as being much in line with the ECtHR’s approach towards the freedom of expression challenges to refusals of trademark applications. Contrary to the position taken in the U.S., in Europe, the approach would greatly depend on the circumstances of each particular case, such as, the mark’s “offensiveness,”²⁸¹ the severity of harm to freedom of expression of the trademark applicant,²⁸² and so on.²⁸³

²⁷⁷ Case C-240/18 P, *Constantin Film Produktion GmbH v. European Union Intellectual Property Office [EUIPO]*, para. 47 (July 2, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=4232D93A774C5379B6048FC908A5423C?text=&docid=215701&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7290447> (opinion of Advocate General Bobek).

²⁷⁸ *Id.* para. 57.

²⁷⁹ *Id.* paras. 56–57.

²⁸⁰ *Id.* para. 57.

²⁸¹ For example, in the case of a Lithuanian clothing company, the ECtHR gave particular consideration to the public authorities’ failure to justify why the reference to religious symbols in advertising was offensive. *ECtHR, Sekmadienis Ltd. v. Lithuania*, no. 69317/14, Jan. 30, 2018, CE:ECHR:2018:0130JUD006931714, para. 79.

²⁸² Arguably, fining a company for its advertising campaign amounts to a direct punishment of expression; whereas, the refusal of trademark registration is rather a measure to discourage certain speech and does not rise to the level of a direct ban on expression. For further discussion on the degree of harm caused to freedom of expression by any potential refusal of trademark registration, see Lisa P. Ramsey, *Non-Traditional Trademarks and Inherently Valuable Expression*, in *THE PROTECTION OF NON-TRADITIONAL TRADE MARKS 337* (Irene Calboli & Martin Senftleben eds., 2018).

²⁸³ For a comparative approach between the United States and the European Union, see Geiger & Pontes, *supra* note 235.

IV. RIGHT TO PRIVACY AS A DEFENSE AGAINST COPYRIGHT ENFORCEMENT AND AS A BASIS FOR MORAL RIGHTS

The intellectual property issues that arose before the Strasbourg Court regarding the right to privacy—guaranteed by the right to respect for private and family life found in Article 8 of the ECHR—concerned: the manner of executing certain search orders on allegations of copyright violation (Section IV.A) and the possible extension to moral rights of Article 8 of the ECHR (Section IV.B).

A. Search Orders and Their Effects on the Right to the Respect for Private Life

The Strasbourg Court first examined the compatibility of search orders (as measures against copyright infringement) with the Convention's privacy provision in *Chappell v. United Kingdom*²⁸⁴ in 1989. The case concerned a challenge to the issue and execution of an interim relief known as an “Anton Piller order”²⁸⁵ to search the applicant's premises that served as both his office and home and to seize property that was subject to civil copyright infringement proceedings. Following the applicant's unsuccessful attempts to set the order aside, he applied to the ECtHR, arguing, first, that the Anton Piller orders, as they existed in English law, were in breach of Article 8 of the ECHR. Under the same provision, he further contested the way in which the order was served and how the subsequent search was carried out in his case.

In particular, he alleged that the grant and the execution of the order were neither in conformity with English law nor proportionate to the legitimate aim pursued, that is, the protection of the rights of others under the second paragraph of Article 8 of the ECHR. The applicant mainly relied on the fact that the two searches—one regarding the “pirated” videos and another concerning obscene ones—were allowed and conducted at the same time, which allegedly distracted him from properly supervising the execution of the order.

In its March 1985 decision on the admissibility of the application, the European Commission of Human Rights dismissed the applicant's complaint about the legitimacy of Anton Piller orders, considering that it was not called upon to examine, in the abstract, whether a particular aspect

²⁸⁴ ECtHR, *Chappell v. United Kingdom*, no. 10461/83, Mar. 30, 1989, CE:ECHR:1989:0330JUD001046183. On this case, see Ann Sherlock, *European Court of Human Rights—Execution of an “Anton Piller Order” and Article 8*, 14 EUR. L. REV. 476 (1989); Lawrence Collins, *Anton Piller Orders and Fundamental Rights*, 106 LAW Q. REV. 173 (1989); Ruth B. Charteris, *Sun Sets on Dawn Raids*, 34 SCOTS L. TIMES 271 (2000).

²⁸⁵ Named so after a case in which its use was approved by the Court of Appeal. See *Anton Piller KG v. Manufacturing Processes Ltd.* [1976] 1 All ER 779 (appeal taken from Eng.).

of domestic law was or was not in conformity with the Convention.²⁸⁶ However, the Commission referred the applicant's complaint to the Strasbourg Court because of the manner in which the order was executed in his particular case.

The court, judging on the merits, held that there had been no violation of Article 8.²⁸⁷ According to the EctHR, the interference with the applicant's home and privacy could be justified under Article 8(2) as aiming to protect the plaintiffs' copyright against unauthorized infringement. The court noted that the grant and the execution of the Anton Piller order in the applicant's case complied with English law. The basic terms and conditions for the grant of the order were laid down with sufficient precision to be foreseeable.²⁸⁸ As such, the order was accompanied with adequate and effective safeguards against arbitrary interference and abuse.²⁸⁹ Those safeguards included a short term grant for the execution of the order, restrictions regarding the time and the number of persons by whom the order could be executed, and a specified purpose for which seized materials could be used.

Moreover, a variety of remedies were available to the applicant in case of any wrongdoing by the plaintiffs. Although the court admitted that the mode of execution could be considered "unfortunate and regrettable"²⁹⁰ as it involved certain shortcomings in procedure,²⁹¹ it nevertheless concluded that the grant and execution of the order were necessary and proportionate to the legitimate aim pursued.

However, the court reached a different conclusion in two much more recent applications where violations of Article 8 had been established. The applicants in the first case,²⁹² Mr. and Ms. Prezhdarovi, were a married couple who ran a computer club in their garage. On February 2, 2005, the

²⁸⁶ *Chappell v. United Kingdom* (dec.), App. No. 10461/83 (Eur. Comm'n on H.R. Mar. 14, 1989), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2210461%2F83%22%2C%22itemid%22:%5B%22001-57459%22%5D%7D>.

²⁸⁷ ECtHR, *Chappell v. United Kingdom*, no. 10461/83, Mar. 30, 1989, CE:ECHR:1989:0330JUD001046183, para. 67.

²⁸⁸ *Id.* paras. 52–57.

²⁸⁹ *Id.* paras. 59–61.

²⁹⁰ *Id.* para. 63.

²⁹¹ These included the fact that Mr. Chappell was not afforded a proper opportunity to refuse entry to his premises and the fact that his premises were searched, simultaneously, by the police and the plaintiffs.

²⁹² ECtHR, *Prezhdarovi v. Bulgaria*, no. 8429/05, Sept. 30, 2014, CE:ECHR:2014:0930JUD000842905. On this case, see Dirk Voorhoof, *European Court of Human Rights: Prezhdarovi v. Bulgaria*, 10 IRIS 1 (Oct. 1, 2014), <http://merlin.obs.coe.int/article.php?id=15036> [<https://perma.cc/KV7M-F2XB>]; *Prezhdarovi v. Bulgaria*, GLOBAL FREEDOM OF EXPRESSION: COLUMBIA UNIVERSITY, <https://globalfreedomofexpression.columbia.edu/cases/prezhdarovi-v-bulgaria/> [<https://perma.cc/69ZB-MYN3>] (last visited Mar. 12, 2020).

district prosecutor ordered a search of the applicants' club upon suspecting that they had installed some games on the computers they were renting to their clients without the necessary software license for reproduction and distribution.²⁹³ To execute the prosecutor's order, on February 21, 2005, the police searched the club and seized five computers containing computer programs, computer games, and films. Thereafter, criminal proceedings against Mr. Prezhdarov were instigated.²⁹⁴

Afterwards, a report on the inspection was sent to a judge who approved it and briefly noted that there were pressing circumstances that justified an immediate search and seizure as the only means by which the necessary evidence could be collected and preserved.²⁹⁵ Mr. Prezhdarov's application against the search and seizure operation, including a claim that the computers contained letters and personal information about friends and clients, was considered inadmissible.²⁹⁶ In the subsequent criminal proceedings, Mr. Prezhdarov was convicted of unlawful distribution of computer programs, computer games, and movies.²⁹⁷ The computers, which had been retained during the criminal proceedings, were also confiscated.

The applicants complained to the EctHR, claiming that the circumstances in their case were not sufficiently pressing as to justify an on-the-spot inspection and search and seizure of their computers. They further maintained that the operation was unnecessarily extended to cover private information contained in the retained computers, which Ms. Prezhdarova had used for her business activities. Lastly, the applicants complained that they had been denied access to an effective remedy in this regard.²⁹⁸

Ruling on a violation of the second paragraph of Article 8 of the ECHR, the court found that the actions of the police at the applicants' computer club and the subsequent retention of the computers as an interference with the applicants' private life were not in accordance with the law.²⁹⁹ Assuming that the actions of the police had some basis in domestic law—because the Code of Criminal Procedure of 1974 provided that, in certain circumstances, the police could conduct search and seizure operations³⁰⁰—the court nevertheless held that the law did not provide adequate safeguards against arbitrary conduct.

²⁹³ ECtHR, *Prezhdarovi v. Bulgaria*, no. 8429/05, Sept. 30, 2014, CE:ECHR:2014:0930JUD000842905, paras. 12–13.

²⁹⁴ *Id.* paras. 15–17.

²⁹⁵ *Id.* para. 20.

²⁹⁶ *Id.* para. 21.

²⁹⁷ *Id.* para. 25.

²⁹⁸ *Id.* para. 54.

²⁹⁹ *Id.* para. 51.

³⁰⁰ *Id.* para. 44.

The EctHR first noted that the circumstances of the case were not so exigent as to buttress an immediate police action outside the criminal proceedings, particularly because of the lapse of time between the prosecutor's order and the actual police inspection.³⁰¹ It further held that the retrospective judicial review of the search provided no meaningful reasoning for the lawfulness or justification of the impugned measure.³⁰² Finally, the court concluded that the lack of any consideration of the seized information's relevance to the investigation and of the applicants' complaint regarding the personal character of some of the information stored on the computers "rendered the judicial review formalistic and deprived the applicants of sufficient safeguards against abuse."³⁰³

The court also found a breach of the "quality of law" requirement³⁰⁴ from *Zosymov v. Ukraine*,³⁰⁵ which concerned a police night search on suspicion of copyright infringement of the applicant's office, car, and garage. As in the previous case, the search was conducted without prior judicial authorization.³⁰⁶ Unlike in *Prezhdarovi*, however, judicial review was never obtained even post factum. According to the Ukrainian rules of criminal procedure, this was because "the relevant complaint could only be brought within the framework of the criminal trial of the case initiated by the police following the disputed visit, in the event that the investigative authority ever brought the case to that stage."³⁰⁷ In the applicant's case, however, the criminal trial was never initiated, despite Mr. Zosymov's numerous efforts, and the relevant criminal proceedings remained stagnant for several years.³⁰⁸

³⁰¹ *Id.* para. 45.

³⁰² *Id.* paras. 47-48.

³⁰³ *Id.* para. 49.

³⁰⁴ As a rule, the ECtHR examines four central questions when an exception to one of the qualified Convention rights (such as the right to privacy) is at stake: (1) whether there has been an interference with that right; (2) whether it is in accordance with law (the "quality of law" requirement); (3) whether it pursues a legitimate aim; and (4) whether it is necessary in a democratic society and proportionate to that aim. In the ECHR, the following rights are qualified: Article 8 (right to respect for private and family life); Article 9 (freedom of thought, conscience and religion); Article 10 (freedom of expression); and Article 11 (freedom of assembly and association). An analogous four-part test is applied when restrictions on the right to property are at stake (Article 1 of the First Protocol to the ECHR). For a further discussion, see Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, in HUMAN RIGHTS FILES NO. 15 (1997). Regarding the right to property, see Aida Grgić, Zvonimir Mataga, Matija Longar & Ana Villfan, *The Right to Property Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and Its Protocols*, in HUMAN RIGHTS HANDBOOKS, NO. 10 (2007).

³⁰⁵ ECtHR, *Zosymov v. Ukraine*, no. 4322/06, July 7, 2016, CE:ECHR:2016:0707JUD000432206.

³⁰⁶ *Id.* para. 61.

³⁰⁷ *Id.* para. 61.

³⁰⁸ *Id.*

According to the Strasbourg Court, in this situation, “domestic law did not provide requisite guarantees against arbitrariness in respect of the police’s actions . . . and did not meet the requirement of quality of law for the purposes of the Convention.”³⁰⁹

B. Moral Rights Grounded in the Convention’s Right to Privacy

Legal scholars are of the opinion that moral rights—even without any case law on point—could be protected by Article 8 of the Convention on the protection of privacy.³¹⁰ The fact that the Strasbourg Court advanced certain arguments in support of moral rights based on Article 8 in relation to trademarks reinforces this contention.

The case at issue concerned a dispute in connection with the right of reproduction of the portrait and name of the applicants’ great-grandfather, a prominent factory owner, in the brewery’s trademark.³¹¹ The applicants passed a copy of the portrait to the local museum, which, in turn, passed it to the brewery. In the action brought against the brewery, the applicants asked to remove their ancestor’s name and portrait from the beer advertisements because those interfered with their right to confidentiality of family life.³¹² The domestic courts, in all instances, dismissed the applicants’ complaints. As a result, the applicants applied to the ECtHR, alleging that the commercial use of their ancestor’s portrait and name caused them distress, which encroached on their private and family life under Article 8 of the ECHR.

The Strasbourg Court found that there had been no interference with the applicants’ human rights. First, the court observed that “the applicants had themselves passed the portrait to the museum,”³¹³ which led the court to conclude that “they had agreed, in principle, that the portrait may be seen by others.”³¹⁴ The ECtHR further noted:

[T]he portrait was posted on produce of the brewery once founded by the applicants’ ancestor. In the Court’s opinion, by using the portrait in this manner the brewery meant to revere his memory as a master brewer rather than insult the applicants’

³⁰⁹ *Id.* para. 62.

³¹⁰ See, e.g., Josef Drexler, *Constitutional Protection of Authors’ Moral Rights in the European Union—Between Privacy, Property and the Regulation of the Economy*, in HUMAN RIGHTS AND PRIVATE LAW: PRIVACY AS AUTONOMY 173–74 (Katja S. Ziegler ed., 2007); Geiger, “Constitutionalizing” Intellectual Property Law?, *supra* note 5, at 383.

³¹¹ ECtHR, *Vorsina v. Russia* (dec.), no. 66801/01, Feb. 5, 2004, CE:ECHR:2004:0205DEC006680101. On this case, see Welkowitz, *supra* note 20, at 694.

³¹² *Id.* para. 2.

³¹³ *Id.*

³¹⁴ *Id.*

feelings towards him. Nothing suggests that the rather distant ties between the applicants and the relative were thereby distorted.³¹⁵

Welkowitz observed that “the court’s finding that the use was not undignified indicates that a less dignified use (and the court did not define what that would be) might have led to a different result.”³¹⁶ Thus, the reasoning of the court points to a quasi-moral-rights argument that might, in the future, receive further development under ECtHR case law on Article 8 and copyright law. This is probable since, in certain countries, the link between moral rights and personality rights is very clear. For example, in Germany, moral rights are described as “authors’ personality rights” (*Urheberpersönlichkeitsrechte*).³¹⁷

V. NON-DISCRIMINATION: POSSIBLE CONSEQUENCES FOR COPYRIGHT RESTRICTIONS ON CERTAIN TYPES OF BUSINESSES AND PATENT APPEAL PROCEEDINGS

The last right in the catalogue of ECHR material guarantees that came into play in the context of intellectual property rights is the right to non-discrimination enshrined in Article 14 of the ECHR. In the IP context, this guarantee was raised before the Convention institutions only on two occasions.

The first pertained to the above-discussed dispute brought to the Commission of Human Rights by the Dutch publisher of weekly “general interest” magazine, *De Geillustreerde Pers N.V.*³¹⁸ Apart from the freedom of expression claim, the publisher also invoked Article 14 of the ECHR, contending that it was discriminated against because under the national broadcasting and copyright legislation, broadcasting organizations and some publishers were allowed, unlike the applicant company, to publish complete program information or at least summaries thereof.³¹⁹

As to the alleged discrimination between the applicant company and the broadcasting organizations, the Commission took into consideration the nature of the broadcasting organizations, which, although performing a public service, were companies created under private law.³²⁰ They were allocated broadcasting time in relation to their membership and

³¹⁵ *Id.*

³¹⁶ Welkowitz, *supra* note 20, at 694.

³¹⁷ Geiger, “*Constitutionalizing Intellectual Property Law?*,” *supra* note 5, at 386 n. 72.

³¹⁸ D.G.P.N.V. v. Netherlands, App. No. 5178/71 (Eur. Comm’n on H.R. July 6, 1976), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%225178/71%22%2C%22itemid%22%3A%2201-3155%22%7D>.

³¹⁹ *Id.* para. 2.

³²⁰ *Id.* para. 101.

the number of subscriptions to their program magazines.³²¹ The profits from those subscriptions were also used for financing the broadcasting activities of the organizations.³²² The European Commission of Human Rights, therefore, considered that there were reasonable justifications for the differential treatment.³²³

As to the alleged discrimination against the applicant company when compared to daily newspapers and newspapers appearing at least three times a week, the Commission found that there had been no differential treatment due to the incomparable features of these two kinds of press publications.³²⁴ In particular, it pointed out that the applicant company sought to publish complete lists, and not merely summaries of programs, whereas the other newspapers were allowed to publish only the short summaries.³²⁵ Finally, the Commission rejected the allegation of discrimination involving foreign weekly magazines. It held that, even assuming that the publications of the applicant company and the foreign magazines were comparable, they nevertheless pursued different aims. On a reciprocal basis, foreign publications were allowed an exchange of program information with broadcasting organizations abroad in order to serve those segments of the public who were interested in foreign broadcasts.³²⁶ Accordingly, there had been no violation of Article 14 of the ECHR.³²⁷

The second occasion on which the Commission was called upon to consider intellectual property regulation in light of Article 14 concerned a case in which the applicant company challenged the fact that the appeal procedure in patent disputes was different from the appeal procedure in other disputes of a pecuniary nature.³²⁸ In this case, unlike in the previous case, the Commission did not even examine whether a different treatment was justified by a legitimate aim, having found that the claimed discriminatory circumstances were not comparable.³²⁹ Additionally, since Article 14 of the ECHR only applied to differences between parties whose situations were analogous, the applicant company's complaint was rejected as manifestly ill-founded.³³⁰

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* para. 102.

³²⁴ *Id.* paras. 104-05.

³²⁵ *Id.* para. 105.

³²⁶ *Id.* para. 107.

³²⁷ *Id.* paras. 108-09.

³²⁸ *B.A.T. v. Switzerland*, App. No. 26684/95 (Eur. Comm'n on H.R. Sept. 4, 1996), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2226684%2F95%22%2C%22itemid%22%3A%2201-28112%22%7D> (available only in French).

³²⁹ *Id.* para. 3.

³³⁰ *Id.*

VI. FAIR TRIAL GUARANTEES APPLICABLE TO IP PROCEEDINGS

Apart from material guarantees, the ECHR also provides a number of procedural safeguards, at the center of which—without doubt—stands the right to a fair trial under Article 6 of the ECHR. The cases concerning fair trial are the most numerous in the Strasbourg Court’s practice on IP. These cases involve aspects of the previously mentioned procedural guarantee, such as: the right of access to court (Section VI.A), the finality of court decisions (*res judicata*) (Section VI.B), the tribunal’s independence and impartiality (Section VI.C), the equality of arms and the adversarial nature of the proceedings (Section VI.D), rules on the administration of evidence (Section VI.E), the oral nature of a hearing (Section VI.F), the right to a reasoned judicial decision (Section VI.G), the right to a reasonable duration of the proceedings (Section VI.H), certain further safeguards applicable in the context of criminal proceedings (Section VI.I), and, finally, the right to an effective remedy³³¹ and timely enforcement of a final court decision (Section VI.J). Although a comprehensive overview of all instances of the interaction of IP with different aspects of the right to a fair trial would go far beyond the scope of this article, some of the most prominent examples can still be highlighted.³³²

A. Access to Courts

The right of access to the courts played a role in several intellectual property cases decided by the ECtHR in relation to the issues of prohibitive time-limits,³³³ certain formal aspects of the appeals procedure,³³⁴ questions of

³³¹ The right to an effective remedy is, strictly speaking, a guarantee in its own right and is enshrined separately from the Convention’s fair trial provision (Article 6) in Article 13 of the ECHR. Note, however, that these two guarantees are closely interrelated, and the E.U. Charter of Fundamental Rights, for example, even places them together within the scope of the same clause (Article 47 of the Charter).

³³² For further discussion of the intersection of IP and fair trial in Europe, see, an excellent article by Jonathan Griffiths, *Enforcement of Intellectual Property Rights and the Right to a Fair Trial*, RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 5, at 438.

³³³ *Metrat v. France*, App. No. 23016/93 (Eur. Comm’n on H.R. May 18, 1994), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2223016/93%22%2C%22itemid%22%3A%2201-27230%22%7D> (on copyright) (available only in French); ECtHR, *AEPI S.A. v. Greece*, no. 48679/99, Apr. 11, 2002, CE:ECHR:2002:0411JUD004867999 (on copyright) (available only in French); ECtHR, *Gheorghe v. Romania*, no. 33883/06, Apr. 12, 2016, CE:ECHR:2016:0412JUD003388306 (on copyright, discussed *infra* text accompanying notes 340–356); and ECtHR, *Sobczynski v. Poland* (dec.), no. 358/04, Sept. 30, 2008, CE:ECHR:2008:0930DEC000035804 (on patents).

³³⁴ *Metrat v. France*, App. No. 23016/93 (Eur. Comm’n H.R. May 18, 1994), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2223016/93%22%2C%22itemid%22%3A%2201-27230%22%7D> (on copyright) (available only in French); *Denev v. Sweden*, App. No.

jurisdiction,³³⁵ allegedly excessive court fees,³³⁶ legal costs,³³⁷ and unduly protracted proceedings.³³⁸ Finally, in a number of patent cases, the applicants similarly challenged the impossibility of appealing the decisions of the Board of Appeal of the EPO to national courts.³³⁹

A recent copyright judgment in the case of *Gheorghe v. Romania*³⁴⁰ provides a good illustration of how timeframe restrictions can impede effective access to judicial protection. In *Gheorghe*, the applicant was a professional photographer who took a number of photographs of landscapes in Călărași County in Romania in 1984.³⁴¹ Although the photographs had been commissioned for commercial publication in an album, the album was not published, and the photographs were retained by a certain F.G., who was in charge of the album project.³⁴² In 2004, the applicant found out, by chance, that an album had been published in 1999 by a company run by F.G., with F.G. credited as the photographer.³⁴³ In February 2004, claiming F.G. had committed copyright infringement, the applicant lodged a criminal complaint with the Romanian Copyright Office

25419/94 (Eur. Comm'n on H.R. Apr. 9, 1997), [https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2225419/94%22\],%22itemid%22:\[%22001-3557%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2225419/94%22],%22itemid%22:[%22001-3557%22]}) (on designs).

³³⁵ ECtHR, *Kessler v. Switzerland* (dec.), no. 56933/00, Sept. 14, 2004, CE:ECHR:2004:0914DEC005693300 (on copyright) (available only in French).

³³⁶ *X. v. Switzerland*, App. No. 6958/75 (Eur. Comm'n on H.R. Dec. 10, 1975), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-75046%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-75046%22]}) (on patents, discussed *infra* text accompanying notes 357, 359–361); ECtHR, *Sté. MATROT v. France* (dec.), no. 43798/98, Dec. 13, 2001, CE:ECHR:2001:1213DEC004379898 (on patents) (available only in French, discussed *infra* text accompanying notes 358, 362).

³³⁷ ECtHR, *Jensen v. Denmark*, no. 8693/11, Dec. 13, 2016, CE:ECHR:2016:1213JUD000869311 (on designs, discussed *infra* text accompanying notes 363–371).

³³⁸ ECtHR, *Kristiansen v. Norway*, no. 25498/08, May 2, 2013, CE:ECHR:2013:0502JUD002549808 (on patents, discussed *infra* text accompanying notes 372–379).

³³⁹ *Reber v. Germany*, App. No. 27410/95 (Eur. Comm'n on H.R. Apr. 12, 1996), [https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2227410/95%22\],%22itemid%22:\[%22001-2868%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2227410/95%22],%22itemid%22:[%22001-2868%22]}); *Lenzing AG v. Germany*, App. No. 39025/97 (Eur. Comm'n on H.R. Sept. 9, 1998), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],%22itemid%22:\[%22001-4410%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-4410%22]}); *Lenzing AG v. United Kingdom*, App. No. 38817/97 (Eur. Comm'n on H.R. Sept. 9, 1998), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],%22itemid%22:\[%22001-4408%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-4408%22]}); ECtHR, *Rambus Inc. v. Germany* (dec.), no. 40382/04, June 16, 2009, CE:ECHR:2009:0616DEC004038204.

³⁴⁰ ECtHR, *Gheorghe v. Romania*, no. 33883/06, Apr. 12, 2016, CE:ECHR:2016:0412JUD003388306.

³⁴¹ *Id.* para. 6.

³⁴² *Id.*

³⁴³ *Id.* para. 7.

(RCO). He also joined a civil action to his criminal complaint, seeking compensation for pecuniary and non-pecuniary damages.³⁴⁴

Following an investigation establishing that the applicant's copyright had indeed been infringed, the RCO forwarded the applicant's complaint to the police in November 2004.³⁴⁵ Although the expert report ordered by the police also confirmed the applicant's authorship of the photographs, the prosecutor's office decided not to open a criminal investigation on the grounds that the copyright infringement limitation period of five years (calculated from the date on which the offense was committed)³⁴⁶ had expired in April 2004. The applicant appealed the decision before the trial court, which ruled in his favor.³⁴⁷ In particular, the court noted that the five-year-limitation period should have been calculated from the date on which the applicant lodged his complaint with the RCO—which was about two months before the end of the five-year term—and not the date on which the RCO forwarded the file to the police.

The court's conclusion was informed by the specific procedure for prosecuting copyright offenses in Romania, whereby only the RCO (and not the applicant) can commence a criminal action for copyright infringement. This term calculation was, nevertheless, rejected on appeal by the higher court,³⁴⁸ which held that the limitation period continued to run until the date on which the police received the criminal complaint from the RCO in November 2004, which was more than five years after the offense had been committed.³⁴⁹ In reaching this conclusion, the higher court made no reference to the civil complaint lodged by the applicant.

The applicant then appealed to the ECtHR, which found that the domestic courts' restrictive interpretation of the limitation period for lodging the copyright infringement claim had deprived the applicant of access to a remedy that would have enabled him to obtain the compensation claimed. While stressing that "the requirement to lodge a judicial claim within a statutory time-limit is not, in itself, incompatible with Article 6 § 1 of the Convention," as this requirement serves the legitimate aims of legal certainty and proper administration of justice,³⁵⁰ the court nevertheless noted that "the right of access to court is impaired when the rules cease to serve [those

³⁴⁴ *Id.* para. 8.

³⁴⁵ *Id.* para. 10.

³⁴⁶ In the present case, that date was the publication of the album in April 1999.

³⁴⁷ Călărași County Court, judgment of November 24, 2005.

³⁴⁸ Bucharest Court of Appeal, judgment of February 17, 2006.

³⁴⁹ *Id.*

³⁵⁰ ECtHR, *Gheorghe v. Romania*, no. 33883/06, April 12, 2016, CE:ECHR:2016:0412JUD003388306, para. 27.

aims]. . . and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court.”³⁵¹

Applying these rules to the facts of the applicant’s case, the ECtHR ruled that the date that should have been taken into account by the domestic courts was the date when the applicant lodged his complaint with the RCO, not the date when that complaint was forwarded by the latter to the police.³⁵² In reaching this conclusion, the court acknowledged that the time it took for the RCO to conduct an investigation could not be imputed to the applicant.³⁵³ Furthermore, the procedural particularities of the Romanian system for filing a criminal copyright infringement action did not allow the applicant to file his complaint directly with the courts.³⁵⁴ Finally, as it concerned the applicant’s joined civil action, the court observed that the domestic rules of criminal procedure required a criminal court to settle a civil action once it decided to discontinue the criminal proceedings.³⁵⁵ In light of the above, the ECtHR concluded:

[T]he interpretation of the time-limit by the court of last resort, followed by the non-examination of the joined civil claim, precluded a full examination of the merits of the case and impaired the very essence of the applicant’s right of access to a court for the purpose of the determination of his civil rights and obligations.³⁵⁶

Additionally, two patent disputes examined the right of access to courts in situations where the excessive costs of proceedings impede judicial review of a case. In *X. v. Switzerland*,³⁵⁷ the question was whether the denial of free legal aid and the obligation to pay a large deposit in order to pursue an action for damages in a patent infringement suit prevented the applicant from accessing the courts. In the second case, *Sté. MATROT v. France*,³⁵⁸ the issue was a civil defendant’s (the company, Sté. MATROT’s) inability to appeal on points of law without paying significant damages awarded to the claimant by the judgment the defendant intended to appeal.

In both instances, the applicants’ claims were rejected as manifestly ill-founded. In relation to the first case, the Commission reiterated that high costs of proceedings may raise an issue under Article 6(1) (fair hearing) of

³⁵¹ *Id.* para. 28.

³⁵² *Id.* para. 30.

³⁵³ *Id.* para. 31.

³⁵⁴ *Id.* para. 32.

³⁵⁵ *Id.* para. 33.

³⁵⁶ *Id.* para. 34.

³⁵⁷ *X. v. Switzerland*, App. No. 6958/75 (Eur. Comm’n on H.R. Dec. 10, 1975), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-75046%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-75046%22]}).

³⁵⁸ ECtHR, *Sté. MATROT v. France* (dec.), no. 43798/98, Dec. 13, 2001, CE:ECHR:2001:1213DEC004379898 (available only in French).

the Convention in certain circumstances.³⁵⁹ The Commission of Human Rights, nevertheless, relied on the national court's finding that the action for damages in the applicant's case was without any prospect of success.³⁶⁰ The Commission further considered that the amount of the deposit was not disproportionate to the size of the claim.³⁶¹ With respect to the second case, the court similarly found that the requirement to pay damages was proportionate in view of the commercial nature of the dispute, the manner in which the damages were calculated, and the applicant company's failure to provide any evidence of its financial situation.³⁶²

An interesting case pertaining to the legal costs of proceedings and their proper allocation—a separate issue under the right of access to court—came under the scrutiny of the Strasbourg Court in December 2016. In this case, the applicant, Mr. Jensen, had been condemned to pay legal costs of an unspecified amount.³⁶³ He was convicted in Denmark for violating intellectual property rights involving the marketing of substantial quantities of counterfeit designer goods such as knives, lamps, and similar products.³⁶⁴ The judgment, which was read aloud to the applicant, stated that he had to pay legal costs, including the lawyers' fees. The applicant did not appeal that judgment. However, in 2010, he was informed that the legal costs he had to pay amounted to approximately 77,000 euros—a decision which the applicant appealed to the High Court of Denmark.³⁶⁵ He claimed that the costs had to be paid entirely or partly by the treasury. His appeal was dismissed because it was lodged after the statutorily allotted time limit.³⁶⁶ According to the high court, the time-limit for an appeal (fourteen days) should have been calculated from the moment the applicant was informed of the decision that he had to pay legal costs, even if he only later learned how much the legal costs amounted to.³⁶⁷ This was because the appeal concerned the order to pay the legal costs and not the actual amount of the legal fees.

The applicant appealed to the ECtHR, complaining about the system of imposing a duty to pay legal costs in a judgment without specifying the amount. The court, however, rejected his claim, holding that there had

³⁵⁹ X. v. Switzerland, App. No. 6958/75 (Eur. Comm'n on H.R. Dec. 10, 1975), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-75046%22%7D>.

³⁶⁰ *Id.* at 158.

³⁶¹ *Id.*

³⁶² ECtHR, Sté. MATROT v. France (dec.), no. 43798/98, Dec. 13, 2001, CE:ECHR:2001:1213DEC004379898, para. 1 (available only in French).

³⁶³ ECtHR, Jensen v. Denmark, no. 8693/11, Dec. 13, 2016, CE:ECHR:2016:1213JUD000869311.

³⁶⁴ *Id.* para. 6.

³⁶⁵ *Id.* para. 10.

³⁶⁶ *Id.* para. 21.

³⁶⁷ *Id.* para. 44.

been no violation of Article 6(1) (access to court) of the ECHR.³⁶⁸ It essentially endorsed the decision of the Danish High Court, observing that the appeal did not concern the amount of fees he was ordered to pay but solely his duty to pay his legal costs.³⁶⁹ It thus followed that the time limit ran from the date of the judgment and not from the date when the applicant learned of the exact amount of the fees.

Despite the applicant's argument that he could not effectively apprise himself of his duty to pay the legal costs because he was not aware that the legal costs would be so burdensome, the court observed that he still could have argued those costs had to be paid by the treasury even without knowing the exact amount owed.³⁷⁰ Since the applicant did not lodge such an appeal until the expiration of the time limit for doing so, the Danish High Court's dismissal of his appeal was a foreseeable reaction. The court further observed that the applicant also had an opportunity to lodge a complaint about the exact amount of legal costs, and the time limit for such a complaint would have started to run from the date on which the applicant had been informed of that exact amount.³⁷¹ The applicant had, however, chosen not to do so.

Moving further, Article 6(1) of the ECHR may also be breached where the length of domestic proceedings renders the applicant's right of access to courts illusory. The case of *Kristiansen v. Norway*³⁷² is a good illustration. It concerned a refusal by the Norwegian Industrial Property Office (NIPO) of a patent application almost eighteen years after the application was filed.³⁷³ By that time, had a patent been granted in Norway, its protection would have expired just two years later since, according to the Norwegian Patents Act of 1967, a granted patent could be maintained for up to twenty years from the filing date of the patent application.³⁷⁴

Before the ECtHR, the applicants complained that only when the NIPO had given its final decision rejecting their patent application were they in a position to institute judicial proceedings to have the matter reviewed by the courts.³⁷⁵ This was, however, practically meaningless by that time, given the twenty years' limitation on patent protection under the Patents Act. The ECtHR held that this situation had indeed amounted to a violation of Article 6(1) of the ECHR (access to court).³⁷⁶ In view of the average processing time

³⁶⁸ *Id.* para. 33.

³⁶⁹ *Id.* para. 37.

³⁷⁰ *Id.* para. 41.

³⁷¹ *Id.* para. 42.

³⁷² ECtHR, *Kristiansen v. Norway*, no. 25498/08, May 2, 2013, CE:ECHR:2013:0502JUD002549808.

³⁷³ *Id.*

³⁷⁴ *Id.* para. 34.

³⁷⁵ *Id.* para. 39.

³⁷⁶ *Id.* para. 2.

of two to three years, the Norwegian Government's argument that the patent authorities could not have evaluated the applicants' patent application earlier failed to convince the court.³⁷⁷

The ECtHR also noted that, although one of the applicants contributed to the length of the proceedings, this was not solely his responsibility, and substantial delays were attributable to the NIPO.³⁷⁸ It, therefore, followed that, in a situation of administrative delay, the rule limiting patent protection to twenty years from the date of filing undermined the possibility of establishing patent rights through judicial remedies.³⁷⁹ Finally, the lack of judicial review of the EPO's decisions gave rise to a series of applications to the ECtHR on the right of access to the courts.³⁸⁰ Nevertheless, the Convention organs dismissed these cases as inadmissible on grounds identical to those advanced in cases involving property claims as discussed above—notably, because of “equivalent protection” provided by the European Patent Convention.³⁸¹ The court also emphasized that, by deciding to not register patents domestically in a number of European countries and choosing to utilize the EPO registration scheme, the applicants accepted the limitation on access to courts in the various domestic systems.³⁸²

B. Res Judicata

Another fair trial guarantee—the principle of finality of court decisions, or *res judicata*—was examined at length in two cases against Romania which concerned the quashing of a final court judgment in the

³⁷⁷ *Id.* para. 54.

³⁷⁸ *Id.* paras. 54–56.

³⁷⁹ *Id.* para. 57. Having reached this conclusion, the court did not find that any separate issue arose in relation to the requirement under Article 6(1) of the Convention that national proceedings be concluded “within a reasonable time” (on this aspect of the right to a fair trial, see *infra* Section VI.H).

³⁸⁰ *Reber v. Germany*, App. No. 27410/95 (Eur. Comm'n on H.R. Apr. 12, 1996), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%222001-2868%22%7D>; *Lenzing AG v. Germany*, App. No. 39025/97 (Eur. Comm'n on H.R. Sept. 9, 1998), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%222001-4410%22%7D>; *Lenzing AG v. United Kingdom*, App. No. 38817/97 (Eur. Comm'n on H.R. Sept. 9, 1998), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%222001-4408%22%7D>; ECtHR, *Rambus Inc. v. Germany* (dec.), no. 40382/04, June 16, 2009, CE:ECHR:2009:0616DEC004038204.

³⁸¹ See *supra* Section II.C.

³⁸² That limitation, in turn, was considered to be proportionate to the legitimate aim of ensuring an effective European system of registration of patents. See, e.g., *Lenzing AG v. United Kingdom*, App. No. 38817/97, para. 1, (Eur. Comm'n on H.R. Sept. 9, 1998) <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%222001-4408%22%7D>. For a critical assessment of a lack of judicial control over the EPO, see sources cited *supra* note 157.

applicant companies' favor following an application for nullity lodged by the General Prosecutor of Romania. One of those cases was a dispute over exploitation rights for the translation of a novel,³⁸³ and another involved the right of exclusive use of the applicant company's trademark.³⁸⁴ In both cases, a violation of Article 6(1) (*res judicata*) and the applicants' property rights (Article 1 of Protocol No. 1) was established because an application for nullity lodged by the public prosecutor, who was not a party to the proceedings, amounted to an extraordinary remedy contrary to the principle of legal certainty.³⁸⁵

C. Independence and Impartiality

Several IP cases before the ECtHR questioned a tribunal's independence and impartiality.³⁸⁶ The most indicative is the *British-American Tobacco* case,³⁸⁷ in which the applicant company challenged the institutional structure of the Netherlands Patent Office, arguing that the office failed to provide an independent and impartial tribunal, particularly with regard to the manner of appointment of its members. British-American Tobacco maintained that the members of the Appeals Division and the Examination Division were part of the same administrative body—the Patent Office—and were appointed on an interchangeable basis for each individual case by the Central Division of the Patent Office.³⁸⁸

³⁸³ ECtHR, *SC Editura Orizonturi SRL v. Romania*, no. 15872/03, May 13, 2008, CE:ECHR:2008:0513JUD001587203 (available only in French).

³⁸⁴ ECtHR, *SC Parmalat Spa v. Romania*, no. 37442/03, Feb. 21, 2008, CE:ECHR:2008:0221JUD003744203 (available only in French).

³⁸⁵ ECtHR, *SC Editura Orizonturi SRL v. Romania*, no. 15872/03, May 13, 2008, CE:ECHR:2008:0513JUD001587203, paras. 61–64 (available only in French); ECtHR, *SC Parmalat Spa v. Romania*, no. 37442/03, Feb. 21, 2008, CE:ECHR:2008:0221JUD003744203, paras. 25–28 (available only in French).

³⁸⁶ ECtHR, *Dima v. Romania* (dec.), no. 58472/00, May 26, 2005, CE:ECHR:2005:0526DEC005847200 (on copyright) (available only in French); *Smith Kline v. Netherlands*, App. No. 12633/87 (Eur. Comm'n on H.R. July 10, 1991), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2212633/87%22%2C%22itemid%22:%5B%22001-73574%22%7D> (on patents); ECtHR, *British-American Tobacco Co. v. Netherlands*, no. 19589/92, Nov. 20, 1995, CE:ECHR:1995:1120JUD001958992 (on patents, discussed *infra* text accompanying notes 387–397); ECtHR, *Binder v. Germany* (dec.), no. 44455/07, Sept. 20, 2011, CE:ECHR:2011:0920DEC004445507 (on patents).

³⁸⁷ ECtHR, *British-American Tobacco Co. v. Netherlands*, no. 19589/92, Nov. 20, 1995, CE:ECHR:1995:1120JUD001958992. On this case, see Burkhart Goebel, *Trademarks as Fundamental Rights—Europe*, 99 TRADEMARK REPORTER 931, 937 (2009); Griffiths, *supra* note 332, at 443; Catarina Holtz, *Due Process for Industrial Property: European Patenting Under Human Rights Control*, at 131, 132, 156, 207 (June 25, 2003) (unpublished Ph.D. dissertation, Handelshögskolan i Stockholm, Rättsvetenskapliga institutionen).

³⁸⁸ ECtHR, *British-American Tobacco Co. v. Netherlands*, no. 19589/92, Nov. 20, 1995, CE:ECHR:1995:1120JUD001958992, para. 68.

The composition of the Appeals Division was entirely left to the discretion of the Central Division, without any possibility for third parties to object.³⁸⁹ There was no formal guarantee against dismissal or suspension. In this respect, the applicant company referred to a case in which a member of the Patent Office who refused to carry out an order by his superior was dismissed. The British-American Tobacco company submitted, finally, that Dutch law did not provide for the possibility to appeal a decision of the Appeals Division to a tribunal that satisfied the Convention's fair trial requirements and that the proceedings before the Appeals Divisions were not transparent.³⁹⁰

The case was first examined by the European Commission of Human Rights. The Commission held that, although there was no manifestation of any personal bias on the part of the members of Appeals Division of the Patent Office, its organizational structure failed to demonstrate the objective appearance of impartiality.³⁹¹ Furthermore, it had not been shown that the Dutch civil courts had ever considered themselves competent to review the decisions of the Appeals Division.³⁹² The Commission, therefore, concluded that the applicant company's case was not heard by an independent and impartial tribunal, and it had not been established that a remedy before such a tribunal was available to the company.³⁹³

The Strasbourg Court, however, disagreed with the Commission's opinion in a judgment of November 1995.³⁹⁴ It noted that, although no Dutch civil court had ever held itself competent to review the decisions of any Division of the Patent Office regarding patent applications, it could not be inferred from this—absent a ruling to the contrary—that the civil-court remedy was “ineffective.”³⁹⁵ Accordingly, the applicant company had the possibility, under domestic law, to bring the case before civil courts in order to establish whether the Appeals Division was a “tribunal” offering safeguards required by Article 6(1) of the ECHR (fair hearing). If the civil courts found that the Appeals Division failed to meet the ECHR standards, they would have had full jurisdiction to rule on the merits of the patent application.³⁹⁶ Since the applicant company chose not to avail itself of the

³⁸⁹ *Id.* paras. 57–58.

³⁹⁰ *Id.* para. 81.

³⁹¹ *B. Co. v. Netherlands*, App. No. 19589/92 (Eur. Comm'n on H.R. May 19, 1994), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-45668%22%7D>], paras. 53–68.

³⁹² *Id.* para. 67.

³⁹³ *Id.* para. 68.

³⁹⁴ ECtHR, *British-American Tobacco Co. v. Netherlands*, no. 19589/92, Nov. 20, 1995, CE:ECHR:1995:1120JUD001958992.

³⁹⁵ *Id.* paras. 82–83.

³⁹⁶ *Id.* para. 84.

judicial remedy, irrespective of its reasons thereof, the Strasbourg Court concluded that there had been no violation of Article 6(1) of the ECHR (fair hearing).³⁹⁷

D. Equality of Arms and Adversarial Proceedings

The Convention institutions considered the right to adversarial proceedings and equality of arms only on two occasions, both involving Finnish patent proceedings. The first case, decided in 1997, concerned the refusal of an applicant company's patent application before the Finnish Board of Patents and Registers on the grounds that the invention lacked the requisite inventive character.³⁹⁸ It appeared that the Finnish Board's organs had mentioned in their decisions a document filed by an interested third party, which had not been previously communicated to the applicant company. On that basis, the applicant company alleged that the principle of equality of arms had not been respected.³⁹⁹

Another case, decided some eighteen years later, pertained to the civil proceedings initiated by an applicant who sought compensation for a patent license.⁴⁰⁰ In accordance with the patent law in force at the time of the hearing, the Finnish District Court appointed two technical experts to provide expertise. The experts' report was, however, only delivered to the parties together with the District Court judgment, thereby excluding the possibility of commenting on the report.

In the Convention organs' opinion, none of the situations amounted to a violation of the principles of equality of arms or adversarial proceedings. According to the Strasbourg Court and its former Commission, in both instances, the applicants had the opportunity to submit their comments in their subsequent appeals to the courts⁴⁰¹ or higher judicial bodies.⁴⁰² Accordingly, any alleged procedural error before the patent office or the trial court could have been corrected through the later judicial proceedings.

³⁹⁷ *Id.* paras. 86–87.

³⁹⁸ *Brown & Williamson Tobacco Corp. v. Finland*, App. No. 23749/94 (Eur. Comm'n on H.R. Dec. 2, 1997), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-3374%22%7D>.

³⁹⁹ *Id.* para. 64.

⁴⁰⁰ ECtHR, *Vazvan v. Finland* (dec.), no. 61815/13, Nov. 3, 2015, CE:ECHR:2015:1103DEC006181513, para. 4.

⁴⁰¹ *Brown & Williamson Tobacco Corp. v. Finland*, App. No. 23749/94, para. 74 (Eur. Comm'n on H.R. Dec. 2, 1997), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-3374%22%7D>.

⁴⁰² ECtHR, *Vazvan v. Finland* (dec.), no. 61815/13, Nov. 3, 2015, CE:ECHR:2015:1103DEC006181513, para. 32.

E. Administration of Evidence

Several cases on intellectual property implicated the rules on the administration of evidence—another procedural guarantee of the right to a fair trial.⁴⁰³ From these cases as well as from the court’s general body of case law on the questions of evidence, one can infer that, in an overwhelming majority of situations, the court abstains from interfering with the way domestic courts handle evidence. According to the ECtHR, “[t]he admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them.”⁴⁰⁴ The Strasbourg Court’s task is limited to “ascertain[ing] whether the proceedings as a whole, including the way in which evidence was taken, were fair.”⁴⁰⁵ The case of *Kessler v. Switzerland* is a good example.⁴⁰⁶

In *Kessler*, the applicant, who was the president of an animal protection association, published two articles in the association’s magazine criticizing the practice of fishing with live bait. In the articles, the applicant used four drawings taken from the fisheries magazine, *Petri Heil*, without indicating their source and without requesting prior permission for the publication of the drawings—an act that subsequently resulted in his conviction for copyright infringement.⁴⁰⁷

In his application to the ECtHR, the applicant complained, among other things, that the domestic courts did not consider some of the evidence and arguments advanced by him, including evidence on the applicability of quotations and news reporting exceptions to copyright infringement and on the general public interest in the contested publication.⁴⁰⁸ At the outset, the court reiterated that the admissibility of evidence was primarily a matter for

⁴⁰³ B.A.T. v. Switzerland, App. No. 26684/95 (Eur. Comm’n on H.R. Sept. 4, 1996), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%2C%22itemid%22:%5B%22001-28112%22%7D> (on patents) (available only in French); ECtHR, *Kessler v. Switzerland* (dec.), no. 56933/00, Sept. 14, 2004, CE:ECHR:2004:0914DEC005693300 (on copyright, discussed *infra* text accompanying notes 406–412) (available only in French); ECtHR, *Dima v. Romania* (dec.), no. 58472/00, May 26, 2005, CE:ECHR:2005:0526DEC005847200 (on copyright) (available only in French).

⁴⁰⁴ See, among many other authorities, ECtHR, *Ramanauskas v. Lithuania* [GC], no. 74420/01, Feb. 5, 2008, CE:ECHR:2008:0205JUD007442001, para. 52.

⁴⁰⁵ *Id.*

⁴⁰⁶ ECtHR, *Kessler v. Switzerland* (dec.), no. 56933/00, Sept. 14, 2004, CE:ECHR:2004:0914DEC005693300 (available only in French).

⁴⁰⁷ The High Court of the Canton of Thurgau (Tribunal supérieur du canton de Thurgovie) ordered the applicant to pay 1,390 euros as compensation for the unauthorized use of protected works. See Judgment of 6 July 1999, *upheld on appeal* by the Swiss Federal Supreme Court (Tribunal fédéral), judgment of 15 March 2000.

⁴⁰⁸ ECtHR, *Kessler v. Switzerland* (dec.), no. 56933/00, Sept. 14, 2004, CE:ECHR:2004:0914DEC005693300, para. 3.b.

regulation by national law⁴⁰⁹ and observed that the judgment in the applicant's case

was taken following the adversarial proceedings during which the applicant was able to challenge the grounds put forward by the opposing party and to submit the arguments he considered relevant to his case. The courts have assessed the credibility of the various items of evidence submitted in the light of the circumstances of the case and duly gave reasons for their decisions in this connection.⁴¹⁰

In the ECtHR's opinion, it "[did] not appear that these courts have drawn any arbitrary conclusions from the facts submitted to them or have exceeded the limits of a reasonable interpretation of the legislation applicable to the present case."⁴¹¹ It thus followed that the applicant's complaint had to be rejected as manifestly ill-founded.⁴¹²

F. Oral Hearing

In a number of patent cases, the Strasbourg Court discussed the entitlement to an oral hearing as one of the instances of the right to a fair trial.⁴¹³ The absence of an oral hearing in the appellate stage of patent validity proceedings was contested in *B.A.T. v. Switzerland*⁴¹⁴ and was found to be justified by the highly technical and purely legal nature of the proceedings in question.⁴¹⁵ The Commission also stressed that the applicant's claim did not concern the absence of an oral hearing throughout the entire proceedings but only for one instance, and the fact that the hearing took place at the trial court level justified the absence of an oral hearing on appeal.⁴¹⁶ Similarly, the court found that the possibility of lodging a further

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* (translation from French by the authors).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Univ. of Ill. Found. v. Netherlands*, App. No. 12048/86 (Eur. Comm'n on H.R. May 2, 1988), [https://hudoc.echr.coe.int/eng#{"fulltext":\["12048/86"\],"itemid":\["001-221"\]}](https://hudoc.echr.coe.int/eng#{); *B.A.T. v. Switzerland*, App. No. 26684/95 (Eur. Comm'n on H.R. Sept. 4, 1996), [https://hudoc.echr.coe.int/eng#{"%22tabview%22":\["%22document%22"\],"%22itemid%22":\["%22001-28112%22"\]}](https://hudoc.echr.coe.int/eng#{) (available only in French); *Brown & Williamson Tobacco Corp. v. Finland*, App. No. 23749/94 (Eur. Comm'n on H.R. Dec. 2, 1997), [https://hudoc.echr.coe.int/eng#{"%22tabview%22":\["%22document%22"\],"%22itemid%22":\["%22001-3374%22"\]}](https://hudoc.echr.coe.int/eng#{).

⁴¹⁴ *B.A.T. v. Switzerland*, App. No. 26684/95 (Eur. Comm'n on H.R. Sept. 4, 1996), [https://hudoc.echr.coe.int/eng#{"%22tabview%22":\["%22document%22"\],"%22itemid%22":\["%22001-28112%22"\]}](https://hudoc.echr.coe.int/eng#{) (available only in French).

⁴¹⁵ *Id.* para. 2.

⁴¹⁶ *Id.* For further discussion of the entitlement to an oral hearing under Convention case law, see EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6: RIGHT TO A FAIR TRIAL (CIVIL LIMB) paras. 249–56 (2019), https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

appeal with the court sufficiently remedied the lack of an oral hearing in the patent application proceedings before the national patent office.⁴¹⁷

G. Reasoned Judicial Decision

The right to a fair trial also encompasses the important guarantee of a sufficiently reasoned judicial decision. The Strasbourg Court has addressed this in the intellectual property context on a number of occasions,⁴¹⁸ some of which even resulted in a finding of violation of Article 6(1) of the ECHR (reasoned judicial decision). This was the case, for example, in the above-mentioned *Dima v. Romania* dispute.⁴¹⁹ *Dima* concerned, apart from the alleged claim of a violation of the right to property discussed in Section II.A.1, the Romanian Supreme Court's failure to address one of the applicant's grounds for appeal relating to the invalidity of an accounting expertise that led to a rejection of his copyright claims by the lower courts. In the ECtHR's opinion, insofar as that submission was crucial to the outcome of the proceedings, it required a specific and explicit reply, without which there was a violation of Article 6(1) of the ECHR (fairness).⁴²⁰ Similarly, the court's failure to address the applicant's argument relating to her trademark's priority amounted to a violation of the Convention's right to a fair trial.⁴²¹ Article 6 of the ECHR, while not requiring a detailed answer to every argument, obliged the courts deciding on the merits to give a reply to at least those submissions by an applicant that were the subject of the argument.⁴²²

⁴¹⁷ *Brown & Williamson Tobacco Corp. v. Finland*, App. No. 23749/94 (Eur. Comm'n on H.R. Dec. 2, 1997), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-3374%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-3374%22]}), paras. 55-56.

⁴¹⁸ *Metrat v. France*, App. No. 23016/93 (Eur. Comm'n on H.R. May 18, 1994), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-27230%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-27230%22]}) (on copyright) (available only in French); ECtHR, *Balani v. Spain*, no. 18064/91, Dec. 9, 1994, CE:ECHR:1994:1209JUD001806491 (on trademarks); *Denev v. Sweden*, App. No. 25419/94 (Eur. Comm'n on H.R. Apr. 9, 1997), [https://hudoc.echr.coe.int/eng#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-3557%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-3557%22]}) (on designs); ECtHR, *Dima v. Romania*, no. 58472/00, Nov. 16, 2006, CE:ECHR:2006:1116JUD005847200 (on copyright) (available only in French).

⁴¹⁹ ECtHR, *Dima v. Romania*, no. 58472/00, Nov. 16, 2006, CE:ECHR:2006:1116JUD005847200.

⁴²⁰ *Id.* paras. 39-41.

⁴²¹ ECtHR, *Balani v. Spain*, no. 18064/91, Dec. 9, 1994, CE:ECHR:1994:1209JUD001806491.

⁴²² *Id.* paras. 27-28. By contrast, a failure of an administrative court to state reasons for refusing the applicant's appeal petition in the design registration proceedings was found justified on consideration that, whenever the national law conditioned acceptance of an appeal to a decision by the competent court—as was the issue in the applicant's case—a simple refusal or acceptance of the petition by that court was sufficient. *Denev v. Sweden*, App. No.

H. Reasonable Time Guarantee

A great number of cases on the intersection of intellectual property and the right to a fair trial concern the allegedly excessive length of proceedings. When addressing this type of disputes, the ECtHR gives “regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case and the conduct of the applicant and of the authorities dealing with the case as well as what was at stake for the applicant.”⁴²³

In the vast majority of such cases, the approach of the ECtHR is largely the same as that applicable to any other type of (non-IP) dispute. A few minor particularities exist only in the heightened technical complexity of patent litigation and certain copyright and other IP cases, which might serve as a justification for the otherwise excessive duration of the proceedings. Thus, no violation of Article 6(1) (length) was found in *Zhurba v. Ukraine*.⁴²⁴ In *Zhurba*, the applicant worked in a company as a senior engineer. He claimed compensation for his “innovative proposal”⁴²⁵ that consisted of the re-engineering of the heating system in the company, which allegedly created significant savings for his employer. The ECtHR held that the duration of the proceedings, which lasted four years and five months, was not unreasonable mainly due to the “complexity of the controversial intellectual property issues at heart of the dispute.”⁴²⁶ Analogously, the factual complexity of a copyright infringement dispute over unauthorized reproduction of the applicant’s photographs in a travel guide by a Georgian

25419/94 (Eur. Comm’n on H.R. Apr. 9, 1997), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%2C%22itemid%22:%5B%22001-3557%22%5D%7D>.

⁴²³ See, among many other authorities, ECtHR, *Nemec v. Slovakia*, no. 48672/99, Nov. 15, 2001, CE:ECHR:2001:1115JUD004867299, para. 34.

⁴²⁴ ECtHR, *Zhurba v. Ukraine* (dec.), no. 11215/03, June 19, 2007, CE:ECHR:2007:0619DEC001121503.

⁴²⁵ The Civil Code of Ukraine recognizes an “innovative proposal” (*раціоналізаторська пропозиція*), alongside literary works, computer programs, trademarks, etc., among the subject matters of intellectual property rights. See Civil Code of Ukraine, No. 435-IV, of 16 January 2003, art. 420 (as amended up to 2 November 2016) (UA127) (available in Ukrainian), <https://wipo.lex.wipo.int/en/text/181865> [<https://perma.cc/CFZ3-ZRFU>]. According to Article 481(1) of the Code, “An innovative proposal is a proposal which is recognised by a legal entity and which contains a technological (technical) or organizational solution in any field of activity.” “The rights in innovative proposal vest in its author and the legal entity to which such a proposal is submitted.” *Id.* art. 483(1). “The author of an innovative proposal shall have the right to fair remuneration by the legal entity to which this proposal is submitted,” whereas “[the] legal entity that has recognized an innovative proposal has the right to use this proposal to any extent.” *Id.* art. 484 (translation from Ukrainian by the authors).

⁴²⁶ ECtHR, *Zhurba v. Ukraine* (dec.), no. 11215/03, June 19, 2007, CE:ECHR:2007:0619DEC001121503, para. 1.

company contributed, together with several other factors, to the finding that the overall length of the less-than-four-year proceedings was not excessive.⁴²⁷

By contrast, a violation of the reasonable-time guarantee was established in *Jamriška v. Slovakia*,⁴²⁸ where the applicant sought acknowledgement of patent rights and compensation for two technological improvements proposed by him to his employer. According to the court, the proceedings in that case—which lasted, in relevant part, for five years and ten months—although complex, were delayed mainly due to the failure of the trial court to proceed with the case in an effective manner.⁴²⁹ Accordingly, the technical complexity of the dispute was not enough to justify its protracted duration.

It is worth mentioning that, in a number of intellectual property cases where the applicants complained about excessive length of domestic proceedings, the court's analysis was not only from the perspective of Article 6(1) (fair hearing) but also from the standpoint of Article 13, which guarantees the right to an effective national remedy.⁴³⁰

⁴²⁷ ECtHR, *Schrade v. Georgia* (dec.), no. 9289/08, Feb. 2, 2016, CE:ECHR:2016:0202DEC000928908, para. 29. The other factors taken into consideration in this regard were: (1) the fact that the proceedings “were spanned over three levels of jurisdiction, some of which were called to examine the case twice;” (2) the fact that the applicant had contributed, by his own conduct, to certain delays in the proceedings, which “were then validly stayed pending the outcome of the associated criminal proceedings;” and (3) “the overall conduct of the authorities which [could not] be blamed for lack of due diligence.” *Id.*

⁴²⁸ ECtHR, *Jamriška v. Slovakia*, no. 51559/99, Oct. 14, 2003, CE:ECHR:2003:1014JUD005155999.

⁴²⁹ *Id.* paras. 29–31.

⁴³⁰ See, establishing a violation of both provisions, ECtHR, *Kuzin v. Russia*, no. 22118/02, June 9, 2005, CE:ECHR:2005:0609JUD002211802 (civil proceedings concerning the recognition of the applicant's copyright and an award of damages that lasted more than five and a half years in one court); ECtHR, *Abramiuc v. Romania*, no. 37411/02, Feb. 24, 2009, CE:ECHR:2009:0224JUD003741102 (available only in French) (alleging lack of an effective remedy whereby the applicant could have raised a complaint based on the excessive length of the two sets of proceedings in a patent infringement dispute); ECtHR, *Mol v. Netherlands* (dec.), no. 10470/07, June 16, 2009, CE:ECHR:2009:0616DEC001047007 (proceedings in a civil dispute concerning alleged infringement of intellectual property rights to a computer program that lasted for more than fifteen years); ECtHR, *Mirković v. Serbia* (dec.), no. 40053/06, Mar. 23, 2010, CE:ECHR:2010:0323DEC004005306 (proceedings in a copyright-related civil suit that lasted for more than six years); ECtHR, *Zarubica v. Serbia* (dec.), no. 47250/07, May 11, 2010, CE:ECHR:2010:0511DEC004725007 (proceedings in a copyright-related civil suit that lasted for more than six years).

For examples of cases where these two provisions were considered separately, see ECtHR, *Zhurba v. Ukraine* (dec.), no. 11215/03, June 19, 2007, CE:ECHR:2007:0619DEC001121503 (civil proceedings seeking to have the applicant's works declared “an innovative proposal” and to obtain remuneration that lasted four years and five months before three levels of jurisdiction); ECtHR, *Rapos v. Slovakia*, no. 25763/02, May 20, 2008, CE:ECHR:2008:0520JUD002576302 (civil proceedings in a design dispute that lasted more than twelve years before two levels of jurisdiction).

As already discussed, the ECtHR's approach to the resolution of the length-of-proceedings disputes in the IP context does not differ substantially from that in non-IP cases.⁴³¹ The case of *Denev v. Sweden*⁴³² stands out in this general pattern. There, a finding of violation of Article 6(1) (length) arose, mainly, not out of an assessment of the common criteria laid down in the court's case law but from the particular subject matter of the action. The case concerned the proceedings before administrative courts, which were decisive for the registration of the applicant's design and normally took one month at each level. In the applicant's case, however, the administrative court proceedings lasted for almost four years.⁴³³ Complaining about the excessive length of proceedings in his case, the applicant maintained that, had his design eventually been registered, the protection afforded would have been practically useless because it would have almost expired given the five-year period of protection, calculated *from the date of the filing of the design application*.⁴³⁴ The Human Rights Commission agreed, holding that there had been a violation of Article 6(1) (reasonable time).⁴³⁵ It noted:

[S]pecial regard should be had to the fact that the registration of a design—should it be granted—is valid for only five years from the date of the filing of the application. In the light of the criteria established by the case-law and having regard to the circumstances of the present case, the Commission therefore considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.⁴³⁶

I. Further Guarantees in Criminal Proceedings

While the above-discussed fair trial guarantees apply to both civil and criminal proceedings, the ECHR provides some additional safeguards to parties in criminal cases. These safeguards are also featured in a number

On the relationship between Article 6(1) (reasonable time) and Article 13 (effective remedy) of the ECHR, see DAVID HARRIS, MICHAEL O'BOYLE, ED BATES & CARLA BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 570-72 (2d ed. 2009).

⁴³¹ See Griffiths, *supra* note 332, at 443 (“There seems little obvious reason why the right to a timely trial should be more likely to be breached in intellectual property proceedings than in any other form of trial.”).

⁴³² *Denev v. Sweden*, App. No. 25419/94 (Eur. Comm'n on H.R. Jan. 14, 1998), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%2C%22itemid%22:%5B%22001-46116%22%5D%7D>. On this case, see Holtz, *supra* note 387, at 76, 172, 203, 393-94, 485.

⁴³³ *Denev v. Sweden*, App. No. 25419/94, para. 2 (Eur. Comm'n on H.R. Jan. 14, 1998).

⁴³⁴ *Id.*

⁴³⁵ *Id.* para. 38.

⁴³⁶ *Id.* para. 37; *cf.* ECtHR, *Kristiansen v. Norway*, no. 25498/08, May 2, 2013, CE:ECHR:2013:0502JUD002549808 (discussed *supra* text accompanying notes 372-379).

of intellectual property decisions.⁴³⁷ The most interesting example is likely the guarantee of legality, which was at stake in *Donald v. France* discussed above.⁴³⁸ There, the applicants complained about—in addition to a violation of their freedom to impart information—national courts’ restrictive interpretation of the internal copyright exception allowing the reproduction of artistic works for news reporting⁴³⁹.

As already mentioned, the French courts ruled that the exception in question (on which the applicants built their defense) was “inapplicable to the creations of the seasonal fashion industries and articles of fashion”⁴⁴⁰ depicted on the applicants’ photographs. According to the applicants, such an interpretation “enlarged the scope of application of the offense of counterfeiting,”⁴⁴¹ thereby running afoul of the principle enshrined in Article 7 of the ECHR that the criminal law must not be extensively construed to an accused’s detriment. The ECtHR, however, refrained from intervening with the interpretation of French law adopted by the national courts—notably, the French Supreme Court—and reiterated that the Strasbourg Court’s role was limited to verifying the compatibility of the effects of such an interpretation with the Convention. The ECtHR observed:

[T]he Supreme Court decided on the scope of application of an exception to the rule protecting the legitimate rights of authors. The Court does not consider that there is any element in its interpretation capable of constituting an infringement of the principles laid down by Article 7 of the Convention.⁴⁴²

⁴³⁷ On the rights of defense, see *EVORA B.V. v. Netherlands*, App. No. 32601/96 (Eur. Comm’n on H.R. Dec. 3, 1997), [https://hudoc.echr.coe.int/eng#{%22tabview%22:%22document%22,%22itemid%22:\[%22001-4046%22\]}](https://hudoc.echr.coe.int/eng#{%22tabview%22:%22document%22,%22itemid%22:[%22001-4046%22]}) (on trademarks); ECtHR, *Eskelinen v. Finland*, no. 43803/98, Aug. 8, 2006, CE:ECHR:2006:0808JUD004380398 (on trade secrets); ECtHR, *Hanževački v. Croatia*, no. 17182/07, Apr. 16, 2009, CE:ECHR:2009:0416JUD001718207 (on software copyright). On the entrapment defense, see ECtHR, *Volkov v. Russia*, nos. 7614/09, 30863/10, Mar. 26, 2015, CE:ECHR:2015:0326JUD000761409 (on software copyright).

⁴³⁸ ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908 (available only in French); see also discussion *supra* Section III.A.2.

⁴³⁹ Article L. 122-5 9° of the French Intellectual Property Code of 1 July 1992, http://www.wipo.int/wipolex/en/text.jsp?file_id=322949 [<https://perma.cc/4JDS-R3V2>] (available in French).

⁴⁴⁰ ECtHR, *Donald v. France*, no. 36769/08, Jan. 10, 2013, CE:ECHR:2013:0110JUD003676908, para. 20 (available only in French, translation in 45 INT’L REV. INTELL. PROP. & COMPETITION L. 354 (2014)).

⁴⁴¹ *Id.*

⁴⁴² *Id.* para. 23.

J. Enforcement of a Final Judicial Decision

The last procedural guarantee that gave rise to a number of cases involving intellectual property proceedings is the right to timely enforcement of final court decisions. Thus, an eleven-year delay in enforcing a final judgment that ordered a State-owned company to compensate the applicant for an unauthorized use of his invention was found contrary to both Article 6(1) (enforcement of a final court decision) and Article 1 of Protocol No. 1 (protection of property) of the ECHR.⁴⁴³

On another occasion, a failure to enforce a final court judgment—awarding the applicant royalties for the use of a patent—because of several procedural errors committed by domestic courts had likewise resulted in a finding of a violation of the Convention.⁴⁴⁴ On the other hand, a delay of almost five years in complying with a court judgment that required a private debtor to pay the applicant damages for copyright infringement was not deemed inappropriate under Article 6(1) of the ECHR because of the private nature of the dispute and the applicant’s own failure to display the necessary diligence in enforcing the judgment.⁴⁴⁵

VII. CONCLUSION

This article has reviewed the ECtHR’s approach to intellectual property from the perspective of different human rights guaranteed in the European Convention on Human Rights, which the ECtHR considers in IP cases. So far, the central focus of the ECtHR in such cases has been on the Convention’s property and freedom of expression clauses. With regard to the former, the ECtHR made it clear that Article 1 of the First Protocol to the ECHR applies to intellectual property, and its scope of influence is not limited to disputes originating in a direct state action. According to the ECtHR, the Convention is also applicable, in certain circumstances, to private-party litigation. This is possible because of the horizontal effect of the Convention that imposes on State Parties to the Convention the positive obligation to ensure—primarily through their respective judicial systems—that the individual rights protected by the Convention are not unduly restrained.

However, as the right to property is among the rights to which the margin of appreciation accorded to domestic authorities “usually deploys its full effect,”⁴⁴⁶ the national determinations on applicants’ IP rights are

⁴⁴³ ECtHR, *Abramiuc v. Romania*, no. 37411/02, Feb. 24, 2009, CE:ECHR:2009:0224JUD003741102 (available only in French).

⁴⁴⁴ ECtHR, *I.D. v. Romania*, no. 3271/04, Mar. 23, 2010, CE:ECHR:2010:0323JUD000327104 (available only in French).

⁴⁴⁵ ECtHR, *Cerăceanu v. Romania* (no. 1), no. 31250/02, Mar. 4, 2008, CE:ECHR:2008:0304JUD003125002 (available only in French).

⁴⁴⁶ Ducoulombier, *supra* note 159, at 46.

unlikely to be overturned by the ECtHR, except in the case of a flagrant violation. Since the scope of property protection is largely left to the discretion of national legislatures, limitations in the public interest are likely to be permissible in accordance with the concept of the social function of property. The danger of excessive protection of IP rights by the Convention, as is sometimes emphasized by some scholars,⁴⁴⁷ should certainly not be overlooked.⁴⁴⁸

Similarly, regarding the right to freedom of expression and information, the court has developed an extensive body of case law in the area of intellectual property protection. In particular, it has allowed an external freedom of expression defense outside the traditional internal balancing mechanisms of copyright and trademark laws. At the same time, the Convention system did not clearly exclude the possibility of bringing forward an Article 10 argument in order to support an IP claim.

The Convention's property and free expression provisions were, however, not the only ones the ECtHR used to interpret the scope of IP protection in Europe. Notably, the particular manner in which the remedies for infringement could be exercised actuated the guarantees of the Convention's right to privacy. This became very clear on application of the search orders based on a suspicion of IP infringement. Besides these rather specific cases, it has also been demonstrated that the right to privacy has broader—though still largely theoretical—implications for the area of moral rights. Some case law has further emerged in relation to the right to be free from discrimination.

In addition to material rights, the procedural guarantees of Article 6 of the Convention (fair trial) also apply to intellectual property disputes. In many instances, consideration of the intellectual property claims brought under this Convention provision does not differ substantially from any other type of non-IP dispute. In certain situations, however, the particular nature of IP rights and litigation is decisive for the final resolution of the case by the ECtHR.⁴⁴⁹

IP lawyers and judges must rethink and study more carefully the role of the ECtHR's judicial practice vis-à-vis the IP framework. This is clear because of the already existing IP case law of the ECtHR that was the focus of this article, the Court's increased interest in approaching this type of (essentially private law) dispute from the external human rights perspective,

⁴⁴⁷ See Robert Burrell & Dev Gangjee, *Trade Marks and Freedom of Expression—A Call for Caution*, 41 INT'L REV. INTELL. PROP. & COMPETITION L. 544 (2010).

⁴⁴⁸ See Geiger, *supra* note 23, at 661.

⁴⁴⁹ For the most remarkable example in the context of a reasonable time guarantee, see *Denev v. Sweden*, App. No. 25419/94 (Eur. Comm'n on H.R. Jan. 14, 1998), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%7B%22document%22,%7B%22itemid%22:%7B%22001-3557%22%7D%7D> (discussed *supra* text accompanying notes 432–436).

and the recent developments in the European legal arena, including an obligation of the E.U. to accede to the ECHR in the future.⁴⁵⁰ Indeed, a deeper understanding of the precise ways in which IP and human rights interoperate can help to create a more balanced and nuanced system of IP protection not only in Europe but also in other regions and countries (including the United States) where human rights and constitutional rights are recognized as fundamental values meriting the highest level of protection.

⁴⁵⁰ See Article 6(2) TEU, as amended by Article 1(8) of the Treaty of Lisbon, and Article 59(2) of the ECHR, as amended by Article 17 of Protocol No. 14 to the ECHR. Although the CJEU rejected the latest draft agreement of E.U. accession to the ECHR (Opinion 2/13 of 18 December 2014, EU:C:2014:2454), this only delayed the accession, which remains binding on the E.U.

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