Introduction

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In the last decades, the role of human rights in the European and international legal orders has very significantly increased, leading to what has been sometimes called the ‘constitutionalization’ of the entire legal system.¹ In the European Union, significant developments such as the entering into force of the Treaty of Lisbon² placed human rights and fundamental freedoms at the very top of the hierarchy of norms;³ since then, there has been a considerable rise in the use of human rights arguments in the decisions of the Court of Justice of the European Union,⁴ and the imminent accession of the

¹ For further discussion, see T. Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’, in this volume; C. Geiger, ‘“Constitutionalising” intellectual property law?, The influence of fundamental rights on intellectual property in Europe’, 37(4) *IIC* 371 (2006).

² European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, OJ 2007/C 306/01 of 17 December 2007.

³ On the consequence for intellectual property, see C. Geiger, ‘Intellectual “property” after the Treaty of Lisbon, towards a different approach in the new European legal order?’, 32(6) *EIPR* 255 (2010); ‘The construction of intellectual property in the European Union: searching for coherence’, in: C. Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives* (EIPIN Series, Vol. 1, Cheltenham, UK/ Northampton, MA, Edward Elgar, 2013), p. 5.

⁴ To name just a few examples, in the field of copyright and related rights: CJEU, Case C-201/13, *Deckmyn* [2014], Judgment of the Court (Grand Chamber) of 3 September 2014, not yet published; CJEU, Case C-314/12, *Telekabel* [2014], Judgment of the Court (Fourth Chamber) of 27 March 2014, not yet published; CJEU, Case C-283/11, *Sky Österreich* [2013], Judgment of the Court (Grand Chamber) of 22 January 2013, not yet published; CJEU, Case C-360/10, *SABAM v. Netlog* [2012], Judgment of the Court (Third Chamber) of 16 February 2012, published in the electronic Reports of Cases; CJEU, Case C-277/10, *Luksan* [2012], Judgment of the Court (Third Chamber) of 9 February 2012, published in the electronic Reports of Cases; CJEU, Case C-145/10, *Painer* [2011], Judgment of the Court (Third Chamber) of 1 December 2011, ECR I-12533; CJEU, Case C-70/10, *Scarlet Extended* [2011], Judgment of the Court (Third Chamber) of 24 November 2011, ECR I-11959; ECJ, Case C-275/06, *Promusicae* [2008], Judgment of the Court (Grand Chamber) of 29 January 2008, ECR I-00271. In the field of trademarks: CJEU, Case T-417/10, *¡Que bueno ye! HIJOPUTA* [2012], Judgment of the General Court (First Chamber) of 9 March 2012, ECR I-11959; CJEU, Case T-526/09, *PAKI* [2011], Judgment of the General Court (Third Chamber) of 5 October 2011, ECR II-00346; CJEU, Case T-232/10, *Representation of the Soviet coat of arms* [2011], Judgment of the General Court (Fourth Chamber) of 20 September 2011, ECR II-06469. In the field of patents: CJEU, Case C-34/10, *Brüstle* [2011], Judgment of the Court of 18 October 2011, ECR I-09821; ECJ, Case C-377/98, *Netherlands v. Parliament and Council* [2001], Judgment of the Court of 9 October 2001, ECR I-07079.

2 Research handbook on human rights and intellectual property

Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ is likely to amplify this phenomenon. At the international level, a similar dynamic can be noticed. As Laurence Helfer has very convincingly summarized,

the international human rights regime developed through the codification and expansion of rights and freedoms and the creation of new international institutions in the United Nations and regional organizations. Over the last century, states have adopted dozens of nonbinding declarations and legally binding treaties to protect an expanding array of civil, political, economic, social and cultural rights. National constitutions, legislation, and judicial decisions incorporated many of these rights, providing a layer of domestic legal protection to prevent and remedy violations. Yet because governments are often unwilling or unable to police their own rights-infringing conduct, international institutions were established to monitor whether public actors were in fact respecting these rights. The institutions evolved in a piecemeal fashion, resulting in a dizzying array of international courts, tribunals, commissions, committees, special rapporteurs, and working groups.⁶

The increasing importance of human rights goes hand in hand with a growing consensus that the global economy needs to be regulated in order to secure basic ethical principles and the most fundamental values of society. This belief found a clear demonstration through the inclusion in the Treaty on European Union of a special article according to which

[t]he Union [...] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (Article 3 TEU).⁷

At the same time, the economic crisis has encouraged countries to place increasing emphasis on their economic well-being, leading sometimes to a new transfer of power from the state to industry. This created a new need for legal intervention to secure human rights: as misuses of power can now also come from economic actors, individual freedoms need not only to be protected vis-à-vis the state, but also vis-à-vis private persons.⁸ In addition, this shift of power from the state to private entities has led

⁵ See *Draft Accession Agreement of the European Union to the European Convention on Human Rights*, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, 47+1(2013)008rev2, Strasbourg, 10 June 2013.

⁶ L. Helfer, 'Introduction', in: L. Helfer (ed.), *Intellectual Property and Human Rights* (Cheltenham, UK/ Northampton, MA, Edward Elgar, 2013), p. 10.

⁷ European Union, *Consolidated version of the Treaty on European Union*, OJ 2010/C 83/13 of 30 March 2010.

⁸ Further on the so-called 'horizontal effect' of human rights protection, see *inter alia* J.-F. 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 (Council of Europe Publishing, 2007), pp. 14–16; D.J. Harris, M. O'Boyle, C. Warbrick and E. Bates, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd ed., Oxford, OUP, 2009), pp. 20–21. See also, more specifically, in the field

to a growing tendency for legislation to be shaped according to the claims of strong lobby groups and in order to secure private interests rather than the common good.⁹ This development made it increasingly necessary for judges to intervene using corrective mechanisms such as human rights in order to counter the negative effects of sectorial legislation and to reestablish a proper balance of interests.¹⁰

This trend has also affected the shape and use of intellectual property rights at European and international level. There has been an ample body of literature that has described the progressive extension of intellectual property rights outside their traditional boundaries.¹¹ At the same time however, the role of intellectual property rights as a tool to secure and foster non-economic values has increasingly been emphasized by policy makers. In a strategic document published by the European Commission in May 2011, it is, for example, emphasized that

[i]nnovation [...] is indispensable to address the big challenges that humankind is facing in the 21st century: ensuring food security, containing climate change, dealing with demographic change and improving citizens' health. It also has an essential role to play in the quality of daily life by fostering cultural diversity.¹²

And the Commission concluded that it is for the intellectual property system to fulfil all these objectives. The challenges are therefore tremendous and can be summarized in the following questions: how to design an IP system that can foster economic growth while at the same time encouraging non-economic values and objectives of human development? How can it incentivize innovation while at the same time protecting the

of freedom of expression protection, M. Birnhack, 'Acknowledging the conflict between copyright law and the freedom of expression under the Human Rights Act', *Ent.L.R.* 24 (2003), p. 30: 'As western democracies turn more and more to market-oriented economies and cultures the source of the threat to the freedom of speech spills over to other players in the democratic field as well, namely the market'.

⁹ For a critical commentary of this tendency, see A. Peukert, 'Intellectual property as an end in itself?', 33(2) *EIPR* 67 (2011); C. Geiger, 'Intellectual property and constitutional law in the EU after the Treaty of Lisbon: Time to revise Art. 17 (2)', Paper presented at the 32nd Annual ATRIP Congress on the topic 'Is intellectual property a *lex specialis*?', University of Oxford (UK), 25 June 2013; 'The future of copyright in Europe: Striking a fair balance between protection and access to information', 1 *IPQ* 1 (2010); and '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(3) *EIPR* 113 (2009).

¹⁰ C. Geiger, 'L'utilisation jurisprudentielle des droits fondamentaux en Europe en matière de propriété intellectuelle: Quel apport? Quelles perspectives?', in: C. Geiger (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe* (Collection du CEIPI, Paris, Litec/ LexisNexis, 2013), p. 193.

¹¹ See as an example, R.C. Dreyfuss, D.L. Zimmermann and H. First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford/ Toronto, Oxford University Press, 2001).

¹² Communication from the Commission, 'A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe', Brussels, 24 May 2011, COM (2011) 287 final, p. 3.

fundamental freedoms of the citizens?¹³ These ambitions are of course not easy to fulfil and will need intensive legal and non-legal research.

This Research Handbook is meant as a contribution to this task by looking at the intersection and interrelation of human rights and intellectual property. The objective is to shed light on intellectual property developments in international, European and national legislation and jurisprudence, approaching them from a human rights perspective. It is also meant to provide a tool for policy makers and litigators in concrete cases. In fact, human rights have often been considered in the past as mere political statements to support a rights-based discourse and certain claims of a rather political nature. The book therefore aspires to offer practical tools for legal experts to use human rights in intellectual property litigation. Even if human rights are increasingly mentioned and applied in intellectual property case law, the mechanisms and methodology of human rights are not always well understood and integrated by private law judges and attorneys. For this purpose, after a comprehensive introductory chapter by Laurence Helfer, who has done pioneering research on the relationship between human rights and intellectual property,¹⁴ the first part of the book starts by looking at the legal reality behind human rights and, through the contributions of human rights experts, sheds light on its basic principles, such as proportionality and the interaction and conflicts of different human rights at international and European levels. Subsequently, the interrelations between human rights and the foundations of intellectual property law are also explored. The second part of the book looks at the implications of human rights for the development of intellectual property and its consequences for both legislation and judicial practice. Here, a comparative approach has been chosen insofar as the national decisions on human rights and IP in Europe, Latin America and the US have been analyzed, as well as the case law of quasi-judicial bodies such as the Boards of Appeal of the OHIM and the EPO, which so far have never been scrutinized in this respect. Part III then examines the practical interactions between the two legal fields, using a human rights rather than an intellectual property law classification: section 1 first looks at civil and political rights, section 2 at economic, social and cultural rights and finally section 3 at collective rights. The last part of the Handbook takes a prospective approach: the final chapter includes various proposals for an ambitious balanced intellectual property provision to be included in human rights instruments and national constitutions in the future.

It is worth briefly recalling the history of this challenging project. It originated with a conference of the EIPIN network organized by CEIPI at the European Court of Human Rights in Strasbourg in April 2013 entitled 'Human Rights and Intellectual Property: From Concepts to Practice'. The excellent quality of the papers presented and the need for more comprehensive analysis and research in this field led the editor to

¹³ On this issue, see C. Geiger, 'The social function of intellectual property rights, or how ethics can influence the shape and use of IP law', in: G.B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property* (Cheltenham, UK/ Northampton, MA, Edward Elgar, 2013), p. 153.

¹⁴ See e.g. L.R. Helfer, 'Human rights and intellectual property: Conflict or coexistence?', 5 *Minn. Intell. Prop. Rev.* 47 (2003); 'Towards a human rights framework for intellectual property', 40 *UC Davis Law Review* 971 (2007); L.R. Helfer and G. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, CUP, 2011).

invite renowned experts to further complete the topics that could not be covered during the conference, and to conceptualize the entire project as a Research Handbook, thereby realizing the long-term aspiration of the editor of this volume to produce a comprehensive collection on the intersection of human rights and intellectual property. At this point, I would like to warmly thank the series editor Jeremy Phillips for his trust and of course the publisher, in particular John-Paul MacDonald and Luke Adams, for sharing the same enthusiasm for this project and for showing the necessary patience to bring it to fruition. I would also like to express my gratitude to Mrs Catherine Trautmann, Member of the European Parliament, for having delivered an inspired introductory speech to the above-mentioned conference and for having later agreed to transform it into a Foreword to this book. My utmost thanks then goes to Laurence Helfer for having agreed to deliver the keynote address and for adapting it into an opening chapter of the book, as well as to all the highly recognized and prominent academics who participated in this ambitious project and drafted their chapters despite time constraints. As mentioned previously, the book originated in the framework of the European Intellectual Property Institutes Network (made up of the Queen Mary Intellectual Property Research Institute (QMIPRI) at Queen Mary, University of London; the Munich Intellectual Property Law Center (MIPLC); the Magister Lvcentinvs at the University of Alicante; the Masters for Intellectual Property Law and Knowledge Management (IPKM) at Maastricht University, and the Centre for International Intellectual Property Studies (CEIPI) of the University of Strasbourg).¹⁵ I would therefore like to express my warmest thanks to the directors and members of the network, in particular Professors Guido Westkamp, Josef Drexl, Manuel Desantes, Anselm Kamperman Sanders, Aurelio López-Tarruella, as well as Dieter Stauder, Noam Shemtov, Yves Reboul, Stéphanie Carre, Franck Macrez and Yann Basire for chairing some of the panels, and of course to all the students from the five academic institutions who participated at the conference. Finally, this volume could not have been possible without the decisive assistance provided by Oleksandr Bulayenko and Elena Izyumenko, doctoral students and research assistants at the CEIPI, as well as Elena Dan, research assistant at the CEIPI. Their help was invaluable during the editing phase. Mr. Bulayenko deserves to be especially praised for his perseverance, trustworthiness, support and enthusiasm during the entire project. Our warmest thanks and gratitude are addressed to all three.

¹⁵ www.eipin.org.