

1. Intellectual property before the European Court of Human Rights

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INTRODUCTION

In the past years, the impact of human rights (HRs) on intellectual property (IP) law has increased significantly, both in Europe and elsewhere, leading to what has sometimes been called the ‘constitutionalization’ of the entire legal system.¹ In the European Union, important 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 use of human rights arguments in the decisions of the Court of Justice of the

* The case law and other developments discussed in this article are current to June 2018.

¹ For further discussion, see Ch Geiger, “‘Constitutionalizing’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe” (2006) 37(4) IIC 371; T Mylly, ‘The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU’, in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK / Northampton, MA, Edward Elgar Publishing, 2015) 103; J Schovsbo, ‘Constitutional Foundations and Constitutionalization of IP Law – A Tale of Different Stories?’ (2015) 7(4) *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 383.

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 consequences for intellectual property, see Ch Geiger, “‘Intellectual Property’” after the Treaty of Lisbon: Towards a Different Approach in the New European Legal Order? (2010) 32(6) *EIPR* 255; Ch Geiger, ‘The Construction of Intellectual Property in the European Union: Searching for Coherence’, in Ch Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives* (EIPIN Series, Vol. 1, Cheltenham, UK/Northampton, MA, Edward Elgar Publishing, 2013) 5.

European Union (CJEU, or Luxembourg Court),⁴ and the imminent accession of the EU to the European Convention on Human Rights (ECHR)⁵ is likely to only amplify this phenomenon.

The growth in importance of human rights goes hand in hand with a rising consensus that the global economy needs to be regulated in a more balanced way in order to secure basic ethical principles and the most fundamental values of society.⁶

⁴ To name just a few examples, in the field of copyright and related rights: CJEU, Judgment in *Mc Fadden*, C-484/14, 15 September 2016, EU:C:2016:689; CJEU, Judgment in *GS Media*, C-160/15, 8 September 2016, EU:C:2016:644; CJEU, Judgment in *Deckmyn*, C-201/13, 3 September 2014, EU:C:2014:2132; CJEU, Judgment in *UPC Telekabel Wien*, C-314/12, 27 March 2014, EU:C:2014:192; CJEU, Judgment in *SABAM v. Netlog*, C-360/10, 16 February 2012, EU:C:2012:85; CJEU, Judgment in *Luksan*, C-277/10, 9 February 2012, EU:C:2012:65; CJEU, Judgment in *Painer*, C-145/10, 1 December 2011, EU:C:2011:798; CJEU, Judgment in *Scarlet Extended*, C-70/10, 24 November 2011, EU:C:2011:771; ECJ, Judgment in *Promusicae*, C-275/06, 29 January 2008, EU:C:2008:54. In the field of trademarks: CJEU, Judgment in *Coty Germany*, C-580/13, 16 July 2015, EU:C:2015:485; CJEU, Judgment in *Schwerdt v. OHIM – Iberamigo (cat&clean)*, T-587/13, 21 January 2015, EU:T:2015:37; CJEU, Judgment in *ALPHAREN*, T-106/12, 3 July 2013, EU:T:2013:340; CJEU, Judgment in *XXXLutz Marken v. OHIM*, T-542/10, 13 June 2012, EU:T:2012:294; CJEU, Judgment in *PAKI*, T-526/09, 5 October 2011, EU:T:2011:564; CJEU, Judgment in *Couture Tech Ltd*, T-232/10, 20 September 2011, EU:T:2011:498. In the field of patents: CJEU, Judgment in *Huawei Technologies*, C-170/13, 16 July 2015, EU:C:2015:477; CJEU, Judgment in *Spain v. Council*, C-147/13, 5 May 2015, EU:C:2015:299; CJEU, Judgment in *Brüstle*, C-34/10, 18 October 2011, EU:C:2011:669; ECJ, Judgment in *Hässle*, C-127/00, 11 December 2003, EU:C:2003:661; ECJ, Judgment in *Netherlands v. Parliament and Council*, C-377/98, 9 October 2001, EU:C:2001:523.

⁵ See Article 6(2) TEU as amended by Article 1(8) of the Treaty of Lisbon; and Article 59(2) ECHR as amended by Article 17 of Protocol No. 14 to the ECHR. Although the CJEU rejected the latest draft agreement of EU 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 EU.

⁶ Ch 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 Publishing, 2013) 153. In the European context in particular, see T Mylly, *Intellectual Property and European Economic Constitutional Law* (Gummerus Kirjapaino Oy, Vaajakoski, 2009); Ch Geiger, 'Moving out of the Economic Crisis: What Role and Shape for Intellectual Property Rights in the European Union?', in H Kalimo and M S Jansson (eds), *EU Economic Law in a Time of Crisis* (Cheltenham, UK/Northampton, MA, Edward Elgar Publishing, 2016) 135.

It is therefore no surprise that the European Court of Human Rights (ECtHR, or Strasbourg Court), Europe's principal human rights watchdog, is increasingly concerned about the conformity of IP laws with Europe's catalogue of human rights and fundamental freedoms.⁷

All areas of intellectual property have been involved; however, surprisingly, most of the decisions rendered by the Strasbourg Court have so far received relatively little comment, with the exception of a handful of cases that attracted a lot of attention. To give only a few examples of the amplitude of the phenomenon, the Strasbourg Court has tested the grant of a compulsory licence for a patented drug for its compliance with the Convention property provision;⁸ assessed the proportionality of the requirement to pay damages for a short news broadcast of copyrighted works with regard to the television channel's right to freely communicate information;⁹ and considered, further, whether an unauthorised reproduction of the portrait and name of the applicants' ancestor in a brewery's trademark was such as to cause them distress by encroaching on their private and family life.¹⁰ 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;¹¹ 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.¹²

⁷ See on this issue, Ch Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property', in P L C Torremans (ed.), *Intellectual Property and Human Rights* (3rd ed, Alphen aan den Rijn, Kluwer Law International, 2015) 115; and, in the context of copyright in particular, from the same author, 'Copyright's Fundamental Rights Dimension at EU Level', in E Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham, UK/Northampton, MA, Edward Elgar, 2009) 27.

⁸ ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.), no 12633/87, 4 October 1990, CE:ECHR:1990:1004DEC001263387.

⁹ ECommHR, *Société Nationale de Programmes FRANCE 2 v. France* (dec.), no 30262/96, 15 January 1997, CE:ECHR:1997:0115DEC003026296 (available only in French).

¹⁰ ECtHR, *Vorsina and Vogralik v. Russia* (dec.), no 66801/01, 5 February 2004, CE:ECHR:2004:0205DEC006680101.

¹¹ ECtHR, *Hiro Balani v. Spain*, no 18064/91, 9 December 1994, CE:ECHR:1994:1209JUD001806491.

¹² ECommHR, *Denev v. Sweden* (report (31)), no 25419/94, 14 January 1998, CE:ECHR:1998:0114REP002541994.

An increased involvement of the ECtHR in IP law regulation has already influenced national judges,¹³ thus calling for closer scrutiny of the 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 will be adjudicated on the national level.¹⁴

The present chapter is the first attempt to give a comprehensive overview of such case law.¹⁵ It starts with the right to property framework for intellectual property and the protection it affords to the

¹³ See for example the French Supreme Court (*Cour de cassation*), 1st Civil Chamber, no. 13-27391, 15 May 2015, published in the Bulletin, available (in French) <<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030600576&fastReqId=1591102659&fastPos=3>> accessed December 2017; Supreme Court of the Netherlands, *GS Media BV v. Sanoma Media Netherlands BV and Others*, 3 April 2015, available (in Dutch) <<https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbXhZnJvaXBsZW98Z3g6ZGFjNjc3MzhkYjBjNWVm>> accessed December 2017, paras 5.2.5–5.2.6; England and Wales High Court (Chancery Division), *Rocknroll v. News Group Newspapers Ltd* [2013] EWHC 24 (Ch) (17 January 2013), para 42; Court of The Hague, *Nadia Plesner v. Louis Vuitton Malletier SA*, no. 389526 / KG ZA 11-294, 4 May 2011, paras 4.2–4.3.

¹⁴ See, for example, J Christoffersen, 'Human Rights and Balancing: The Principle of Proportionality', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property supra* note 1, 19.

¹⁵ Those – not many – doctrinal sources devoted to the ECtHR jurisprudence on IP matters often concentrate on a specific Convention right of relevance for IP protection, such as the right to property (see L R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International Law Journal* 1) or the right to freedom of expression and information (see P B Hugenholtz, 'Copyright and Freedom of Expression in Europe', in R C Dreyfuss, D L Zimmerman, and H First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford, Oxford University Press, 2001) 343, <https://pure.uva.nl/ws/files/3274348/16602_PBH_Engelberg.doc> accessed December 2017. 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) (D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights', Proceedings of the International Conference CKS-CERDOCT Doctoral Schools, *Challenges of the Knowledge Society*, Bucharest, 15–16 April 2011, 93; D S Welkowitz, 'Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles' (2013) 46 *Akron Law Review* 675), or concentrating on the impact of Convention rights on a particular jurisdiction (T Pinto, 'The Influence of the European Convention on Human Rights in Intellectual Property Rights' (2002) 24(4) *EIPR* 209).

economic interests of IP holders (1). The chapter 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 (2). The chapter next focuses on the more rare examples of IP interaction with the right to privacy, mainly reduced to the questions of an exercise of remedies for IP infringement and certain – still largely theoretical – arguments in support of the protection of moral rights under the scope of this right (3). Furthermore, the right to non-discrimination, which gave rise to disputes pertaining to restrictions imposed by national broadcasting and copyright legislation on some types of businesses, as well as those concerning the different nature of patent appeal proceedings, merits a separate examination (4). A range of procedural guarantees such as the right of access to court, 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 their application to IP proceedings, are analysed in the last part of the chapter (5). Some concluding observations are made at the end.

1. THE HUMAN RIGHT TO PROPERTY AS A BASIS FOR THE PROTECTION OF ECONOMIC INTERESTS OF IP HOLDERS

Since the beginning of the 1990s, the Court and its former Commission of Human Rights¹⁶ have repeatedly stated that different IP rights – including patents, copyrights, and trademarks – were all protected by the general right to property of Article 1 of Protocol No. 1 to the ECHR.¹⁷ Moreover, not only the acquired intellectual property title was deemed

¹⁶ The European Commission of Human Rights (ECommHR) was the ECHR body abolished in 1998 that had been until then entrusted with decisions on the admissibility of applications to the Court (see Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155).

¹⁷ See, in the field of patent law: ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.), no 12633/87, 4 October 1990, CE:ECHR:1990:1004DEC001263387; ECommHR, *Lenzing AG v. the United Kingdom* (dec.), no 38817/97, 9 September 1998, CE:ECHR:1998:0909DEC003881797, para 2. In the field of copyright: ECommHR, *A.D. v. the Netherlands* (dec.), no 21962/93, 11 January 1994, CE:ECHR:1994:0111DEC002196293, para 3; ECommHR,

protected, but also the applications for the registration thereof.¹⁸ An overview of the Convention case law on the right to property makes it possible to distinguish three categories of cases: IP disputes originating in a direct State action (1.1.); IP disputes between private parties that can still be attributable to the State by virtue of the Convention's horizontal effect (1.2.); and the claims against international organisations (notably, the European Patent Office (EPO)) (1.3.).¹⁹

1.1 Negative Aspect: Direct State Interference with the Exercise of IP Rights

The first category of property-as-a-basis-for-IP cases is the most 'traditional' in the Convention terms insofar as it 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 the applicant's IP entitlement (1.1.1.) or refusal to restore it (1.1.2.), and a more specific issue pertaining to compulsory licencing (1.1.3.).

1.1.1 Non-recognition of an applicant's IP entitlement

The first type of dispute resulting out of a direct State action – non-recognition of the applicant's IP entitlement under the domestic legal

Aral, Tekin and Aral v. Turkey (dec.), no 24563/94, 14 January 1998, CE:ECHR:1998:0114DEC002456394, para 4; ECtHR, *Dima v. Romania* (dec.), no 58472/00, 26 May 2005, CE:ECHR:2005:0526DEC005847200 (available only in French); ECtHR, *Melnychuk v. Ukraine* (dec.), no 28743/03, 5 July 2005, CE:ECHR:2005:0705DEC002874303, para 3; ECtHR, *Bălan v. Moldova*, no 19247/03, 29 January 2008, CE:ECHR:2008:0129JUD001924703, para 34; ECtHR, *SC Editura Orizonturi SRL v. Romania*, no 15872/03, 13 May 2008, CE:ECHR:2008:0513JUD001587203 (available only in French), para 70; ECtHR, *SIA AKKA/LAA v. Latvia*, no 562/05, 12 July 2016, CE:ECHR:2016:0712JUD000056205, para 41. In the field of trademarks: ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no 73049/01, 11 January 2007, CE:ECHR:2007:0111JUD007304901, para 72; ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007, CE:ECHR:2007:0918DEC002537904, para 1.

¹⁸ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no 73049/01, 11 January 2007, CE:ECHR:2007:0111JUD007304901, para 78.

¹⁹ For an excellent analysis of the Convention's law on the right to property in its application to intellectual property, see L R Helfer, 'The New Innovation Frontier?' *supra* note 15.

system – was considered at length for the first time in 2005 in the case of *Dima v. Romania*.²⁰ The applicant in that case was a graphic designer who had worked in the studio of Plastic Arts of the Romanian Defence 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 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 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 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 in their reasoning on the new Law on copyright of 1996 which, unlike the law in force at the time of the design's creation, explicitly excluded State symbols from the subject-matter of copyright. The applicant appealed on points of law to the Romanian Supreme Court of Justice, challenging the retroactive application of the 1996 Law to his situation. The Supreme Court dismissed the applicant's appeal, essentially basing its argument – unlike the lower judicial instances – on the 1956 Decree on copyright 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 the subject-matter of copyright under the aforementioned Decree, the latter, which used the positive enumeration technique in defining the scope of protection, did not provide that the State emblem and seal could be copyrighted.

²⁰ ECtHR, *Dima v. Romania* (dec.), no 58472/00, 26 May 2005, CE:ECHR:2005:0526DEC005847200 (available only in French). For an assessment of this case, see L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 14–18; and D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights' *supra* note 15, 96, 100–101.

The applicant contested this finding of the country's highest court 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 resulting from the exploitation of his work to which he was entitled 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. 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, thereby finding it appropriate to examine whether the applicant had in this respect a 'possession' or at least a 'legitimate expectation' of acquiring a 'possession'.²¹ Concerning the latter point, however, the ECtHR abstained from interfering with the domestic courts' reasoning and declared the applicant's complaint inadmissible *ratione materiae* – that is to say, due to the applicant's failure to prove that the right claimed by him was recognised, at least arguably, under Romanian law.²² 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 favour of the applicant.²³ Nor was there any favourable case law allowing the applicant to prove that it was possible to acquire copyright in the designs of the State emblem and seal.²⁴ The Supreme Court's interpretation of national copyright laws was, moreover, such as to exclude that possibility. It therefore followed that the applicant did not have a 'possession' or at least a 'legitimate expectation' of acquiring a 'possession' in terms of the Convention.²⁵ In particular, no '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.²⁶ In this light, with regard to the limited power of the ECtHR to review alleged errors of fact or law committed by the national

²¹ ECtHR, *Dima v. Romania* (dec.), no 58472/00, 26 May 2005, CE:ECHR:2005:0526DEC005847200 (available only in French).

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

courts, there appeared to be no arbitrariness in the way the Supreme Court decided in the applicant's case.²⁷

Some three years later in a very similar dispute, however, the Strasbourg Court reached what on the surface at least is an opposite conclusion. The case at issue, *Bălan v. Moldova*,²⁸ concerned the refusal of Moldovan courts to compensate the applicant for unauthorised use of a photograph by the Ministry of Internal Affairs as a background for national identity cards. Unlike in the case of *Dima*, nevertheless, the applicant's authorship was acknowledged by the domestic courts which also awarded him some compensation. 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. The latter 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.

The ECtHR, to which the case was referred thereafter, considered 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.²⁹ The Strasbourg Court took note of the fact, first, that the applicant's rights in the photograph had been recognised by the domestic courts in a final judgment and therefore constituted a 'possession' within the meaning of the Convention property provision.³⁰ As to the Supreme Court's argument that identity cards could not be subject to copyright, the ECtHR pointed to the distinction in the relevant national law between the authors' rights in respect of their works and the property right over the material object in which their creation was

²⁷ Ibid.

²⁸ ECtHR, *Bălan v. Moldova*, no 19247/03, 29 January 2008, CE:ECHR:2008:0129JUD001924703. For a discussion of this case, see L R Helfer and G W Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, Cambridge University Press, 2011) 212–213; D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights' *supra* note 15, 105; and H G Ruse-Khan, 'Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property supra* note 1, 70, 80–82 and 87.

²⁹ ECtHR, *Bălan v. Moldova*, no 19247/03, 29 January 2008, CE:ECHR:2008:0129JUD001924703, para 46.

³⁰ Ibid., paras 34–46.

embodied.³¹ Since the 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 in respect of his photograph.³² Insofar as it concerned the applicant's failure to ask the courts to prohibit the use of his work, the ECtHR considered that the impugned use of the photograph, even in the absence of the applicant's petition, posed an interference with his right.³³ This was due to the fact that the illegal character of unauthorised 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.³⁴ 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 later aim could have been reached in a variety of ways not involving the breach of the applicant's IP rights.³⁵

1.1.2 Refusal to restore an IP title

The State's refusal to restore a previously recognised IP title, as a second instance of direct State action, was at stake in the case of *University of Illinois Foundation v. the Netherlands*.³⁶

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 (which happened 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 applicant's subsequent request for restoration of the patent was rejected by the Patent Council, which relied on the provision of the Dutch Patent Act, according

³¹ Ibid., para 35.

³² Ibid.

³³ Ibid., paras 38–40.

³⁴ Ibid., para 38.

³⁵ Ibid., 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 Court (ECtHR, *AsDAC v. the Republic of Moldova*, no 47384/07, communicated on 17 January 2013).

³⁶ ECommHR, *University of Illinois Foundation v. the Netherlands* (dec.), no 12048/86, 2 May 1988, CE:ECHR:1988:0502DEC001204886.

to which the possibility to request restoration did not apply when the loss of rights resulted from late payments, where an extended payment period existed.

Relying on Article 1 of Protocol No. 1 (protection of property) 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 foundation'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 either in Dutch law or in the Convention itself.³⁷ Accordingly, its recognition 'would essentially entail a right to acquire property'³⁸ which was not guaranteed by Article 1 of Protocol No. 1.³⁹

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 made it clear on numerous occasions, the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'.⁴⁰ A recent example from Belgium is instructive in this regard. The country's Constitutional Court found in 2014 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 legislator's 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.⁴¹ Such a sanction was hence held contrary to the Belgian Constitution's property provision (Article 16), read in conjunction with Article 1 of the First Protocol to the ECHR.

1.1.3 Compulsory licencing

A different category of disputes involving direct State action revolved around the grant of compulsory licences for the use of protected works.

³⁷ Ibid., para 1.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See, inter alia, ECtHR, *Matthews v. the United Kingdom* [GC], no 24833/94, 18 February 1999, CE:ECHR:1999:0218JUD002483394, para 39; ECtHR, *Selmouni v. France* [GC], no 25803/94, 28 July 1999, CE:ECHR:1999:0728JUD002580394, para 101; ECtHR, *Sergey Zolotukhin v. Russia* [GC], no 14939/03, 10 February 2009, CE:ECHR:2009:0210JUD001493903, para 80.

⁴¹ Constitutional Court of Belgium (*Cour constitutionnelle*), *BioPheresis Technologies Inc v. State of Belgium*, no. 3/2014, 16 January 2014 (available in French) <http://www.eplawpatentblog.com/2014/February/Cour%20Cost%202016%20janvier%202014_01446200.pdf> accessed December 2017.

The question of whether such a grant amounts to an unjustified interference with the rightholder's possessions was raised before the Convention institutions twice.

The first case, *Smith Kline v. the Netherlands*,⁴² dates back to 1990. It concerned the dispute around the grant by the Dutch Patent Office of a compulsory licence 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 licence.

Although finding that the decisions of the Patent Office, conferring a compulsory licence for the applicant's patent, constituted a control of the use of property,⁴³ the Commission nevertheless considered that such control was lawful and pursued the legitimate aim of encouraging technological and economic development.⁴⁴ As for the proportionality, the Commission observed that

the 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.⁴⁵

The second occasion on which compulsory licencing was tested for its compliance with the Convention's property provision arose very

⁴² ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.), no 12633/87, 4 October 1990, CE:ECHR:1990:1004DEC001263387. For a discussion of this case, see L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 12–13, 27–28, and 32–35; and H G Ruse-Khan, 'Overlaps and Conflict Norms in Human Rights Law' *supra* note 28, 79.

⁴³ ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.), no 12633/87, 4 October 1990, CE:ECHR:1990:1004DEC001263387.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

recently – in July 2016 – and concerned this time the Latvian collective rights management organisation (SIA AKKA/LAA) that filed a complaint⁴⁶ about being ordered by national courts to conclude licencing agreements for the use of musical works of the authors it represented with two domestic broadcasters on the terms set by the courts.⁴⁷ According to the applicant organisation, the national courts' orders amounted to an unjustified restriction of the exclusive rights of the authors represented by SIA AKKA/LAA, in violation of Article 1 of Protocol No. 1 (protection of property) to the ECHR.

The ECtHR disagreed, holding that there had been no violation of the named provision.⁴⁸ It first rejected the Government's contention that the applicant organisation could not claim to be a victim of a measure that infringed the rights guaranteed by the Convention to its members.⁴⁹ According to the Court, once the domestic legal order attributed the protection of authors' rights to an organisation founded by the authors for this purpose, and vested it with independent rights transferred from the authors, then that organisation must have been regarded as a victim of a measure affecting these rights.⁵⁰ The ECtHR established next that SIA AKKA/LAA disposed 'possessions' – that is, the rights transferred to it by its members⁵¹ – and that those possessions had been interfered with

⁴⁶ ECtHR, *SIA AKKA/LAA v. Latvia*, no 562/05, CE:ECHR:2016:0712JUD000056205, 12 July 2016. See, on this case, the Press Unit of the ECtHR, *Factsheet – New Technologies* (Council of Europe/ European Court of Human Rights, July 2017), 15–16, <http://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf> accessed December 2017.

⁴⁷ 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 in relation to broadcasting and related rights), section 5 of the Latvian Civil Procedures Law of 14 October 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 6 April 2000 (*Autortiesību likums*) (part three of this section providing that if the licence agreement does not set out the royalty rate, the latter shall be decided by the domestic courts). Latvian Civil Procedures and Copyright Laws are available (English translation by the World Intellectual Property Organization (WIPO)) <<http://www.wipo.int/wipolex/en/profile.jsp?code=LV>> accessed December 2017.

⁴⁸ ECtHR, *SIA AKKA/LAA v. Latvia*, no 562/05, CE:ECHR:2016:0712JUD000056205, 12 July 2016, para 81.

⁴⁹ *Ibid.*, para 43.

⁵⁰ *Ibid.*, para 49.

⁵¹ *Ibid.*, para 55.

by the domestic courts.⁵² 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.⁵³ It was also of the opinion that the measures complained of pursued a legitimate aim, as they served both the radio stations' interest to obtain a licence allowing them to legally broadcast the musical works in question and the public interest in having access to those works.⁵⁴ In reaching this conclusion, it was taken 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'.⁵⁵ Finally, on the question of proportionality, the Court considered that the national courts had managed to strike a fair balance between a legitimate aim sought and the rights of the collecting society to equitable remuneration. In this regard, the ECtHR noted, first, that, in setting the royalty rate, the domestic courts relied on the terms already negotiated by the parties who were also before that provided with the time to reach an agreement.⁵⁶ Second, it was noted that banning the broadcast would not have suited the interests of copyright holders to obtain the maximum profit from the exploitation of musical works.⁵⁷ Thirdly, the courts' orders for the parties to enter into a licencing agreement were limited in scope and time.⁵⁸

As an overview of Convention cases pertaining to direct State interference in the exercise of IP rights demonstrates, the ECtHR leaves Member States considerable discretion in regulating (intellectual) property disputes.⁵⁹ Unless IP rights are given domestic recognition in the form of a legislative act or a court decision, the Strasbourg Court will be reluctant to accept that the claimed right falls within the Convention property provision: in other words, that any substantive interest protected by the

⁵² Ibid., para 59.

⁵³ Ibid., paras 64–66; see *supra* note 47.

⁵⁴ Ibid., paras 69–71.

⁵⁵ Ibid., para 70.

⁵⁶ Ibid., para 77.

⁵⁷ Ibid., para 78.

⁵⁸ Ibid., para 79.

⁵⁹ See A Peukert, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* *supra* note 1, 132.

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

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 when deciding on the manner in which the interest in protecting intellectual property is to be balanced 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 being absolute⁶⁰ and that the Strasbourg Court rarely interferes with the findings at the national level. Only in situations of blatant violations, as was the case in *Bălan v. Moldova*, 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 (having the burden of proof) and that some sort of recognition of their right can be traced to the national level.

1.2 Positive Aspect: State Failure to Regulate IP Disputes between Private Parties

Although the 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'.⁶¹ This extension of the Convention's reach to disputes between private actors (also known as a 'horizontal effect' of the Convention⁶²) may take place, for example, when the national legislation does not meet the requirements of

⁶⁰ See Ch Geiger, 'The Social Function of Intellectual Property Rights' *supra* note 6; and, from the same author, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* *supra* note 1, 661.

⁶¹ ECommHR, *J.S. v. the United Kingdom* (dec.), no 19173/91, 8 January 1993, CE:ECHR:1993:0108DEC001917391.

⁶² See for example J F Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the*

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 those cases, the national judicial decisions are regarded as a form of State action.⁶³

In relation to intellectual property proceedings, the 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 (1.2.1); infringement disputes and claims for royalties (1.2.2); and disputes over ownership of an IP title (1.2.3).

1.2.1 Contractual disputes

A contractual intellectual property dispute – the first in the private-party type of conflict – was the subject of the case of *Aral, Tekin and Aral v. Turkey*.⁶⁴ 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 that those materials could not, accordingly, 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 Works⁶⁵ which, at the material time, recognised a certain form of the work for hire doctrine. Article 8, paragraph 2 of that Law provided, in particular, 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'.⁶⁶ The trial court considered, nevertheless,

European Convention on Human Rights (Council of Europe, Human Rights Handbooks, No. 7, 2007) 14.

⁶³ See L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 28.

⁶⁴ ECommHR, *Aral, Tekin and Aral v. Turkey* (dec.), no 24563/94, 14 January 1998, CE:ECHR:1998:0114DEC002456394. For commentary on this case, see L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 28–29; and D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights' *supra* note 15, 97–98.

⁶⁵ Turkish Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works (as 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> accessed December 2017.

⁶⁶ Note that the currently in force version of this law no longer contains this provision: see Law No 5846 of 5 December 1951 on Intellectual and Artistic

that the characters created by the applicants could still be used by them in other magazines or newspapers, but in relation to other subjects and stories. All the subsequent attempts by the applicants to overturn this decision were unsuccessful.

Responding to the applicants' challenge of the domestic courts' refusal to recognise them as owners of the artistic material created by them, the European Commission of Human Rights observed that

there 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 another ...⁶⁷

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

the 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.⁶⁸

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'.⁶⁹ Accordingly, no shortcomings attributable to the State were established by the Commission in this respect.⁷⁰

Just a few months later the Commission again had to resolve a contractual dispute – this time involving a civil claim brought by the applicants who owned legally protected industrial property and construction secrets in Germany. The applicants sought damages from an Italian

Works (as 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> accessed December 2017.

⁶⁷ ECommHR, *Aral, Tekin and Aral v. Turkey* (dec.), no 24563/94, 14 January 1998, CE:ECHR:1998:0114DEC002456394, para 4.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid. Complaint rejected as manifestly ill-founded.

company to which they licenced their trade secrets alleging breach of the licencing contract including unauthorised use of transferred knowledge.⁷¹ The domestic courts dismissed the claim on the grounds of an intentional deception, finding that the applicants had been aware of the impossibility of obtaining the legal protection of the technology at stake in Italy. The applicants then appealed to the ECtHR, claiming that the domestic courts' decisions amounted to a breach of their property rights. They submitted that the trade secrets of a high commercial value had been transferred to the defendant.

The Commission considered that the applicants had failed to prove, in the course of the domestic judicial proceedings, that their licence had any commercial value.⁷² Accordingly, and insofar as their property claim had never been recognised 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'.⁷³ It therefore followed that 'the applicants have not shown that they have the right referred to' and that their complaint under Article 1 of Protocol No. 1 had to be rejected as manifestly ill-founded.⁷⁴

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

On occasion, however, the Court would reject applications alleging a violation of the Convention property provision not 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 previously owned by the State to pay royalties to a patent holder.⁷⁵ 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

⁷¹ ECommHR, *G.D. & M. v. Germany* (dec.), no 29818/96, 20 May 1998, CE:ECHR:1998:0520DEC002981896.

⁷² *Ibid.*, para 1.

⁷³ *Ibid.*, para 2.

⁷⁴ *Ibid.*

⁷⁵ ECtHR, *Mihăilescu v. Romania* (dec.), no 47748/99, 26 August 2003, CE:ECHR:2003:0826DEC004774899.

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.⁷⁶

1.2.2 Infringement disputes and claims for royalties

Analogous cautiousness of the Court to intervene with the domestic courts' interpretation of intellectual property issues accompanied the second type of property disputes between private parties – those pertaining to infringement claims and claims for royalties. One example is the case of *Melnychuk v. Ukraine*.⁷⁷ 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. Basing his main argument on that the newspaper's refusal raised an issue under Article 10 (freedom of expression) ECHR, Mr. Melnychuk also maintained that the critical reviews infringed his copyright. However, he did not advance any possible basis for this claim which was hence dismissed by the national courts as 'unsubstantiated'. The applicant appealed to the ECtHR, relying (alongside Article 10) on Article 1 of Protocol No. 1 to the ECHR, again without explaining in what way the Convention property provision could have been breached.

The Court declared the applicant's complaint inadmissible (manifestly ill-founded).⁷⁸ Having reiterated that intellectual property is protected in principle by Article 1 of Protocol No. 1, it 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'.⁷⁹ 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.⁸⁰ 'Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1.'⁸¹

⁷⁶ Ibid. Complaint rejected as manifestly ill-founded.

⁷⁷ ECtHR, *Melnychuk v. Ukraine* (dec.), no 28743/03, 5 July 2005, CE:ECHR:2005:0705DEC002874303. For a discussion of this case, see L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 29–30.

⁷⁸ ECtHR, *Melnychuk v. Ukraine* (dec.), no 28743/03, 5 July 2005, CE:ECHR:2005:0705DEC002874303, para 3.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

Unlike in the case of *Melnychuk*, an interference with the Convention property provision was established two years later in a dispute over the registration of domain names which allegedly violated the trademark rights of others.⁸² The applicant company in the case at issue, 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 concluded 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, several sets of proceedings were brought against the applicant by other companies and private individuals claiming that the registration and use by Paeffgen of certain domains breached their trademark rights and / or their rights to a (business) name. In all 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 obliged to apply for their cancellation – a decision that Paeffgen had further contested before the ECtHR. It argued that the absolute prohibition on using its domain names and the duty to apply for a cancellation thereof, instead of a mere duty to refrain from a specific infringement of the plaintiffs' rights, disproportionately interfered with its right to property under Article 1 of Protocol No. 1 to the ECHR.

The Strasbourg Court agreed that the measure in question did in fact amount to an interference with the applicant's 'possessions', thereby recognising that domain names benefit from the protection of Article 1 of the First Protocol to the Convention.⁸³ It observed, however, that such interference served to protect the trademark rights or other rights of third parties by effectively preventing unauthorised use to the detriment of the rightholders.⁸⁴ Although it was true that the domestic courts did not consider it sufficient to order less restrictive measures, the Court noted that the applicant company failed to demonstrate limited ways of using the domains in question which would not risk interfering with the rights

⁸² ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007, CE:ECHR:2007:0918DEC002537904. On this case, see D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights' *supra* note 15, 105.

⁸³ ECtHR, *Paeffgen GmbH v. Germany* (dec.), nos 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007, CE:ECHR:2007:0918DEC002537904, para 1.

⁸⁴ *Ibid.*

of others.⁸⁵ The ECtHR further observed that the applicant was aware that the domain name registration did not imply freedom from third party claims.⁸⁶ It also took note of the fact that, at the time of the domestic court proceedings, the applicant company had hardly used its domains.⁸⁷ It thus followed that the judicial orders complained of were proportionate and had not excessively burdened the applicant.⁸⁸

As is the case with the other types of dispute discussed above, the Court is likely to reject the applicant's property claim originating in the claim for royalties if at no point in domestic proceedings that claim was recognised by the courts. It is on these grounds that the Court declined, for example, an action concerning a claim for royalties from a limited liability company for a furniture line the applicant had designed and on which the ordinary courts had failed to decide for more than twelve years.⁸⁹ Responding to the applicant's allegation that, as a result of the ordinary courts' failure to decide on his action, he was unable to use his property (that is, the royalties due by the defendant), the ECtHR considered that the claims, not determined by a final court decision, did not amount to 'possessions' attracting the guarantees of the Convention property provision.⁹⁰ Accordingly, just as in the case of *Dima* discussed above, the complaint was declared inadmissible *ratione materiae*.⁹¹

As can be seen, the rulings under the Convention 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 unauthorised reproduction of the applicant's book by a youth non-governmental organisation (NGO) on the website of one of that NGO's projects on the history of Azerbaijan.⁹² When the applicant was informed of the infringement and requested that his book be removed from the website (which was done immediately), the book had already been downloaded 417 times. The applicant brought

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid. Complaint rejected as manifestly ill-founded.

⁸⁹ ECtHR, *Rapos v. Slovakia*, no 25763/02, 20 May 2008, CE:ECHR:2008:0520JUD002576302.

⁹⁰ Ibid., para 40.

⁹¹ Ibid.

⁹² ECtHR, *Safarov v. Azerbaijan*, no 885/12, communicated on 18 May 2017.

a civil claim against the NGO asking for pecuniary and non-pecuniary damages to compensate the loss he incurred as a result of the unauthorised reproduction of his book. The trial court dismissed the applicant's claims referring to Article 18 of the Azerbaijani Copyright Law⁹³ that allows 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 that 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 court had failed to refer to any of the purposes listed exhaustively in Article 18 of the 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 court reiterating the lower instances' reasoning and in addition referring also to Article 15(3) of the Copyright Law, which states that once the lawfully published 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 complained to the ECtHR, raising claims about the domestic court's reasoning of their decisions under Article 6(1) (fair trial) ECHR and about the failure by the State 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 – an indication that the case is likely to be examined on the merits.⁹⁴

1.2.3 Disputes over ownership of an IP title

The final type of the private-party disputes originated in the claims of competing ownership of an intellectual property right. The most prominent example is without doubt the case of *Anheuser-Busch* which is also to date the sole intellectual property dispute that has made it to the ECtHR's highest body, the Grand Chamber.⁹⁵

⁹³ Law of the Republic of Azerbaijan on Copyright and Related Rights of 5 June 1996 (as amended up to Law No. 636-IVQD of 30 April 2013) (English translation by the WIPO) <http://www.wipo.int/wipolex/en/text.jsp?file_id=317315> accessed December 2017.

⁹⁴ Instead of being rejected at the point of admissibility review.

⁹⁵ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no 73049/01, 11 January 2007, CE:ECHR:2007:0111JUD007304901. For a discussion of this case, see K D Beiter, 'The Right to Property and the Protection of Interests in Intellectual Property – A Human Rights Perspective on the European Court of Human Right's Decision in *Anheuser-Bush Inc v Portugal*' (2008) 39(6) IIC 714;

The applicant, an American company, which sells 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. A Czech company, Budějovický Budvar, which also produced beer under the name 'Budweiser', opposed that application.⁹⁶ It argued that 'Budweiser Bier' had already been registered in its name as an appellation of origin under the 1958 Lisbon Agreement.⁹⁷ Following the breakdown of negotiations between the two companies that took place throughout the 1980s, 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. The American company then obtained a registration certificate for the 'Budweiser' trademark. 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.⁹⁸ The trial court dismissed the appeal, finding that the only intellectual property eligible for protection under Portuguese law

B Goebel, 'Trade Marks are "Possessions", as are Applications' (2007) 2(4) *JIPLP* 197; J W Reiss, 'Commercializing Human Rights: Trademarks in Europe after Anheuser-Bush v. Portugal' (2011) 14(2) *The Journal of Intellectual Property* 176; D Bogdan, 'Intellectual Property in the Case-Law of the European Court of Human Rights' *supra* note 15, 101–102, 106; L R Helfer, 'The New Innovation Frontier?' *supra* note 15, 3–4, 12–13, 18–28 and 30–32; A Rahmatian, 'Trade Marks and Human Rights', in P L C Torremans (ed.), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Alphen aan den Rijn, Kluwer Law International, 2008), 335, 346–347; and D S Welkowitz, 'Privatizing Human Rights?' *supra* note 15, 701–707.

⁹⁶ 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.

⁹⁷ The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was signed in Lisbon on 31 October 1958, revised in Stockholm on 14 July 1967, and amended on 28 September 1979. It enabled Contracting States to request other Contracting States to protect appellations of origin of certain products, if they were recognised 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.

⁹⁸ An 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

and the Bilateral Agreement was the ‘Českobudějovický Budvar’ appellation of origin, and not the German translation of this phrase into ‘Budweiser Bier’. This decision was, however, overturned by the appellate court in a judgment affirmed subsequently by the Portuguese Supreme Court, the latter holding that the protection under the 1986 Agreement between the two States extended to cover also translations of names of their respective national products. The applicant company’s registration of ‘Budweiser’ as a trademark was, therefore, refused.

In a last bid to defend its interests, the American company appealed to the ECtHR, claiming that the Supreme Court’s application of a bilateral treaty that came into force after it had filed its application to register the trademark, which ultimately resulted in its 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 Court’s Chamber, which, in a judgment of 11 October 2005, held that there had been no violation of the applicant company’s (intellectual) property rights.⁹⁹ This was because the latter had failed to obtain a final registration of its trademark which only (and not the application for the registration of a trademark) could be regarded as ‘possessions’ within the meaning of the ECHR.¹⁰⁰ The Chamber clarified in this regard that the applicant company had had a hope of acquiring such a ‘possession’, but not a legally protected legitimate expectation.¹⁰¹ Accordingly, Article 1 of Protocol No. 1 was considered inapplicable to the mere applications for the registration of a trademark.¹⁰²

Upon the applicant company’s request, the case was then referred to the Grand Chamber. The latter, in contrast, took note of the bundle of financial rights and interests that derived from an application for trademark registration, which, notwithstanding its conditional character, possessed a substantial financial value for the applicant company.¹⁰³ The Grand Chamber thus noted that the applicant owned a set of proprietary rights recognised by the domestic law in connection with its trademark

was signed in Lisbon on 10 January 1986 and which came into force on 7 March 1987, after publication in the Official Gazette.

⁹⁹ ECtHR, *Anheuser-Busch Inc. v. Portugal*, no 73049/01, 11 October 2005, CE:ECHR:2005:1011JUD007304901, para 53.

¹⁰⁰ *Ibid.*, paras 50–52.

¹⁰¹ *Ibid.*, para 52.

¹⁰² *Ibid.*, para 53.

¹⁰³ ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], no 73049/01, 11 January 2007, CE:ECHR:2007:0111JUD007304901, para 76.

application, which accordingly was to be examined under Article 1 of Protocol No. 1.¹⁰⁴ Nonetheless, no violation of that provision was established by the Grand Chamber either.¹⁰⁵ As to the issue of the alleged retrospective application of the 1986 Agreement, it noted that the applicant company had not had an effective registration in existence when the impugned legislation took effect.¹⁰⁶ Concerning the applicant company's allegation of violation of the right of priority to its trademark application, the ECtHR reiterated that its role was not to review the domestic courts' interpretation of the relevant legislation.¹⁰⁷ Accordingly, it concluded that the Supreme Court's judgment did not constitute interference with the applicant company's right to the peaceful enjoyment of its possessions.¹⁰⁸

One important conclusion arising from an overview of the 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* discussed above). However, for the horizontal effect of the Convention to come into play it would not suffice for the courts hearing such disputes to do no more than 'provide[] a forum for the determination of the applicant's rights'¹⁰⁹: there must also be a reasonable suspicion of arbitrariness or unfairness on the part of domestic judiciary or of a lack of proportionality in its approach towards balancing the applicant's interests. If the domestic courts interpret national law in a manner that is inconsistent with the Convention requirements (including by application of legislation which contradicts Article 1 of Protocol No. 1 guarantees), the horizontal effect of the ECHR arises. This is a positive phenomenon, as it extends the safeguards of the human rights review to the private-party level.

In general, the principles on the basis of which private IP disputes are decided by the Strasbourg Court are hardly different from those which have already been outlined above in relation to the claims originating in a direct State action: The claimed IP entitlement has to find some recognition at the national level for the issue under Article 1 of Protocol

¹⁰⁴ Ibid., para 78.

¹⁰⁵ Ibid., para 87.

¹⁰⁶ Ibid., para 84.

¹⁰⁷ Ibid., para 85.

¹⁰⁸ Ibid., para 87.

¹⁰⁹ ECtHR, *Melnychuk v. Ukraine* (dec.), no 28743/03, 5 July 2005, CE:ECHR:2005:0705DEC002874303, para 3.

No. 1 to the ECHR to arise; if/once such recognition is established, the question of whether there had been an interference with the applicant's possessions, 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. The first criterion (recognition of the property right by the domestic legal system) was not met, for example, in the above-discussed case of *Rapos v. Slovakia*, where the claims in a design dispute 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. In those cases where the applicants' property claim fell within the scope of Article 1 of the First Protocol, no violation was established either due to the applicants' failure to properly substantiate their claims (*G.D. & M. v. Germany*; *Melnychuk v. Ukraine*) or due to the wide discretion accorded to the domestic courts in balancing the applicants' intellectual property rights with other competing interests (*Aral, Tekin and Aral*; *Paeffgen Gmbh*; and *Anheuser-Busch*). It is also notable that most of such cases got rejected as manifestly ill-founded, thus not even reaching the consideration on the merits.¹¹⁰

1.3 Claims against International Organisations (EPO)

Alongside Article 1 Protocol No. 1 cases on IP resulting out of direct State action and those originating in the private-party litigation, a separate category of applications arose out of complaints against international organisations, notably the European Patent Office. 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.¹¹¹ The Commission and the Court have, however, steadily rejected those allegations.

¹¹⁰ Of all cases reviewed in this section (section 1.2), only *Anheuser-Busch* was decided on the merits. All other cases were rejected at the level of admissibility review – the majority as manifestly ill-founded for either lack of interference with the applicant's right 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 1.1 above (on the State's direct action), likewise, were rejected at the admissibility stage, with only *Bälan* and *SIA AKKA/LAA* reaching examination on the merits.

¹¹¹ ECommHR, *Heinz v. the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights* (dec.), no 21090/92, 10 January 1994, CE:ECHR:1994:0110DEC002109092; ECommHR, *Reber, Reber Systematik*

They considered, as regards the proceedings before the EPO, that they were not competent to examine complaints against international organisations that were not parties to the ECHR in their own right. It was, however, noted that the transfer of powers from the ECHR State to an international organisation (such as the EPO) did not altogether exclude that State's responsibility under the Convention, making it dependent on the level of fundamental rights protection in that organisation. Given though that the European Patent Convention provided, according to the Commission and the Court, for an 'equivalent protection' as regards the ECHR,¹¹² any transfer of powers to it 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 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'.¹¹³ It was emphasised, however, in the latest of the ECtHR decisions on the EPO, that the presumption of 'equivalent protection' can be rebutted if in the circumstances of a particular case it is considered that the protection of Convention rights is manifestly deficient.¹¹⁴

GmbH and Kinkel v. Germany (dec.), no 27410/95, 12 April 1996, CE:ECHR:1996:0412DEC002741095; ECommHR, *Lenzing AG v. Germany* (dec.), no 39025/97, 9 September 1998, CE:ECHR:1998:0909DEC003902597; ECommHR, *Lenzing AG v. the United Kingdom* (dec.), no 38817/97, 9 September 1998, CE:ECHR:1998:0909DEC003881797; ECtHR, *Rambus Inc. v. Germany* (dec.), no 40382/04, 16 June 2009, CE:ECHR:2009:0616DEC004038204.

¹¹² On the observance of human rights in the EPO practice, see A Kupzok, 'Human Rights in the Case Law of the EPO Boards of Appeal', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property supra* note 1, 311.

¹¹³ J Phillips, 'EPO not Bound by Human Rights Convention' (IPKat, 23 November 2004) <<http://ipkitten.blogspot.fr/2004/11/epo-not-bound-by-human-rights.html>> accessed December 2017. More generally, criticising the lack of judicial review of the EPO decisions, see J Pagenberg, 'The ECJ on the Draft Agreement for a European and Community Patent Court – Hearing of May 18, 2010' (2010) 41(6) IIC 695, 700–705.

¹¹⁴ ECtHR, *Rambus Inc. v. Germany* (dec.), no 40382/04, 16 June 2009, CE:ECHR:2009:0616DEC004038204, para 1.

2. 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) value¹¹⁵ and against which IP needs to be balanced. The first of these rights is without doubt the right to freedom of expression and information (guaranteed under Article 10 ECHR).¹¹⁶ The claims of users form the vast majority of disputes brought to the Convention organs under this right. On a few occasions, however, Article 10 ECHR was also invoked by the rightholders themselves either as grounds for stronger protection of their, essentially economic,

¹¹⁵ On the hierarchy of the ECHR rights, see P Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?', in Ch Geiger (ed), *Research Handbook on Human Rights and Intellectual Property supra* note 1, 39, observing in particular at pp. 45–46 that the 'strength' of Convention 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 Convention 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, 7 December 1976, CE:ECHR:1976:1207JUD000549372, para 49). Article 10 ECHR is sometimes even called the 'European First Amendment' (D Voorhoof, 'Het Europese "First Amendment": de vrijheid van expressie en informatie en de rechtspraak van het EHRM betreffende art. 10 EVRM (1994-1995)', *Mediaforum (Amsterdam)* 11 (1995); Ch Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé* (Paris, Litec, 2004) 166.

¹¹⁶ Freedom of artistic creativity, equally protected by Article 10 ECHR, is also potentially affected by copyright law, as many cases at national level have shown (see on this issue Ch Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?', Centre for International Intellectual Property Studies Research Paper No 2017-08; 8(3) U.C. Irvine L Rev (forthcoming 2018) <<https://ssrn.com/abstract=3053980>> accessed December 2017. If the ECtHR had not yet to decide on the conflict, it is likely that cases involving freedom of artistic creativity will be brought in the future before the Court, in particular with the rise of digital reproduction techniques and their increasing use in contemporary art and music.

interests¹¹⁷ or to justify the right to express oneself via trademark registration.¹¹⁸

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 (2.1.) and trademarks (2.2.), although a claim on a potential violation of freedom of expression and information in the field of trade secrets is currently (as of June 2018) pending before the Court.¹¹⁹

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

The oldest type of conflict between IP and HRs that the ECtHR has faced in its practice concerns copyright and freedom of expression. Already in 1968 – some ten years after the Convention enforcement mechanism, the European Court of Human Rights, was incepted – the Convention institutions had to decide on the compatibility of copyright protection for compilations of television programmes with Article 10 of the Convention.¹²⁰ Over the years, the conflict has developed from being more or less ignored by the Convention institutions (2.1.1.) to its full acknowledgement in the wake of the expansion of copyright protection

¹¹⁷ See the *AEPI* case discussed below in section 2.1.3. The idea also exists that, insofar as copyright is 'the engine of free expression' (US Supreme Court, *Eldred v. Ashcroft*, 537 U.S. 186, at 219 (2003)), freedom of expression could support, in theory, a protection claim. However, it is likely that 'the engine' argument is more suitable to provide a justification for the protection of the rights of users rather 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 American Constitution as the purpose behind the grant of economic (most frequently property) rights to the holders of copyrights and patents (Section 8, Clause 8 of the US Constitution).

¹¹⁸ See the cases discussed in section 2.2.2 below.

¹¹⁹ ECtHR, *Diasamidze and Batumelebi v. Georgia and 1 other application*, nos 49071/12 and 51940/12, communicated on 14 September 2016.

¹²⁰ See ECommHR, *N.V. Televizier v. the Netherlands* (report (30)), no 2690/65, 3 October 1968, CE:ECHR:1968:1003REP000269065, discussed below. The ECtHR was established on 21 January 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> accessed December 2017).

and its enforcement mechanisms in the digital environment (2.1.2.). Furthermore, as already mentioned, Article 10 was scrutinised for not only its potential to further wider 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 (2.1.3.).

2.1.1 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 a conflict of IP and HRs in general), *N.V. Televizier v. the Netherlands*,¹²¹ arose out of a complaint filed with the Strasbourg Court by the Dutch publisher of a weekly magazine *Televizier* which contained details on forthcoming radio and television programmes of the country's five different broadcasting corporations. In respect of *Televizier's* publications of these programmes, civil proceedings were instituted against the applicant company by those broadcasters and an organisation which periodically made compilations of their programmes called *Centraal Bureau voor den Omroep in Nederland* (Dutch Central Broadcasting Office). It was alleged in those proceedings that the applicant, when publishing information about forthcoming radio and television programmes, had made use of the compilations of the Broadcasting Office, in violation of the Dutch Copyright Act of 1912. Reference was made to Article 10 of this Act which conferred protection even on works in writing which were not of a distinctive or personal character. After a series of court decisions, the Netherlands Supreme Court eventually affirmed the Broadcasting Office's (but not the corporations') copyright in the compilations, having considered 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.¹²²

Televizier contested this finding before the ECtHR, maintaining that, as a consequence of the Supreme Court's decision, broadcasting corporations, which also published weekly magazines or had financial interest

¹²¹ ECommHR, *N.V. Televizier v. the Netherlands* (report (30)), no 2690/65, 3 October 1968, CE:ECHR:1968:1003REP000269065. On this case, see Harvard Law Review Association, 'International Law – European Convention on Human Rights – Commission Decides to Consider Dutch Copyright Decision Challenged on Freedom of Expression Grounds' (1967) 80 Harvard Law Review 1798; and M B Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 UCLA Law Review 1180, 1185.

¹²² Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), judgment of 25 June 1965.

in such magazines, had an unjustifiable monopoly over the news services in the Netherlands regarding forthcoming radio and television programmes. This amounted, in the applicant company's opinion, to a violation of Article 10 (freedom of expression) of the Convention.

The Commission declared the application admissible as giving rise to a number of important issues regarding the interpretation of the Convention and held that the applicant company was to be considered a 'victim' within the meaning of the Convention.¹²³ However, the case never made it to the merits since an out-of-court settlement was reached between the parties.¹²⁴ It appears that the magazine *Televizier* was absorbed into one of the five broadcasting corporations and was thereafter allowed to publish the complete programmes of all broadcasting organisations. Furthermore, the relevant provisions of the 1912 Copyright Act, on which the proceedings against the applicant company were based, were replaced by new legislation (notably the new Broadcasting Act of 1967). The latter envisaged that the newly created coordinating broadcasting authority – Netherlands Broadcasting Foundation (*Nederlandse Omroep Stichting*, NOS) – was to compile the complete programme listings on information supplied by various licenced broadcasting organisations. It then had to make available those listings to all broadcasting organisations for reproduction and publication in their own programme magazines. In addition, short summaries of the lists were to be sent to daily newspapers and those appearing at least three times a week and also to certain foreign publishers. Pursuant to Article 22 of the Broadcasting Act, 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 this new legislation (together with the Supreme Court's interpretation of the 1912 Netherlands 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 Geïllustreerde Pers N.V.*, whose petition for distributing through these magazines complete lists of television and radio programme data was refused with reference to the

¹²³ ECommHR, *N.V. Televizier v. The Netherlands* (dec.), no 2690/65, 15 December 1966, CE:ECHR:1966:1215DEC002690065.

¹²⁴ ECommHR, *N.V. Televizier v. the Netherlands* (report (30)), no 2690/65, 3 October 1968, CE:ECHR:1968:1003REP000269065.

mentioned legislation.¹²⁵ The applicant company brought its case before the Commission complaining that such a refusal constituted an unjustified interference with its right to freely receive and impart information as guaranteed by Article 10 ECHR.¹²⁶

Whereas the Commission declared the application admissible as ‘rais[ing] substantial issues of law and of fact’,¹²⁷ it nevertheless concluded that there had been no violation of the Convention. It first considered that the freedom to impart information of the kind that was at issue in the applicant’s case could only be granted to ‘the author, the originator or otherwise the intellectual owner’ of it.¹²⁸ 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 have in its possession.¹²⁹ It was further noted that the free flow of such information had not been jeopardised in any way as the public in general was able to inform itself about the programme schedule through a variety of other

¹²⁵ ECommHR, *De Geïllustreerde Pers N.V. v. the Netherlands* (report (31)), no 5178/71, 6 July 1976, CE:ECHR:1976:0706REP000517871. On this case, see P B Hugenoltz, ‘Copyright and Freedom of Expression in Europe’ *supra* note 15, 12; L R Helfer and G W Austin, *Human Rights and Intellectual Property* *supra* note 28, 261–263, 273, 277–279; and Ch Beat Graber, ‘Copyright and Access – A Human Rights Perspective’, in C B Graber et al. (eds), *Digital Rights Management: The End of Collecting Societies?* (Berne, Stämpfli Publishers, 2005) 71, 85.

¹²⁶ On the conflict between copyright and freedom of information as protected by Article 10 ECHR, see more generally Ch Geiger, *Droit d’auteur et droit du public à l’information* *supra* note 115; Ch Geiger, ‘Author’s Right, Copyright and the Public’s Right to Information: A Complex Relationship’, in F Macmillan (ed.), *New Directions in Copyright Law* (Vol. 5, Cheltenham, UK/Northampton, MA, Edward Elgar Publishing, 2007) 24; P B Hugenoltz, ‘Copyright and Freedom of Expression in Europe’ *supra* note 15; A Strövel and F Tulkens, ‘Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access’, in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford, Oxford University Press, 2006) 287; E Izyumenko, ‘The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective’ (2016) 19(3–4) *Journal of World Intellectual Property* 115. For further references to numerous sources exploring the relationship between copyright and freedom of expression, see Y Harn Lee, *Copyright and Freedom of Expression: A Literature Review* (CREATe Working Paper 2015/04, May 2015).

¹²⁷ ECommHR, *D.G.P.N.V. v. The Netherlands* (dec.), no 5178/71, 12 October 1973, CE:ECHR:1973:1012DEC000517871.

¹²⁸ ECommHR, *De Geïllustreerde Pers N.V. v. the Netherlands* (report (31)), no 5178/71, 6 July 1976, CE:ECHR:1976:0706REP000517871, para 84.

¹²⁹ *Ibid.*

sources.¹³⁰ Finally, the Commission considered that the mere commercial interest of the applicant company which might have been compromised by its competitive disadvantage with regard to other magazines could not be regarded as falling within the scope of Article 10 ECHR.¹³¹

As Prof. 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’.¹³²

Nevertheless, the Commission’s pronouncement in *De Geillustreerde Pers N.V.* on the conflict of copyright with freedom of information 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 2.¹³³ The latter broadcasted in November 1988, as part of a theatrical news television programme devoted to a famous actress, 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 of 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 estate¹³⁴ on the grounds that the presentation of the paintings amounted to a ‘brief

¹³⁰ Ibid., para 86.

¹³¹ Ibid., paras 87–88.

¹³² P B Hugenholtz, ‘Copyright and Freedom of Expression in Europe’ *supra* note 15, 12.

¹³³ ECommHR, *Société Nationale de Programmes FRANCE 2 v. France* (dec.), no 30262/96, 15 January 1997, CE:ECHR:1997:0115DEC003026296 (available only in French). On this case, see P B Hugenholtz, ‘Copyright and Freedom of Expression in Europe’ *supra* note 15, 12–13; A Strowel and F Tulkens, ‘Freedom of Expression and Copyright under Civil Law’ *supra* note 126, 306–307; L R Helfer and G W Austin, *Human Rights and Intellectual Property* *supra* note 28, 263–264; Ch Geiger and E Izyumenko, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression’ (2014) 45(3) IIC 316, 332–333; Ch Beat Graber, ‘Copyright and Access – A Human Rights Perspective’ *supra* note 125, 85–86.

¹³⁴ The High Court of Paris (*Tribunal de grande instance de Paris*), judgment of 15 May 1991.

quotation'¹³⁵ justified by the critical or informatory nature of the television report in which they were incorporated. This judgment was, however, overturned on appeal,¹³⁶ France 2 being 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'. Having found that the frescoes were not part of the decor of the theatre to the restoration of which the broadcast was devoted, the appellate court held that the communication to the public of the frescoes of Vuillard 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,¹³⁷ the latter finding 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'.¹³⁸ It then established without difficulty that the 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' to and easily foreseeable for the applicant – 'a television channel, whose activity is directly related to the legislation on intellectual property'.¹³⁹ 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'.¹⁴⁰

¹³⁵ Within the meaning of an internal exception to copyright envisaged in Article 41(3) of the French Law on Literary and Artistic Property of 11 March 1957 (since 1 July 1992 incorporated in Article L. 122-5(3)(a) of the French Intellectual Property Code of 1 July 1992, <http://www.wipo.int/wipolex/en/text.jsp?file_id=322949> accessed December 2017 (available only in French).

¹³⁶ The Paris Court of Appeal (*Cour d'appel de Paris*), judgment of 7 July 1992.

¹³⁷ The French Supreme Court (*Cour de cassation*), judgment of 4 July 1995.

¹³⁸ ECommHR, *Société Nationale de Programmes FRANCE 2 v. France* (dec.), no 30262/96, 15 January 1997, CE:ECHR:1997:0115DEC003026296 (available only in French), translation by the authors.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

The core of the analysis then centred, as is often the case, on the question of proportionality. In this regard, the European Commission pointed out that:

it 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.¹⁴¹

Like the *De Geïllustreerde Pers N.V.* ruling, the Commission's reasoning in *France 2* has since then been criticised in the literature, this time for the Commission's excessive cautiousness in intervening in the area of copyright from the external freedom of expression perspective.¹⁴²

However, if compared to the first two decisions on copyright and freedom of expression about the broadcasting organisations' monopoly in television listings, the analysis in *France 2* might appear as a step forward, as it was admitted by the Convention organ that copyright regulation constitutes an 'interference' with the right to freedom of expression and information and is hence not immune, as it is often argued, from an external human rights review.¹⁴³

¹⁴¹ Ibid.

¹⁴² P B Hugenholtz, 'Copyright and Freedom of Expression in Europe' *supra* note 15, 13; Ch Beat Graber, 'Copyright and Access – A Human Rights Perspective' *supra* note 125, 86.

¹⁴³ In fact, courts in Europe, in the US and elsewhere have for a long time been very reluctant to admit any freedom of expression defence outside copyright law, considering that any potential conflict has been addressed already

A real breakthrough in the Court's treatment of the free expression/copyright conflict had not followed until recently, however, when the ECtHR had to face the problems posed by copyright enforcement to the free flow of information in the new digital environment.

2.1.2 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 copyright / freedom of expression case law all concern, unsurprisingly, the measures of copyright enforcement online.¹⁴⁴ 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 rendered almost simultaneously in early 2013 pertained to the issues of unauthorised dissemination of copyright-protected works on the Internet. One of those, *Ashby Donald and Others v. France*,¹⁴⁵ concerned the conviction in France for copyright infringement by three fashion photographers, one of whom had taken photographs of Paris fashion shows and posted them on a website of the

by legislatures internally through the legal boundaries of the exclusive right (see e.g. *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979), at 1188 ('[t]he first amendment is not a licence to trammel on legally recognized rights in intellectual property'); *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (copyright is 'categorically immune' to free speech); *Television New Zealand Ltd. v. Newsmonitor Services Ltd.* [1994] 2 NZLR 91; French Supreme Court, '*Tuileries*', 4 July 1995, 167 RIDA 259; German Federal Court of Justice, '*CB-Infobank I*', 16 January 1997, GRUR 459 (1997); Austrian Supreme Court, '*Karikaturwiedergabe*', 9 December 1997, GRUR Int. 896 (1998)).

¹⁴⁴ See, for an analysis of the influence of the right to freedom of expression and information on European copyright law in the digital context, E Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era' *supra* note 126.

¹⁴⁵ ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French). For an assessment of this case, see Ch Geiger and E Izyumenko, 'Copyright on the Human Rights' Trial' *supra* note 133; D Voorhoof and I Høedt-Rasmussen, 'ECHR: Copyright vs. Freedom of Expression' (Kluwer Copyright Blog, 25 January 2013) <<http://copyrightblog.kluweriplaw.com/2013/01/25/echr-copy-right-vs-freedom-of-expression/>> accessed December 2017; P L C Torremans, 'Ashby Donald and Others v France, Application 36769/08, EctHr, 5th section, Judgment of 10 January 2013' (2014) 4(1) Queen Mary Journal of Intellectual

applicants' online fashion magazine. Since the pictures were published without authorisation from the fashion houses concerned, the latter, together with the French Fashion Federation, filed a suit for copyright infringement. The three photographers based their defence on Article 10 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), but 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 the French copyright law. As a result, the applicants were ordered to pay fines and damages totalling more than 250,000 euros.

In the wake of that national courts' decision, the photographers applied to the Strasbourg Court, insisting that the fashion photographs contained information of general public interest and that the posting thereof 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 arose almost simultaneously before the ECtHR in another high-profile dispute on application by two co-founders of the notorious 'The Pirate Bay' (TPB) file-sharing service who were criminally charged in Sweden for contributing through their service to the infringement of copyright concerning music, films and computer games by other persons.¹⁴⁶ As in

Property 95; A 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' (2014) 100 *Revue Trimestrielle des Droits de l'Homme* 889; F Marchadier, 'Le conflit entre le droit d'auteur et la liberté d'expression devant la Cour Européenne des Droits de l'Homme' (2013) 304 *Légipresse* 221; and A 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*)' (2013) 5 *Propr. intell.* 7.

¹⁴⁶ ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ['The Pirate Bay'] (dec.), no 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712. For comments on this case, see Ch Geiger and E Izyumenko, 'Copyright on the Human Rights' Trial' *supra* note 133; D Voorhoof and I Høedt-Rasmussen, 'ECHR: Copyright vs. Freedom of Expression II (The Pirate Bay)' (Kluwer Copyright Blog, 20 March 2013) <<http://copyrightblog.kluweriplaw.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/>> accessed December 2017; J Jones, 'Internet Pirates Walk the Plank with Article 10 Kept at Bay: *Neij and Sunde Kolmisoppi v Sweden*' (2013) 35(11) *EIPR* 695; and A Strowel, 'Pondération entre liberté d'expression et droit d'auteur sur Internet' *supra* note 145.

the case with the French photographers, the national proceedings ended unfavourably for 'The Pirate Bay' co-founders, the latter receiving prison sentences of ten and eight months respectively, together with joint liability for damages amounting to 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.¹⁴⁷

Similarly to the applicants in *Ashby Donald*, TPB co-founders then sought justice in the ECtHR. They maintained that Article 10 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 that convicting the persons responsible for that service for the acts committed by its users ran afoul of those principles.

The ECtHR held in each case that the applicants' convictions constituted an interference with Article 10 ECHR. Although ultimately finding no violation of that provision, the Court engaged in an elaborated analysis of the proportionality of interference with regard to 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'.¹⁴⁸ According to the ECtHR, the factors that stood against the applicants were the commercial character of their expression¹⁴⁹ and the fact that the information contained in the shared material did not contribute, contrary to what the applicants in *Ashby Donald* (in

¹⁴⁷ Notably, the Court of Appeal pointed out that TPB had created the possibility to upload and store torrent files, a database and a tracker-function, and thus had not merely offered transfer of data or *caching*. The Court of Appeal also noted that the defendants had committed offences intentionally and had not taken any precautionary measures, while the torrent files, which referred to copyright-protected material, had not been removed despite warnings and requests that they do so.

¹⁴⁸ ECommHR, *Société Nationale de Programmes FRANCE 2 v. France* (dec.), no 30262/96, 15 January 1997, CE:ECHR:1997:0115DEC003026296 (available only in French), translation by the authors.

¹⁴⁹ ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French), para 39; and, somewhat implicitly, ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ['*The Pirate Bay*'] (dec.), no 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712.

particular) have claimed, to the general debate of public interest¹⁵⁰ and '[could not] reach the same level [of protection] as that afforded to political expression and debate'.¹⁵¹ 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 (protection of property) to the ECHR.¹⁵² The Court also pronounced on the 'nature and severity of the penalties imposed'¹⁵³ on the applicants, having considered that in neither case could those penalties be regarded as disproportionate.¹⁵⁴

The Court's analysis in *Ashby Donald* and '*TPB*' denoted a prominent and important shift. The ECtHR made it clear that even *illegal* and *profit-making* sharing of copyright-protected material was not devoid of the freedom of expression guarantees and that, in certain circumstances, it was simply impossible to ignore the freedom of expression checks to assess what impact the copyright legal framework had on the enjoyment of human rights in Europe.¹⁵⁵

The eagerness of the Court to give more scrutiny, from the external human rights perspective, to internal copyright regulation manifested itself once again in yet another Article 10 decision rendered one year

¹⁵⁰ ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French), para 39.

¹⁵¹ ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ['*The Pirate Bay*'] (dec.), no 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712.

¹⁵² See section 1 above.

¹⁵³ ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ['*The Pirate Bay*'] (dec.), no 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712.

¹⁵⁴ In the *TPB* case that conclusion was reached on consideration of 'the fact 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*' (ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ['*The Pirate Bay*'] (dec.), no 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712). As regards the French photographers, the Court reasoned, rather surprisingly, that the applicants 'have not produced any evidence' proving that the substantial criminal fines imposed on them had 'financially strangled' them (ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French), para 43, translation by the International Review of Intellectual Property and Competition Law: 45(3) IIC 354 (2014)).

¹⁵⁵ For a joint analysis of the *Ashby Donald* and '*TPB*' rulings, see Ch Geiger and E Izyumenko, 'Copyright on the Human Rights' Trial' *supra* note 133.

after the cases discussed above. *Akdeniz v. Turkey*¹⁵⁶ concerned the blocking of access in Turkey, at the request of the Professional Union of Phonogram Producers, to the websites *myspace.com* and *last.fm* on the grounds that they were disseminating musical works in violation of copyright. The applicant – that had applied to the ECtHR as a regular user of the websites in question – complained about the collateral effects of blocking, which according to him amounted to a disproportionate response in light of Article 10 ECHR. Like in *Ashby Donald* and ‘*TPB*’, the Court engaged in the proportionality evaluation, providing certain guidance on how this type of conflict can be approached from the freedom of expression standpoint. Although on the substance the application was declared inadmissible for the applicant’s lack of victim status,¹⁵⁷ the ECtHR implied that the outcome might have been different depending on how the website was used (actively or passively),¹⁵⁸ collateral effects of the blocking on legitimate content,¹⁵⁹ the value of the blocked information in terms of its contribution to a debate on a matter of general interest,¹⁶⁰ availability of alternative means of accessing that information,¹⁶¹ and the comparative importance of IP as a human right against which the rights of the Internet users had to be balanced.¹⁶²

2.1.3 Freedom of expression as a restriction to access: Article 10 invoked on the part of the rightholders

As already stated in the introduction to this section, the 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 the rightholders in an attempt to further stronger and broader protection. For example, in the case of *AEPI*

¹⁵⁶ ECtHR, *Akdeniz v. Turkey* (dec.), no 20877/10, 11 March 2014, CE:ECHR:2014:0311DEC002087710 (available only in French). On this case, see Ch Geiger and E Izyumenko, ‘The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking’ (2016) 32(1) *American University International Law Review* 43; and A Strowel, ‘Pondération entre liberté d’expression et droit d’auteur sur Internet’ *supra* note 145, 890–895, 909.

¹⁵⁷ ECtHR, *Akdeniz v. Turkey* (dec.), no 20877/10, 11 March 2014, CE:ECHR:2014:0311DEC002087710 (available only in French), para 29.

¹⁵⁸ *Ibid.*, para 27.

¹⁵⁹ *Ibid.*, para 28.

¹⁶⁰ *Ibid.*, para 26.

¹⁶¹ *Ibid.*, para 25.

¹⁶² *Ibid.*, para 28.

S.A.,¹⁶³ the lack of protection for all musical works administered by the Greek collecting society AEPI (Hellenic Society for the Protection of Intellectual Property) for a period during which it could not secure an approval from the Ministry of Culture was challenged by AEPI on the freedom of expression grounds. The collecting society complained that, for the time that 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 paying the royalties. AEPI maintained that artistic expression, including music, was an integral part of the rights protected by Article 10 ECHR and that this protection encompassed the right of the creator of a literary or artistic work to exercise 'a total control over such work, as desired'.¹⁶⁴ According to the applicant, 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 rightholder's permission'.¹⁶⁵

The ECtHR rejected this overbroad reading of Article 10, but did so not for reasons pertaining to the substance of the applicant organisation's complaint, but rather because the Court did not consider the applicant – a legal entity – eligible to raise this sort of action:

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 by it – namely the dissemination of musical works without appropriate authorisation – 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.¹⁶⁶

¹⁶³ ECtHR, *AEPI S.A. (société hellénique pour la protection des droits d'auteur) v. Greece* (dec.), no 48679/99, 3 May 2001, CE:ECHR:2001:0503 DEC004867999 (available only in French).

¹⁶⁴ *Ibid.*, para 3, translation from French by the authors.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

It is notable, 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.

2.2 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 unauthorised use of trademarks by third parties for socially important purposes, including parodic criticism (2.2.1.); and the claims coming from the potential trademark holders themselves challenging the refusals of their applications for trademark registrations (2.2.2.).

2.2.1 Unauthorised trademark use and its justifiability on the basis of free expression

Only once was the use of a trademark for parodic criticism tested on freedom of speech grounds before the Convention organs. This was on application, in the beginning of the 1990s, to the European Commission by an Austrian anti-smoking association and its chairman.¹⁶⁷ The association had, as part of an advertising campaign against smoking, sold pamphlets, posters and stickers showing the caricature of a skeleton which, riding a camel, held a cigarette in front of it. Underneath this picture, the following slogan was written: ‘ONLY A CAMEL WALKS MILES FOR A CIGARETTE’.¹⁶⁸ A lawsuit was then filed by an international tobacco company against the applicants requesting that they refrain from using the slogan and pay compensation. According to the company, the publicity distorted its advertising slogan ‘I walk miles for a

¹⁶⁷ ECommHR, *Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* (dec.), no 17200/90, 2 December 1991, CE:ECHR:1991:1202DEC001720090. On this case, see W Sakulin, *Trademark Protection and Freedom of Expression – An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European Law* (The Hague / London / New York, Kluwer Law International, 2010), 284–286.

¹⁶⁸ ‘NUR EIN KAMEL GEHT MEILENWEIT FÜR EINE ZIGARETTE’ in German. In German language, ‘Kamel’ in this context could be understood as a pejorative term for a person acting in a foolish or stupid manner.

CAMEL'¹⁶⁹ in a satirical and ironical manner, which could be understood as a disparagement of the company's products. After a series of the lower court decisions, the Austrian Supreme Court held against the applicants, imposing a prohibition on using the slogan and picture at issue as well as the words 'KAMEL' or 'CAMEL' in the applicants' anti-smoking publicity.¹⁷⁰ The Supreme Court considered in particular that a considerable part of the general public would understand the applicants' publicity as a clear allusion to the plaintiff's cigarettes as being especially strong and unhealthy and that the applicants had not been entitled to select the plaintiff's trademark in order to criticise tobacco products in general.

The applicants contested the impugned prohibition before the Commission of Human Rights, arguing that their rights under Article 10 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.¹⁷¹ Nevertheless, it found no reasons for using 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.¹⁷² 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 slogans'.¹⁷³ The Commission thus 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'.¹⁷⁴

It is notable that some fifteen years later the French Supreme Court took an opposite position in an identical dispute which 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

¹⁶⁹ 'Ich gehe meilenweit für eine CAMEL' in German.

¹⁷⁰ Austrian Supreme Court (*Oberster Gerichtshof*), decision of 9 January 1990.

¹⁷¹ ECommHR, *Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* (dec.), no 17200/90, 2 December 1991, CE:ECHR:1991:1202DEC001720090, para 1.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

court was ready to fully engage in the external evaluation of the compatibility of trademark law with freedom of expression, coming to the conclusion that freedom of expression justified the use of a trademark for the purposes of criticism.¹⁷⁵ Similarly, in other jurisdictions, starting at the beginning of the 2000s, courts began giving precedence to freedom of expression in cases on parodic use, for social criticism, of right-holders' well-known brands.¹⁷⁶

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 unauthorised trademark use. This position was even confirmed less than one year after the decision in *CAMEL* in another case concerning trademark use for socially important purposes – this time in drug prescriptions.¹⁷⁷

The applicants were a physician, a pharmacist and a medical insurance fund who 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 which were medically and pharmaceutically considered as being equivalent. The list was drawn up by a designated Dutch authority¹⁷⁸ and consisted of registered brand names and names of generic drugs. The applicants requested Ciba-Geigy, a pharmaceutical company who owned the trademark and name Tanderil

¹⁷⁵ French Supreme Court, *CNMTR v. Société JT*, 19 October 2006 (Cass (F)). For an overview of a number of other decisions rendered in France that allowed freedom of expression to prevail in cases of trademark parodies, see Ch Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35(3) IIC 268; and, from the same author, 'Trade Marks and Freedom of Expression – The Proportionality of Criticism' (2007) 38(3) IIC 317.

¹⁷⁶ See, on parodic reproduction of a brewery's trademark on T-shirts for the purposes of criticising racial exploitation, the Constitutional Court of South Africa, *Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V. t/a Sabmark International*, CCT 42/04, 27 May 2005; and, on artistic use of Luis Vuitton's design in a painting critical of the society of consumerism, the Court of The Hague, *Nadia Plesner v. Louis Vuitton Malletier SA*, no 389526 / KG ZA 11-294, 4 May 2011.

¹⁷⁷ ECommHR, *Nijs, Jansen and the Onderlinge Waarborgmaatschappij Algemeen Ziekenfonds Delft-Schiedam-Westland U.A. v. the Netherlands* (dec.), no 15497/89, 9 September 1992, CE:ECHR:1992:0909DEC001549789. On this case, see W Sakulin, *Trademark Protection and Freedom of Expression supra* note 167, 259–261.

¹⁷⁸ That is, Netherlands Commission Information Drug Prices (*Commissie Voorlichting Prijzen Geneesmiddelen*).

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 was, however, rejected in all instances. Domestic courts, which based their decisions on the Benelux Court's interpretation of the relevant provision of the Uniform Benelux Trade Mark Act, stated that a use of a trademark in such a way that its owner would suffer damage was only permitted where such use could be justified by exceptional circumstances, which had not existed in the present case.

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 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'.¹⁷⁹ 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'.¹⁸⁰

As with the first ECHR cases on copyright and freedom of expression, the above-discussed approach of the Commission in Article 10 decisions on trademarks did not face a positive response in the literature.¹⁸¹ 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] an interference with their

¹⁷⁹ ECommHR, *Nijs, Jansen and the Onderlinge Waarborgmaatschappij Algemeen Ziekenfonds Delft-Schiedam-Westland U.A. v. the Netherlands* (dec.), no 15497/89, 9 September 1992, CE:ECHR:1992:0909DEC001549789, para 1.

¹⁸⁰ *Ibid.*

¹⁸¹ See W Sakulin, *Trademark Protection and Freedom of Expression supra* note 167, 259–261 and 284–286.

right to freedom of expression'.¹⁸² The Court had therefore allowed the freedom of expression defence as an external limit to trademark law. Furthermore, although no violation was established by the Convention institutions in the free speech/trademark cases, it might also be the case that nowadays the Court would decide similar types of 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'.¹⁸³ New realities might require paying greater attention to the freedom of expression interests in the context of unauthorised trademark use than was considered necessary at the beginning of the 1990s. One factor pointing in this direction is the change in the position of the judiciary towards the relationship between trademarks and freedom of expression in several jurisdictions: as noted above, national courts (the French Supreme Court among them) are no longer reluctant to engage in reconsidering the scope of trademark protection through recourse to external freedom of expression checks and balances.

2.2.2 Refusal of trademark registration – a challenge to the trademark applicant's freedom of expression?

Unauthorised 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 signs of potential trademark holders on the grounds that such signs are either 'contrary to public policy or to accepted principles of morality'¹⁸⁴ or considered to be deceptive.¹⁸⁵ Freedom of expression is usually claimed in this context by

¹⁸² ECommHR, *Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* (dec.), no 17200/90, 2 December 1991, CE:ECHR:1991:1202DEC001720090, para 1 (emphasis added).

¹⁸³ See e.g. ECtHR, *Matthews v. the United Kingdom* [GC], no 24833/94, 18 February 1999, CE:ECHR:1999:0218JUD002483394, para 39, and other sources cited in footnote 40.

¹⁸⁴ On the EU level, this ground for refusal of trademark registration is enshrined in Article 7(1)(f) of the Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (Text with European Economic Area (EEA) relevance), OJ No. L 78 of 24 March 2009, p. 1, ELI: <<http://data.europa.eu/eli/reg/2009/207/2016-03-23>>; 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), OJ L 336 of 23 December 2015, p. 1, ELI: <<http://data.europa.eu/eli/dir/2015/2436/oj>>.

¹⁸⁵ Article 7(1)(g) of the Council Regulation No 207/2009 and Article 4(1)(g) of the Directive (EU) No 2015/2436.

trademark applicants to cover their freedom to use the signs applied for as trademarks.¹⁸⁶

With respect to deceptive marks, the Strasbourg Court has recently pronounced on whether the refusal of their registration as trademarks violates the freedom of expression of trademark applicants in a case which concerned the figurative sign 'CRUCIFIX' sought to be registered in Romania.¹⁸⁷ The mark was a combination of a drawing¹⁸⁸ and the word 'crucifix' in a particular design and was intended to cover legal services. The National Trademark and Patent Office of Romania (OSIM) refused registration on the grounds that the mark was deceptive¹⁸⁹ and contrary to public order and morality.¹⁹⁰ With regard to the mark's

¹⁸⁶ See on this issue Ch Geiger and L Pontes, 'Trade Mark Registration, Public Policy, Morality and Fundamental Rights', Centre for International Intellectual Property Studies (CEIPI) Research Paper No 2017-01; forthcoming in *20 Years of the Boards of Appeal at EUIPO, Anniversary Book, Celebrating the Past, Looking Forward to the Future* (Alicante, EUIPO, 2018), <<https://ssrn.com/abstract=3009170>> accessed December 2017; J Griffiths, 'Is There a Right to an Immoral Trademark?', in P L C Torremans (ed.), *Intellectual Property and Human Rights supra* note 7, 423; L P Ramsey, 'A Free Speech Right to Trademark Protection?' (2016) 16 *The Trademark Reporter* 797; E Bonadio, 'Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademarks' (2015) 19 *Marquette Intellectual Property Law Review* 39; S Snedden, 'Immoral Trade Marks in the UK and at OHIM: How Would the Redskins Dispute be Decided There?' (2016) 11(4) *JIPLP* 270.

¹⁸⁷ ECtHR, *Dor v. Romania* (dec.), no 55153/12, 25 August 2015, CE:ECHR:2015:0825DEC005515312 (available only in French).

¹⁸⁸ The drawing depicted a stylised cross with floral elements, placed on a base below which was written 'CRUCIFIX'. The cross was surrounded by a crown in the shape of the letter C representing stylised laurel leaves.

¹⁸⁹ Ground of refusal of section 5(f) of the Romanian Law No. 84/1998 on Trademarks and Geographical Indications of 1998 (English translation by the WIPO) <http://www.wipo.int/wipolex/en/text.jsp?file_id=207374> accessed December 2017.

¹⁹⁰ Ground of refusal of section 5(i) of the Law No 84/1998, *ibid.* Note that the EU First Trademarks Directive (First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ No. L 40 of 11 February 1989, p. 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' (currently Article 4(3)(b) of the Directive (EU) No. 2015/2436 of the European Parliament and of the Council of 16

deceptiveness, OSIM observed that, because the church enjoyed a high level of public trust, the use of the 'CRUCIFIX' mark for legal services could mislead the public into believing that such services were provided by this religious organisation. As it concerned the public order requirement, OSIM considered that the mark's registration would have infringed the provisions of the national Law on Manufacture and Marketing of Religious Objects,¹⁹¹ 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 an infringement of freedom of expression. He also claimed being discriminated against insofar as OSIM had accepted the registration of other marks containing similar graphic elements. The County Court allowed the action and ordered registration of the mark.¹⁹² It considered 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 misleading character invoked by OSIM, the court considered that the mark at issue, combined with the legal services for which it 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 that, therefore, the owner of the mark could mislead the public into believing that there was a connection with the church. In a final judgment on the case, the Bucharest Court of Appeal allowed the appeal and dismissed the action.¹⁹³ Having examined the drawing accompanying the mark, the Court of Appeal 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 providing legal services. Given the broad involvement of religious institutions in charitable and aid activities in various fields, it was not excluded, in the court's opinion, that religious organisations could also provide legal assistance to their believers. The court concluded

December 2015 to approximate the laws of the Member States relating to trade marks (Text with EEA relevance), OJ L 336 of 23 December 2015, p. 1, ELI: <http://data.europa.eu/eli/dir/2015/2436/oj>).

¹⁹¹ Section 1(2) of the Romanian Law No. 103/1992 on Manufacture and Marketing of Religious Objects.

¹⁹² County Court of Bucharest, judgment of 8 June 2010.

¹⁹³ Bucharest Court of Appeal, judgment of 21 June 2011.

that the mark owner could thus benefit from public confidence in the church, that the mark was therefore deceptive, and that it was hence unnecessary to examine the conformity of the mark with public order and morality. Finally, the Court of Appeal found that the refusal to register the trademark did not infringe the ECHR provisions on freedom of expression and non-discrimination. On the latter point, it noted that examples cited by the applicant were irrelevant since those marks contained compound words and complex drawings, which thereby departed from religious symbols.¹⁹⁴

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 ECHR) and that, by refusing his application, the domestic authorities infringed his freedom expression (Article 10 ECHR).

Having observed at the outset that the present case fell to 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.¹⁹⁵ It accepted that the dismissal of the application for registration amounted to an interference with the applicant's right to freedom of expression insofar as the mark at issue constituted an important element of the applicant's advertising strategy¹⁹⁶ (advertising being one of the forms of commercial speech protected by the Convention). However, such interference was in accordance with law (the relevant ground of refusal was provided in the national Law on Trademarks and Geographical Indications),¹⁹⁷ pursued a legitimate aim (protection of the public against false advertising)¹⁹⁸ and was proportionate to this aim. With regard to the proportionality of the measure, the ECtHR observed that the applicant had

¹⁹⁴ One of the judges of the panel expressed a dissenting opinion and argued in favour 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 was concerned with the functioning of the State apparatus and that Romania was a secular State in which religion was separated from the State, the dissenting judge held that religious symbols were not part of the public order.

¹⁹⁵ ECtHR, *Dor v. Romania* (dec.), no 55153/12, 25 August 2015, CE:ECHR:2015:0825DEC005515312 (available only in French), para 57.

¹⁹⁶ *Ibid.*, para 42.

¹⁹⁷ *Ibid.*, paras 45–46.

¹⁹⁸ *Ibid.*, para 47.

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.¹⁹⁹

In these circumstances, and taking into account the particularly wide margin of discretion which the national authorities enjoyed in regulating commercial and advertising speech, the national judges were in their right to reject the applicant's claim.²⁰⁰

The ECtHR has yet to give its opinion on the potential implications of refusing marks contrary to public policy and morality for the trademark applicants' freedom of expression,²⁰¹ although the CJEU has already

¹⁹⁹ Ibid., para 53, translation from French by the authors.

²⁰⁰ Ibid., paras 51, 54 and 56.

²⁰¹ For possible implications of this ground for refusal for the freedom of expression rights not of the trademark applicants, but of the *users*, see the recent decision of European Free Trade Association (EFTA) Court in *Vigeland*, E-5/16, 6 April 2017. In this case, the Court tried 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 accepted, in principle, that the ground for refusal of 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 as such: in 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' (para 92). It is notable, however, that no single reference was made in the Court's judgment 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 (para 65). For the comments on this judgment, see M 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' (2017) 48(6) IIC 683; and T Hvammen 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, 4 September 2017) <<http://trademarkblog.kluweriplaw.com/2017/09/04/efta-eea-famous-work-art-contrary-accepted-principles-morality-public-policy-article-3-trade-mark-directive/>> accessed December 2017. More generally on the (in)sufficiency of the current trademark law guarantees for the protection of the general interest in keeping the public domain works free, see L Anemaet, 'The Public Domain is Under Pressure – Why We Should not Rely on Empirical Data when Assessing Trade Mark Distinctiveness' (2016) 47(3) IIC 303. See also Ch Geiger and L Pontes, 'Trade Mark Registration, Public Policy, Morality and Fundamental Rights' *supra* note 186.

faced the issue on four occasions.²⁰² Each time though the Luxemburg Court rejected the applicants' free expression arguments, considering that they had either failed to argue properly that the refusal of their trademark application was not covered by limitations on freedom of expression provided by Article 10(2) ECHR,²⁰³ that the registration refusal did not prevent the applicants from continuing to market their products with the signs in question as non-registered marks,²⁰⁴ or simply that freedom of expression was irrelevant for the field of trademarks.²⁰⁵

The Strasbourg Court's silence on the matter might, however, change soon, as this exact type of a challenge was recently lodged with the Court and is currently pending before it.²⁰⁶

The application at issue concerns the refusal by the Romanian trademark registration authority to register the applicant's trademark which

²⁰² CJEU, Judgment in *Couture Tech Ltd*, T-232/10, 20 September 2011, EU:T:2011:498 (on the OHIM's refusal to register the Soviet coat of arms as a Community trademark because of the ban on the former USSR symbols in certain EU Member States); CJEU, Judgment in *Cortés del Valle López v. OHIM* (*¡Que bueno ye! HIJOPUTA*), T-417/10, 9 March 2012, EU:T:2012:120 (available only in French and Spanish) (on the OHIM's refusal to register the figurative mark with the word elements '¡Que bueno ye! Hijoputa' perceived as an inherently offensive and shocking expression by the Spanish public of the EU); CJEU, Judgment in *Eřag Trade Mark Company v. OHIM (FICKEN LIQUORS)*, T-54/13, 14 November 2013, EU:T:2013:593 (available only in French and German) (on the OHIM's refusal to register a figurative sign with word elements 'FICKEN LIQUORS' considered to be a vulgar and obscene term in German); and CJEU, Judgment in *Constantin Film Produktion v. EUIPO (Fack Ju Göhte)*, T-69/17, 24 January 2018, EU:T:2018:27 (available only in French and German) (on the refusal by EUIPO to register an expression 'Fack Ju Göhte' as an EU trademark because the word element 'fack ju' (identical to that of the English expression 'fuck you') was expected to be perceived as shocking and vulgar by the German public).

²⁰³ CJEU, Judgment in *Couture Tech Ltd*, T-232/10, 20 September 2011, EU:T:2011:498, para 71.

²⁰⁴ CJEU, Judgment in *Cortés del Valle López v. OHIM* (*¡Que bueno ye! HIJOPUTA*), T-417/10, 9 March 2012, EU:T:2012:120 (available only in French and Spanish), para 26; and CJEU, Judgment in *Eřag Trade Mark Company v. OHIM (FICKEN LIQUORS)*, T-54/13, 14 November 2013, EU:T:2013:593 (available only in French and German), para 44.

²⁰⁵ CJEU, Judgment in *Constantin Film Produktion v. EUIPO (Fack Ju Göhte)*, T-69/17, 24 January 2018, EU:T:2018:27 (available only in French and German). Note that this case is currently pending an appeal to the Court of Justice.

²⁰⁶ ECtHR, *Csibi v. Romania*, no 16632/12, communicated on 20 October 2015.

read, translated from Hungarian, ‘Szekely Land is not Romania!’²⁰⁷ 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, which is contrary to the provisions of the Constitution on the unitary character of the Romanian State, and, consequently, also to the national trademark law that does not allow the registration of trademarks contrary to public order.

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

It might take several years for the Strasbourg Court to decide on the issue. On the one hand, the Court’s previous reluctance to interfere with the reasoning of domestic courts in IP/free speech disputes, unless there are sufficiently compelling reasons to do otherwise, points to an unfavourable outcome for the applicant. It is certainly also of importance that the CJEU has never found that a substantial issue arose in terms of freedom of expression in analogous circumstances. On the other hand, in the ‘Crucifix’ case, the Court qualified a refusal of trademark registration as an interference with freedom of expression, which certainly brings the human rights analysis of similar cases to the next stage.²⁰⁸ Moreover, in one of its most recent pronouncements on the permissibility of restrictions on commercial speech on the grounds of public morals, the ECtHR found in favour of the ‘speaker’.²⁰⁹ The Court held, in particular, that the imposition of a fine on a clothing company²¹⁰ for the use in its

²⁰⁷ ‘Szekelyfold nem România!’ in Hungarian.

²⁰⁸ It is also notable that one of the decisive points in the proportionality analysis of the ‘Crucifix’ case was the applicant’s failure to demonstrate any link between the legal services covered by the mark applied for and the crucifix symbol. It is thus uncertain how the ECtHR would decide if the applicants in similar future cases succeed in establishing such a link (instead of simply confining themselves to claiming that their choice of a trademark sign was covered by freedom of expression).

²⁰⁹ ECtHR, *Sekmadienis Ltd. v. Lithuania*, no 69317/14, 30 January 2018, CE:ECHR:2018:0130JUD006931714.

²¹⁰ The company was fined on the basis of the country’s Law on Advertising that prohibited the advertising contrary to public morals.

advertising campaign of the images of Jesus and Mary was not sufficiently justified. Whether this decision can possibly have implications for the issue of non-registrability of trademarks contrary to public order or morals is uncertain at this stage.²¹¹ In the US, for example, the provision of the Lanham Act prohibiting the registration of disparaging trademarks²¹² was recently declared unconstitutional by the country's Supreme Court on the grounds that that provision amounted to a viewpoint discrimination running contrary to the First Amendment of the American Constitution.²¹³ As a result, the US Patent and Trademark Office's refusal to register the racially offensive name of the music band as a trademark was found to violate the trademark applicant's freedom of expression. In Europe, however, an approach of the ECtHR is likely to be far less radical and would greatly depend on the circumstances of each

²¹¹ Consider, for example, refusals to register the marks 'MADONNA' (upheld by the Swiss Supreme Court, Case 4A_302/2010, 22 September 2010); 'JESUS' (Basic Trademark SA's Trade Mark Application, [2005] R.P.C. 25, 18 January 2005); representation of the Soviet coat of arms (upheld by the General Court in the Judgment in *Couture Tech Ltd v. OHIM (Representation of the Soviet coat of arms)*, T-232/10, 20 September 2011, EU:T:2011:498); and a figurative mark representing crucifix (OHIM, Decision of the First Board of Appeal of 10 September 2015 in Case R 510/2013-1, *Representation d'une croix*). Note, however, that in a number of decisions the EUIPO has admitted either that the refusal to register a sign as an EU trademark on the grounds of public policy and morality might be contrary to freedom of expression (EUIPO, Decision of the Second Board of Appeal of 28 June 2017 in Case R 2244/2016-2, *BREXIT*, paras 25, 33-35) or that freedom of expression has a role to play in the interpretation and application of the ground for refusal based on morals and public order (OHIM, Decision of the Second Board of Appeal of 6 July 2015 in Case R 1727/2014-2, *Oval shape*, paras 30-31).

²¹² The Lanham Act, 15 U.S.C. §1052(a). This provision prohibits the registration of trademarks that may 'disparage ... or bring ... into contempt, or disrepute' any 'persons, living or dead'.

²¹³ US Supreme Court, *Matal v. Tam*, 582 U.S. ____ (2017) (19 June 2017). For an analysis of this case, see L P Ramsey, 'A Free Speech Right to Trademark Protection?' *supra* note 186; K Corey, "'We Are Slant. Who Cares? We're Proud of That': Intersection of the Lanham Act and Free Speech' (July/August 2017) 50 Maryland Bar Journal 36.

particular case (i.e. the mark's 'offensiveness',²¹⁴ the severity of harm to freedom of expression of the trademark applicant²¹⁵ and so on).

3. RIGHT TO PRIVACY AS A DEFENCE AGAINST COPYRIGHT ENFORCEMENT AND AS A BASIS FOR MORAL RIGHTS

With regard to the right to privacy (guaranteed by Article 8 (right to respect for private and family life) ECHR), the intellectual property issues that arose before the Strasbourg Court concerned: the manner of executing certain search orders on allegations of copyright violation (3.1.); and the possible extension to moral rights of Article 8 ECHR (3.2.).

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

The compatibility of search orders as measures against copyright infringement with the Convention privacy provision was first examined by the Strasbourg Court in the case of *Chappell v. the United Kingdom*²¹⁶ back in 1989. The case concerned the challenge to the issue and

²¹⁴ In the case of the Lithuanian clothing company, for example, 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, 30 January 2018, CE:ECHR:2018:0130 JUD006931714, para 79).

²¹⁵ Arguably, fining the company for its advertising campaign amounts to a direct punishment of expression, whereas the refusal of trademark registration is rather a measure of discouragement of particular speech that does not attain to the level of a direct ban on expression. For further discussion of the degree of harm caused to freedom of expression by any potential refusal of trademark registration, see L P Ramsey, 'Non-Traditional Trademarks and Inherently Valuable Expression', forthcoming in I Calboli and M Senftleben (eds), *The Protection of Non-Traditional Marks: Critical Perspectives* (New York, Oxford University Press, 2018); San Diego Legal Studies Paper No. 18-325, <<https://ssrn.com/abstract=3104939>> accessed February 2018.

²¹⁶ ECtHR, *Chappell v. the United Kingdom*, no 10461/83, 30 March 1989, CE:ECHR:1989:0330JUD001046183. On this case, see A Sherlock, 'European Court of Human Rights – Execution of an "Anton Piller Order" and Article 8' (1989) 14(6) *European Law Review* 476; L Collins, 'Anton Piller Orders and Fundamental Rights' (1990) 106 *Law Quarterly Review* 173; and R Charteris, 'Sun Sets on Dawn Raids' (2000) 34 *Scots Law Times* 271.

execution of an interim relief known as an ‘Anton Piller order’²¹⁷ to search the applicant’s premises, which served both as his offices 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 such, as they existed in English law, were in breach of Article 8 ECHR. He further contested under the same provision 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 ECHR. The applicant mainly relied on the fact that the two searches – one as regards 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 decision of March 1985 on the admissibility of application, the Commission dismissed the applicant’s complaint about the legitimacy of Anton Piller orders as such, considering that it was not called upon to examine, in the abstract, whether a particular aspect of domestic law was or was not in conformity with the Convention.²¹⁸ It referred, however, the applicant’s complaint on the manner in which the order was executed in his particular case to the Court, which, judging on the merits, held that there had been no violation of Article 8.²¹⁹ According to the ECtHR, the interference with the applicant’s home and privacy could be justified under Article 8(2) as aiming at the protection of the plaintiffs’ copyright against unauthorised 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.²²⁰ The order, as such, was accompanied with adequate and effective safeguards against arbitrary interference and abuse.²²¹ Those included a short term granted

²¹⁷ So called after the name of a case in which its use was approved by the Court of Appeal, *Anton Piller KG v. Manufacturing Processes Ltd.* [1976] 1 All England Law Reports 779.

²¹⁸ ECommHR, *A.R.M. Chappell v. the United Kingdom* (dec.), no 10461/83, 14 March 1985, CE:ECHR:1985:0314DEC001046183, para 6.

²¹⁹ ECtHR, *Chappell v. the United Kingdom*, no 10461/83, 30 March 1989, CE:ECHR:1989:0330JUD001046183, para 67.

²²⁰ *Ibid.*, paras 52–57.

²²¹ *Ibid.*, paras 59–61.

for the execution, restrictions regarding the time at which and the number of persons by whom it could be executed, as well as a specified purpose for which seized materials could be used. Moreover, a variety of remedies was available to the applicant in case of any wrongdoings by the plaintiffs. Although admitting that the mode of execution could be regarded as 'unfortunate and regrettable',²²² as it involved certain shortcomings in the procedure,²²³ the Court nevertheless concluded that the grant and execution of the order were necessary and proportionate to the legitimate aim pursued.

This was not the conclusion, however, in two much more recent applications to the Court, in which a violation of Article 8 had indeed been established. The applicants in the first case,²²⁴ Mr. and Ms. Prezhdarovi, were a married couple who ran a computer club in their garage. On 2 February 2004, the district prosecutor ordered a search of the applicants' club after suspicions were raised that they had installed some games on the computers they were renting to their clients without the necessary software licence for reproduction and distribution. In executing the prosecutor's order, on 21 February 2004, the police searched the club and seized five computers containing computer programs, computer games and films, following which the criminal proceedings against Mr. Prezhdarov were instigated. A report on the inspection was afterwards sent to a judge who approved it and noted briefly that there had been pressing circumstances and that an immediate search and seizure were the only means by which the collection and preservation of the necessary evidence could be undertaken. Mr. Prezhdarov's application against the search-and-seizure operation, including a claim that the computers contained letters as well as personal information about friends and clients, was considered inadmissible. In the subsequent criminal proceedings, Mr. Prezhdarov was convicted of unlawful distribution of

²²² Ibid., para 63.

²²³ These included the fact that Mr. Chappell was not afforded a proper opportunity to refuse the plaintiffs entry to his premises and the fact that the latter were searched, simultaneously, by the police and the plaintiffs.

²²⁴ ECtHR, *Prezhdarovi v. Bulgaria*, no 8429/05, 30 September 2014, CE:ECHR:2014:0930JUD000842905. On this case, see D Voorhoof, 'European Court of Human Rights: Prezhdarovi v. Bulgaria' (2014) 10(1) IRIS 1, <<http://merlin.obs.coe.int/article.php?id=15036>> accessed December 2017; and Global Freedom of Expression: Columbia University, 'Prezhdarovi v. Bulgaria', <<https://globalfreedomofexpression.columbia.edu/cases/prezhdarovi-v-bulgaria/>> accessed December 2017.

computer programs, computer games and movies. 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 the computers. They further maintained that the operation was unnecessarily extended to cover private information contained in the retained computers, which Ms. Prezhdarova besides had used for her business activities. Lastly, the applicants complained that they had been denied access to an effective remedy in this regard.

Ruling on a violation of Article 8 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 (the second paragraph of Article 8).²²⁵ 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 operations,²²⁶ the Court nevertheless considered that this law did not provide adequate safeguards against arbitrary conduct. In this regard, the ECtHR noted, first, that the circumstances of the case were not so exigent as to buttress an immediate police action outside the criminal proceedings, given, in particular, the lapse of time between the prosecutor's order and the actual police inspection.²²⁷ It further held that the retrospective judicial review of the search provided no meaningful reasoning as to the lawfulness or justification of the impugned measure.²²⁸ Finally, the Court concluded that the lack of any consideration of the relevance of the seized information for 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'.²²⁹

²²⁵ ECtHR, *Prezhdarovi v. Bulgaria*, no 8429/05, 30 September 2014, CE:ECHR:2014:0930JUD000842905, para 51.

²²⁶ *Ibid.*, para 44.

²²⁷ *Ibid.*, para 45.

²²⁸ *Ibid.*, paras 47–48.

²²⁹ *Ibid.*, para 49.

The ‘quality of law’ requirement²³⁰ was also found breached in the case of *Zosymov v. Ukraine*,²³¹ 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 authorisation. Unlike in the *Prezhdarovi* case, however, the judicial review was never obtained even post factum. This was because, according to the Ukrainian rules of criminal procedure, ‘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’.²³² 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. In this situation, according to the Court, ‘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’.²³³

²³⁰ As a rule, the ECtHR will examine 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 had been an interference with that right; (2) whether it was in accordance with law (the ‘quality of law’ requirement); (3) whether it pursued a legitimate aim; and (4) was 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). See further S Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg, Council of Europe Publishing, Human rights files No 15, 1997); and, with regard to the right to property, A Grgić, Z Mataga, M Longar and A Vilfan, *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* (Strasbourg, Council of Europe, Human rights handbooks, No 10, 2007).

²³¹ ECtHR, *Zosymov v. Ukraine*, no 4322/06, 7 July 2016, CE:ECHR:2016:0707JUD000432206.

²³² *Ibid.*, para 61.

²³³ *Ibid.*, para 62.

3.2 Moral Rights Grounded in the Convention's Right to Privacy

Legal scholars are of the opinion that moral rights, even if there is no case law on them yet, could be protected by Article 8 of the Convention on the protection of privacy.²³⁴

The fact that the Court advanced certain arguments in support of the 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.²³⁵ A copy of the portrait was passed by the applicants to the local museum which, in its 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. 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 ancestors' portrait and name caused them distress such as to encroach on their private and family life under Article 8 ECHR.

The Court found, however, that there had been no interference with the applicants' human rights. It observed, first, that 'the applicants had themselves passed the portrait to the museum',²³⁶ concluding on that basis that 'they had agreed, in principle, that the portrait may be seen by others'.²³⁷ The ECtHR further noted that

the 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' feelings towards him. Nothing suggests that the

²³⁴ See e.g. J Drexl, 'Constitutional Protection of Authors' Moral Rights in the European Union – Between Privacy, Property and the Regulation of the Economy', in K S Ziegler (ed.), *Human Rights and Private Law: Privacy as Autonomy* (Oxford and Portland, OR, Hart Publishing, 2007) 159, 173–174; Ch Geiger, "'Constitutionalizing" Intellectual Property Law?' *supra* note 1, 383.

²³⁵ ECtHR, *Vorsina and Vogralik v. Russia* (dec.), no 66801/01, 5 February 2004, CE:ECHR:2004:0205DEC006680101. On this case, see D S Welkowitz, 'Privatizing Human Rights?' *supra* note 15, 694.

²³⁶ ECtHR, *Vorsina and Vogralik v. Russia* (dec.), no 66801/01, 5 February 2004, CE:ECHR:2004:0205DEC006680101.

²³⁷ *Ibid.*

rather distant ties between the applicants and the relative were thereby distorted.²³⁸

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’.²³⁹ Thus, the reasoning of the Court points to a quasi-moral-rights argument that might in the future receive further development under the ECtHR case law on Article 8 also in relation to copyright. 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*).²⁴⁰

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

The last right in the catalogue of the 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 Convention. 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’ magazines, *De Geïllustreerde Pers N.V.*²⁴¹ Apart from the freedom of expression claim, the latter also invoked Article 14 of the Convention, contending that it was discriminated against insofar as under the national broadcasting and copyright legislation, the broadcasting organisations and some publishers were allowed, unlike the applicant company, to publish complete programme information or at least summaries thereof.

²³⁸ Ibid.

²³⁹ D S Welkowitz, ‘Privatizing Human Rights?’ *supra* note 15, 694.

²⁴⁰ Ch Geiger, “‘Constitutionalizing’ Intellectual Property Law?’ *supra* note 1, note 72.

²⁴¹ ECommHR, *De Geïllustreerde Pers N.V. v. the Netherlands* (report (31)), no 5178/71, 6 July 1976, CE:ECHR:1976:0706REP000517871.

As to the alleged discrimination between the applicant company on the one hand and the broadcasting organisations on the other, the Commission took into consideration the nature of the broadcasting organisations which, although performing a public service, were companies created under private law.²⁴² Broadcasting time was allocated to them in relation to their membership and the number of subscriptions to their programme magazines.²⁴³ The profits from those subscriptions were also used for financing the broadcasting activities of the organisations.²⁴⁴ The European Commission of Human Rights, therefore, considered that there were reasonable justifications for the differential treatment.²⁴⁵ As to the alleged discrimination against the applicant company in regard 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 in these two kinds of press publications.²⁴⁶ It pointed out, in particular, that the applicant company sought to publish the complete lists, and not merely summaries, whereas the other newspapers were allowed to publish only the short summaries.²⁴⁷ Finally, the Commission rejected the allegation of discrimination as regards foreign weekly magazines. It held that, even assuming that the applicant company's and foreign magazines' publications were comparable, they nevertheless pursued different aims, foreign publications being allowed on a reciprocal basis for an exchange of programme information with broadcasting organisations abroad, in order to serve those segments of the public who were interested in foreign broadcasts.²⁴⁸ There had been, accordingly, no violation of Article 14 ECHR.²⁴⁹

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 questioned the fact that the appeal procedure in disputes over patents was different from the appeal procedure in other disputes of a pecuniary nature.²⁵⁰ In this case, unlike in the previous case, the Commission did not even examine whether a different

²⁴² Ibid., para 101.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid., para 102.

²⁴⁶ Ibid., paras 104–105.

²⁴⁷ Ibid., para 105.

²⁴⁸ Ibid., para 107.

²⁴⁹ Ibid., paras 108–109.

²⁵⁰ ECommHR, *B.A.T. v. Switzerland* (dec.), no 26684/95, 4 September 1996, CE:ECHR:1996:0904DEC002668495 (available only in French).

treatment was justified by a legitimate aim, having found that the circumstances claimed to be discriminatory were not comparable.²⁵¹ Accordingly, and since Article 14 ECHR only applied to differences between parties whose situations were analogous, the applicant company's complaint was rejected as manifestly ill-founded.²⁵²

5. FAIR TRIAL GUARANTEES APPLICABLE TO IP PROCEEDINGS

Apart from material guarantees, the ECHR also provides for a number of procedural safeguards, at the centre of which, without doubt, stands the right to a fair trial under Article 6 of the Convention. The cases concerning fair trial are the most numerous in the Court's practice on IP (almost seventy). They involve such aspects of this procedural guarantee as the right of access to court (5.1.), the finality of court decisions (*res judicata*) (5.2.), the tribunal's independence and impartiality (5.3.), the equality of arms and the adversarial nature of the proceedings (5.4.), rules on the administration of evidence (5.5.), the oral nature of a hearing (5.6.), the right to a reasoned judicial decision (5.7.), the right to a reasonable duration of the proceedings (5.8.), certain further safeguards applicable in the context of criminal proceedings (5.9.), and, finally, the rights to an effective remedy²⁵³ and timely enforcement of a final court decision (5.10.). 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 chapter, some of the most prominent examples can still be highlighted.²⁵⁴

²⁵¹ Ibid., para 3.

²⁵² Ibid.

²⁵³ 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 ECHR. Note, however, that these two guarantees are closely interrelated, and the EU Charter of Fundamental Rights, for example, even places them together within the scope of the same clause (Article 47 of the Charter).

²⁵⁴ For further discussion of the intersection of IP and fair trial in Europe, see an excellent article by J Griffiths, 'Enforcement of Intellectual Property Rights and the Right to a Fair Trial', in Ch Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* supra note 1, 438.

5.1 Access to Court

The right of access to court played a role in several intellectual property cases decided by the ECtHR in relation to the issues of prohibitive time-limits,²⁵⁵ certain formal aspects of the appeal procedure,²⁵⁶ questions of jurisdiction,²⁵⁷ allegedly excessive court fees,²⁵⁸ legal costs,²⁵⁹ and unduly protracted proceedings.²⁶⁰ Finally, in a number of patent cases, the impossibility to appeal the decisions of the Board of Appeal of the EPO to national courts was likewise challenged by the applicants.²⁶¹

A recent copyright judgment in the case of *Dumitru Gheorghe v. Romania*²⁶² provides a good illustration of how the time-limits restrictions can impede effective access to judicial protection. The applicant was a professional photographer who took a number of photographs of

²⁵⁵ ECommHR, *Metrat v. France* (dec.), no 23016/93, 18 May 1994, CE:ECHR:1994:0518DEC002301693 (copyright, available only in French); ECtHR, *AEPI S.A. v. Greece*, no 48679/99, 11 April 2002, CE:ECHR:2002:0411JUD004867999 (copyright, available only in French); ECtHR, *Dumitru Gheorghe v. Romania*, no 33883/06, 12 April 2016, CE:ECHR:2016:0412JUD003388306 (copyright, discussed below); and ECtHR, *Sobczynski v. Poland* (dec.), no 358/04, 30 September 2008, CE:ECHR:2008:0930DEC000035804 (patents).

²⁵⁶ ECommHR, *Metrat v. France* (dec.), no 23016/93, 18 May 1994, CE:ECHR:1994:0518DEC002301693 (copyright, available only in French); ECommHR, *Denev v. Sweden* (dec.), no 25419/94, 9 April 1997, CE:ECHR:1997:0409DEC002541994 (design).

²⁵⁷ ECtHR, *Kessler v. Switzerland* (dec.), no 56933/00, 14 September 2004, CE:ECHR:2004:0914DEC005693300 (copyright, available only in French).

²⁵⁸ ECommHR, *X. v. Switzerland* (dec.), no 6958/75, 10 December 1975, CE:ECHR:1975:1210DEC000695875 (patents, discussed below); ECtHR, *Sté. MATROT v. France* (dec.), no 43798/98, 13 December 2001, CE:ECHR:2001:1213DEC004379898 (patents, available only in French, discussed below).

²⁵⁹ ECtHR, *Jensen v. Denmark*, no 8693/11, Judgment of 13 December 2016, CE:ECHR:2016:1213JUD000869311 (designs, discussed below).

²⁶⁰ ECtHR, *Kristiansen and Tyvik v. Norway*, no 25498/08, 2 May 2013, CE:ECHR:2013:0502JUD002549808 (patents, discussed below).

²⁶¹ ECommHR, *Reber, Reber Systematik GmbH and Kinkel v. Germany* (dec.), no 27410/95, 12 April 1996, CE:ECHR:1996:0412DEC002741095; ECommHR, *Lenzing AG v. Germany* (dec.), no 39025/97, 9 September 1998, CE:ECHR:1998:0909DEC003902597; ECommHR, *Lenzing AG v. the United Kingdom* (dec.), no 38817/97, 9 September 1998, CE:ECHR:1998:0909DEC003881797; ECtHR, *Rambus Inc. v. Germany* (dec.), no 40382/04, 16 June 2009, CE:ECHR:2009:0616DEC004038204.

²⁶² ECtHR, *Dumitru Gheorghe v. Romania*, no 33883/06, 12 April 2016, CE:ECHR:2016:0412JUD003388306.

landscapes in Călărași County in Romania in 1984. 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. 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. being credited as a photographer. In February 2004, claiming that F.G. had committed copyright infringement, the applicant lodged a criminal complaint with the Romanian Copyright Office (RCO). He also joined a civil action to his criminal complaint, seeking compensation for pecuniary and non-pecuniary damage. Following an investigation that established that the applicant's copyright had indeed been infringed, the RCO forwarded the applicant's complaint to the police in November 2004. Although the expert report ordered by the police likewise confirmed the applicant's authorship of the photographs, the prosecutor's office decided not to open a criminal investigation on the grounds that the limitation period of five years for the punishment for copyright infringement (calculated from the date on which the offence was committed)²⁶³ had expired in April 2004. The applicant appealed that decision before the trial court, which ruled in his favour.²⁶⁴ The court noted, in particular, that the date from which the term of limitation of five years should have been calculated was not the date on which the RCO forwarded the file to the police but the date on which the applicant lodged his complaint with the RCO (which happened some two months before the end of the five-year term). This conclusion was informed by the particular nature of Romanian procedure for the punishment of copyright offences, whereby only the RCO (and not the applicant) could lodge the criminal action for copyright infringement with the judicial bodies. This term-calculation was, nevertheless, rejected on appeal by the higher court,²⁶⁵ which held that the limitation period continued to run until the date on which the police had received the criminal complaint from the RCO – that is to say, until November 2004 – more than five years after the offence had been committed. In reaching this conclusion, no reference was made 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

²⁶³ In the present case, that date was the publication of the album in April 1999.

²⁶⁴ Călărași County Court, judgment of 24 November 2005.

²⁶⁵ Bucharest Court of Appeal, judgment of 17 February 2006.

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 serving the aims of legal certainty and the proper administration of justice,²⁶⁶ the Court nevertheless noted that ‘the right of access to court is impaired when the rules cease to serve [those aims] and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court’.²⁶⁷ Applying these rules to the facts of the applicant’s case, the ECtHR considered that the date that should have been taken into account by the domestic courts was the date when the applicant had lodged his complaint with the Copyright Office and not the date when that complaint was forwarded by the latter to the police. In reaching this conclusion, the Court took notice of the fact that the time it took for the RCO to conduct an investigation could not be imputable to the applicant.²⁶⁸ Furthermore, the procedural particularities of the Romanian system for filing a criminal copyright infringement action did not allow the applicant to lodge his complaint directly with the courts.²⁶⁹ 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.²⁷⁰ In light of the above, the ECtHR concluded that

the 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.²⁷¹

Another aspect of the right to access relating to the situation when the excessive costs of proceedings impede judicial review of a case was examined in two patent disputes. In one of those, *X. v. Switzerland*,²⁷² the question was raised whether the denial of free legal aid and the obligation

²⁶⁶ ECtHR, *Dumitru Gheorghe v. Romania*, no 33883/06, 12 April 2016, CE:ECHR:2016:0412JUD003388306, para 27.

²⁶⁷ *Ibid.*, para 28.

²⁶⁸ *Ibid.*, para 31.

²⁶⁹ *Ibid.*, para 32.

²⁷⁰ *Ibid.*, para 33.

²⁷¹ *Ibid.*, para 34.

²⁷² ECommHR, *X. v. Switzerland* (dec.), no 6958/75, 10 December 1975, CE:ECHR:1975:1210DEC000695875.

to pay a large deposit in order to pursue an action for damage in a patent infringement suit did not prevent the applicant from going before the courts. In the second case, *Sté. MATROT v. France*,²⁷³ the issue at stake was an inability of a defendant in civil proceedings (the company Sté. MATROT) to appeal on points of law without paying significant damages awarded to the claimant by the judgment Sté. MATROT intended to appeal. In both instances, the applicants' claims were rejected as manifestly ill-founded. Although reiterating, in relation to the first case, that high costs of proceedings may raise an issue under Article 6(1) (fair hearing) of the Convention in certain circumstances,²⁷⁴ the Commission of Human Rights nevertheless relied on the national court's finding according to which the action for damage in the applicant's case was without any prospect of success.²⁷⁵ The Commission further considered that the amount of the deposit was not disproportionate to the size of the claim.²⁷⁶ As concerns the second case, the requirement to pay damages was likewise found 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.²⁷⁷

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, a certain Mr. Jensen, had been condemned to pay legal costs of an unspecified amount.²⁷⁸ He was convicted in 2009 in Denmark of violation of intellectual property rights involving the marketing of substantial quantities of counterfeit designer goods such as knives, lamps and similar products. 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

²⁷³ ECtHR, *Sté. MATROT v. France* (dec.), no 43798/98, 13 December 2001, CE:ECHR:2001:1213DEC004379898 (available only in French).

²⁷⁴ ECommHR, *X. v. Switzerland* (dec.), no 6958/75, 10 December 1975, CE:ECHR:1975:1210DEC000695875.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ ECtHR, *Sté. MATROT v. France* (dec.), no 43798/98, 13 December 2001, CE:ECHR:2001:1213DEC004379898 (available only in French), para 1.

²⁷⁸ ECtHR, *Jensen v. Denmark*, no 8693/11, 13 December 2016, CE:ECHR:2016:1213JUD000869311.

the High Court. He claimed that the costs had to be paid entirely or partly by the Treasury. His appeal was, however, dismissed because it was lodged after the statutory allotted time-limit. According to the High Court, this time-limit for an appeal (fourteen days) should in this case be 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. 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 been no violation of Article 6(1) (access to court) ECHR. It endorsed, essentially, the decision of the Danish High Court, observing that the applicant's appeal did not concern the amount of fees he was ordered to pay, but solely his duty to pay his legal costs.²⁷⁹ It thus followed that the time-limit ran from the date of the judgment and not from the date when the exact amount of the fees was communicated to the applicant. As to the applicant's argument that, at the time of the judgment, he was not aware that the legal costs would be so burdensome (and could not therefore effectively apprise himself of the decision imposing the duty to pay those costs on him), the Court observed that the applicant could have still argued, even without knowing the exact amount of the legal costs, that those had to be paid by the Treasury.²⁸⁰ Since the applicant did not lodge such an appeal until the expiration of the time-limit for doing so, the 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 that 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.²⁸¹ The applicant had, however, chosen not to do so.

Moving further, Article 6(1) ECHR may also be breached where the length of domestic proceedings renders the applicant's right of access to a court illusory. The case of *Kristiansen and Tyvik v. Norway*²⁸² is a good illustration. It concerned the refusal by the Norwegian Industrial Property Office (NIPO) of a patent application almost eighteen years after that application was filed. By that time, had a patent been granted in Norway,

²⁷⁹ Ibid., para 37.

²⁸⁰ Ibid., para 41.

²⁸¹ Ibid., para 42.

²⁸² ECtHR, *Kristiansen and Tyvik v. Norway*, no 25498/08, 2 May 2013, CE:ECHR:2013:0502JUD002549808.

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.

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 their matter reviewed by the courts. 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) (access to court) ECHR. In view of the average processing time of two to three years, the Court was not convinced by the argument brought forward by the Norwegian Government that the patent authorities could not have determined the applicants' patent application earlier. The ECtHR also took note of the fact that, although one of the applicants contributed to the length of the proceedings, this was not solely his responsibility, and that substantial delays were attributable to the NIPO.²⁸³ It thus followed that, in a situation of administrative delay such as in the applicants' case, the rule whereby patent rights were protected for twenty years from the date of the filing of the patent application had the effect of undermining the possibility of having such rights established through the use of judicial remedies.²⁸⁴

Finally, the lack of judicial review of the decisions of the EPO had given rise to a series of applications to the ECtHR from the standpoint of the right to a court.²⁸⁵ All of these were nevertheless dismissed by the Convention organs as inadmissible on grounds identical to those advanced in relation to the applicants' property claims in cases that have already been discussed above – notably, for the reason of 'equivalent protection' provided by the European Patent Convention as regards the ECHR.²⁸⁶ Emphasis was also placed on the fact that, in deciding not to

²⁸³ Ibid., paras 54–56.

²⁸⁴ Ibid., 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 section 5.8 below).

²⁸⁵ ECommHR, *Reber; Reber Systematik GmbH and Kinkel v. Germany* (dec.), no 27410/95, 12 April 1996, CE:ECHR:1996:0412DEC002741095; ECommHR, *Lenzing AG v. Germany* (dec.), no 39025/97, 9 September 1998, CE:ECHR:1998:0909DEC003902597; ECommHR, *Lenzing AG v. the United Kingdom* (dec.), no 38817/97, 9 September 1998, CE:ECHR:1998:0909DEC003881797; ECtHR, *Rambus Inc. v. Germany* (dec.), no 40382/04, 16 June 2009, CE:ECHR:2009:0616DEC004038204.

²⁸⁶ See section 1.3 above.

register patents separately in a number of European countries, but rather to avail themselves of the EPO registration scheme, the applicants in these cases accepted the limitation on access to court in the various domestic systems which that choice brought with it.²⁸⁷

5.2 *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 applicant companies' favour following an application for nullity lodged by the General Prosecutor of Romania. One of those cases pertained to a dispute over exploitation rights for the translation of a novel;²⁸⁸ another to the right of exclusive use of the applicant company's trademark.²⁸⁹ In both those cases a violation of Article 6(1) (*res judicata*), as well as of the applicants' property (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.²⁹⁰

5.3 Independence and Impartiality

A tribunal's independence and impartiality was questioned in several intellectual property cases brought before the ECtHR.²⁹¹ The most

²⁸⁷ That limitation, in turn, was regarded proportionate to the legitimate aim of ensuring an effective European system of registration of patents (see e.g. ECommHR, *Lenzing AG v. the United Kingdom* (dec.), no 38817/97, 9 September 1998, CE:ECHR:1998:0909DEC003881797, para 1). For a critical assessment of a lack of judicial control over the EPO, see the sources listed in note 113.

²⁸⁸ ECtHR, *SC Editura Orizonturi SRL v. Romania*, no 15872/03, 13 May 2008, CE:ECHR:2008:0513JUD001587203 (available only in French).

²⁸⁹ ECtHR, *SC Parmalat Spa and SC Parmalat Romania SA v. Romania*, no 37442/03, 21 February 2008, CE:ECHR:2008:0221JUD003744203 (available only in French).

²⁹⁰ ECtHR, *SC Editura Orizonturi SRL v. Romania*, no 15872/03, 13 May 2008, CE:ECHR:2008:0513JUD001587203 (available only in French), paras 61–64; ECtHR, *SC Parmalat Spa and SC Parmalat Romania SA v. Romania*, no 37442/03, 21 February 2008, CE:ECHR:2008:0221JUD003744203 (available only in French), paras 25–28.

²⁹¹ ECtHR, *Dima v. Romania* (dec.), no 58472/00, 26 May 2005, CE:ECHR:2005:0526DEC005847200 (copyright, available only in French); ECommHR, *Smith Kline v. the Netherlands* (report (28)), no 12633/87, 10 July

indicative is the *British-American Tobacco* case,²⁹² in which the applicant company challenged the institutional structure of the Netherlands Patent Office, arguing that the latter had failed to provide the requisites of an independent and impartial tribunal, in particular with regard to the manner of appointment of its members. British-American Tobacco maintained in particular 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. The composition of the Appeals Division was entirely left to the discretion of the Central Division, without any possibility for third parties to object. 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 to a tribunal satisfying the Convention fair trial requirements against a decision of the Appeals Division and that the proceedings before the latter were not transparent.

The case was first examined by the European Commission of Human Rights, which considered that, although there was no manifestation of any personal bias on the part of the members of Appeals Division of the Patent Office, its organisational structure failed to demonstrate the objective appearance of impartiality.²⁹³ Furthermore, it had not been shown that the Dutch civil courts had ever considered themselves competent to review the decisions of the Appeals Division.²⁹⁴ The

1991, CE:ECHR:1991:0710REP001263387 (patents); ECtHR, *British-American Tobacco Company Ltd v. the Netherlands*, no 19589/92, 20 November 1995, CE:ECHR:1995:1120JUD001958992 (patents, discussed below); ECtHR, *Binder v. Germany* (dec.), no 44455/07, 20 September 2011, CE:ECHR:2011:0920DEC004445507 (patents).

²⁹² ECtHR, *British-American Tobacco Company Ltd v. the Netherlands*, no 19589/92, 20 November 1995, CE:ECHR:1995:1120JUD001958992. On this case, see B Goebel, 'Trademarks as Fundamental Rights – Europe' (2009) 99 Trademark Reporter 931, 937; J Griffiths, 'Enforcement of Intellectual Property Rights and the Right to a Fair Trial' *supra* note 254, 443; and C Holtz, *Due Process for Industrial Property: European Patenting under Human Rights Control* (Handelshögskolan i Stockholm, Rättsveternskapliga institutionen, 2003) 131, 132, 156 and 207.

²⁹³ ECommHR, *The B. Company v. the Netherlands* (report (31)), no 19589/92, 19 May 1994, CE:ECHR:1994:0519REP001958992, paras 53–68.

²⁹⁴ *Ibid.*, para 67.

Commission therefore concluded that the applicant company's case was not heard by an independent and impartial tribunal and that it had not been established that a remedy before such a tribunal was available to the company.²⁹⁵ The Strasbourg Court, however, disagreed with this opinion of the Commission in a judgment of November 1995.²⁹⁶ It noted that, although it was true that no Netherlands 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'.²⁹⁷ Accordingly, the applicant company had the possibility, under the domestic law, to bring the case before the civil courts in order to establish whether the Appeals Division was a 'tribunal' offering safeguards required by Article 6(1) (fair hearing) ECHR. If the civil courts had found that the Appeals Division had lacked the ECHR standards, they would have had full jurisdiction to rule on the merits of the patent application.²⁹⁸ Since the applicant company chose not to avail itself of that judicial remedy, irrespective of what could have been the reasons for that, the Court concluded that there had been no violation of Article 6(1) (fair hearing) ECHR.²⁹⁹

5.4 Equality of Arms and Adversarial Proceedings

The right to adversarial proceedings and equality of arms was considered by the Convention institutions on only two occasions, both involving Finnish patent proceedings. The first case, decided back in 1997, concerned the refusal of the applicant company's patent application before the Finnish Board of Patents and Registers on the grounds that the invention lacked the required inventive character.³⁰⁰ It appeared that the 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. Another case, decided some eighteen years later, pertained to the civil proceedings

²⁹⁵ Ibid., para 68.

²⁹⁶ ECtHR, *British-American Tobacco Company Ltd v. the Netherlands*, no 19589/92, 20 November 1995, CE:ECHR:1995:1120JUD001958992.

²⁹⁷ Ibid., paras 82–83.

²⁹⁸ Ibid., para 84.

²⁹⁹ Ibid., paras 86–87.

³⁰⁰ ECommHR, *Brown & Williamson Tobacco Corporation v. Finland* (report), no 23749/94, 2 December 1997, CE:ECHR:1997:1202REP002374994.

initiated by an applicant who sought compensation for a patent licence.³⁰¹ In accordance with the patent law in force at the time of the hearing, two technical experts were appointed by the Finland District Court to provide expertise. This was, however, delivered to the parties only together with the District Court judgment, thereby excluding the possibility of commenting on it.

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 Court and its former Commission, in both instances the applicants had the opportunity to submit their comments in their subsequent appeals to the courts³⁰² or higher judicial bodies.³⁰³ Accordingly, any alleged procedural error before the Patent Office or the trial court would have been corrected in the (later) judicial proceedings.

5.5 Administration of Evidence

The rules on the administration of evidence – another procedural guarantee of the right to a fair trial – were implicated in several cases on intellectual property.³⁰⁴ What could be inferred from those cases, as well as from the general body of the Court's case law on the questions of evidence, is that in an overwhelming majority of situations, the Court abstains from interfering with the way the evidence is administered by the domestic courts. 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'.³⁰⁵ The Strasbourg Court's task is limited to 'ascertain[ing] whether the

³⁰¹ ECtHR, *Vazvan v. Finland* (dec.), no 61815/13, 3 November 2015, CE:ECHR:2015:1103DEC006181513.

³⁰² ECommHR, *Brown & Williamson Tobacco Corporation v. Finland* (report), no 23749/94, 2 December 1997, CE:ECHR:1997:1202REP002374994, para 74.

³⁰³ ECtHR, *Vazvan v. Finland* (dec.), no 61815/13, 3 November 2015, CE:ECHR:2015:1103DEC006181513, para 32.

³⁰⁴ ECommHR, *B.A.T. v. Switzerland* (dec.), no 26684/95, 4 September 1996, CE:ECHR:1996:0904DEC002668495 (patents, available only in French); ECtHR, *Kessler v. Switzerland* (dec.), no 56933/00, 14 September 2004, CE:ECHR:2004:0914DEC005693300 (copyright, available only in French, discussed below); ECtHR, *Dima v. Romania* (dec.), no 58472/00, 26 May 2005, CE:ECHR:2005:0526DEC005847200 (copyright, available only in French).

³⁰⁵ See, among many other authorities, ECtHR, *Ramanauskas v. Lithuania* [GC], no 74420/01, 5 February 2008, CE:ECHR:2008:0205JUD007442001, para 52.

proceedings as a whole, including the way in which evidence was taken, were fair'.³⁰⁶ The case of *Kessler v. Switzerland* is a good example.³⁰⁷

The applicant, the president of an animal protection association, published in the association's magazine two articles criticising the practice of fishing with live bait. In his articles, he used four drawings taken from the fisheries magazine *Petri Heil*, without, however, indicating their source and without requesting a prior permission for the publication of the drawings – an act that subsequently resulted in the applicant's conviction for copyright infringement.³⁰⁸

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 on the applicability to his case of the quotation and news reporting exceptions to copyright and on the general public interest in the contested publication. Having recalled at the outset that the admissibility of evidence was primarily a matter for regulation by national law,³⁰⁹ the Court 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.³¹⁰

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'.³¹¹ It thus followed that the applicant's complaint had to be rejected as manifestly ill-founded.³¹²

³⁰⁶ Ibid.

³⁰⁷ ECtHR, *Kessler v. Switzerland* (dec.), no 56933/00, 14 September 2004, CE:ECHR:2004:0914DEC005693300 (available only in French).

³⁰⁸ The applicant was ordered, notably, to pay 1,390 euros in compensation for unauthorised use of protected works (the High Court of the Canton of Thurgau (*Tribunal supérieur du canton de Thurgovie*), judgment of 6 July 1999, upheld on appeal by the Swiss Federal Supreme Court (*Tribunal fédéral*), judgment of 15 March 2000).

³⁰⁹ ECtHR, *Kessler v. Switzerland* (dec.), no 56933/00, 14 September 2004, CE:ECHR:2004:0914DEC005693300 (available only in French), para 3.b.

³¹⁰ Ibid., translation from French by the authors.

³¹¹ Ibid.

³¹² Ibid.

5.6 Oral Hearing

An entitlement to an oral hearing, as one of the instances of the right to a fair trial, was discussed in a number of patent cases brought before the Strasbourg Court.³¹³ Thus, an absence of an oral hearing in the appeal stage of patent validity proceedings was contested in the case of *B.A.T. v. Switzerland*³¹⁴ and found justified by the highly technical and purely legal nature of the proceedings in question.³¹⁵ The Commission also stressed in that case that the applicant's claim did not concern the absence of an oral hearing throughout the entire proceedings but only for one instance and that the absence of an oral hearing on appeal was justified by the fact that the hearing took place at the trial court level.³¹⁶ Analogously, the lack of an oral hearing in the patent application proceedings before the national patent office was considered sufficiently remedied by the possibility to lodge a further appeal with the court.³¹⁷

5.7 Reasoned Judicial Decision

The right to a fair trial also encompasses an important guarantee of a sufficiently reasoned judicial decision. This was considered, in the intellectual property context, on a number of occasions,³¹⁸ some of which even gave rise to a finding of violation of Article 6(1) (reasoned judicial

³¹³ ECommHR, *University of Illinois Foundation v. the Netherlands* (dec.), no 12048/86, 2 May 1988, CE:ECHR:1988:0502DEC001204886; ECommHR, *B.A.T. v. Switzerland* (dec.), no 26684/95, 4 September 1996, CE:ECHR:1996:0904DEC002668495 (available only in French); ECommHR, *Brown & Williamson Tobacco Corporation v. Finland* (report), no 23749/94, 2 December 1997, CE:ECHR:1997:1202REP002374994.

³¹⁴ ECommHR, *B.A.T. v. Switzerland* (dec.), no 26684/95, 4 September 1996, CE:ECHR:1996:0904DEC002668495 (available only in French).

³¹⁵ *Ibid.*, para 2.

³¹⁶ *Ibid.* For further discussion of the entitlement to an oral hearing under the Convention case law, see European Court of Human Rights – Research Division, *Guide on Article 6: Right to a Fair Trial (Civil Limb)* (Council of Europe / European Court of Human Rights, 2013), paras 249–256.

³¹⁷ ECommHR, *Brown & Williamson Tobacco Corporation v. Finland* (report), no 23749/94, 2 December 1997, CE:ECHR:1997:1202REP002374994, paras 55–56.

³¹⁸ ECommHR, *Metrat v. France* (dec.), no 23016/93, 18 May 1994, CE:ECHR:1994:0518DEC002301693 (copyright, available only in French); ECtHR, *Hiro Balani v. Spain*, no 18064/91, 9 December 1994, CE:ECHR:1994:1209JUD001806491 (trademarks); ECommHR, *Denev v. Sweden* (dec.), no 25419/94, 9 April 1997, CE:ECHR:1997:0409DEC002541994 (design); ECtHR,

decision) ECHR. This was the case, for example, in the above-mentioned *Dima v. Romania* dispute³¹⁹ which concerned 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 served as a basis for 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, in the absence of which there had been a violation of Article 6(1) (fairness) ECHR.³²⁰ 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.³²¹ Article 6 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 applicants' submissions that were the subject of argument.³²²

5.8 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 deciding on this type of a dispute, the ECtHR will 'hav[e] 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'.³²³

Dima v. Romania, no 58472/00, 16 November 2006, CE:ECHR:2006:1116JUD005847200 (copyright, available only in French).

³¹⁹ ECtHR, *Dima v. Romania*, no 58472/00, 16 November 2006, CE:ECHR:2006:1116JUD005847200 (available only in French).

³²⁰ *Ibid.*, paras 39–41.

³²¹ ECtHR, *Hiro Balani v. Spain*, no 18064/91, 9 December 1994, CE:ECHR:1994:1209JUD001806491.

³²² *Ibid.*, 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 – as was the issue in the applicant's case – acceptance of an appeal to a decision by the competent court, a simple refusal or acceptance of a petition by that court was sufficient (ECommHR, *Denev v. Sweden* (dec.), no 25419/94, 9 April 1997, CE:ECHR:1997:0409DEC002541994).

³²³ See, among many other authorities, ECtHR, *Nemec and Others v. Slovakia*, no 48672/99, 15 November 2001, CE:ECHR:2001:1115JUD004867299, para 34.

In the vast majority of such cases, the approach of the ECtHR would be largely the same as that applicable to any other type of (non-IP) dispute. A few minor particularities could be found only in the heightened technical complexity of patent (but also certain copyright and other IP) litigation 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 the case of *Zhurba v. Ukraine*³²⁴ concerning the claim for compensation for the applicant's 'innovative proposal'³²⁵ which consisted in re-engineering of the heating system in the company where the applicant worked as a senior engineer, and which allegedly created significant savings for his employer. In that case, the duration of the proceedings, which lasted four years and five months, was not found unreasonable due mainly to the 'complexity of the controversial intellectual property issues at heart of the dispute'.³²⁶ Analogously, the factual complexity of a copyright infringement dispute over unauthorised reproduction of the applicant's photographs in a travel guide by a Georgian company contributed, together with several other factors, to the finding that the overall length of the less-than-four-year proceedings was not excessive.³²⁷ To the contrary, a violation of a reasonable time guarantee

³²⁴ ECtHR, *Zhurba v. Ukraine* (dec.), no 11215/03, 19 June 2007, CE:ECHR:2007:0619DEC001121503.

³²⁵ The Civil Code of Ukraine recognises an 'innovative proposal' (*раціоналізаторська пропозиція*) among the subject-matters of intellectual property rights alongside literary works, computer programs, trademarks, etc. (see Article 420 of the Civil Code of Ukraine, No. 435-IV of 16 January 2003 (as amended up to 2 November 2016) (UA127) (available in Ukrainian) <<http://www.wipo.int/wipolex/en/details.jsp?id=6071>> accessed December 2017). According to Article 481(1) of the Code, '[a]n 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' (Article 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' (Article 484 of the Code) (translation from Ukrainian by the authors).

³²⁶ ECtHR, *Zhurba v. Ukraine* (dec.), no 11215/03, 19 June 2007, CE:ECHR:2007:0619DEC001121503, para 1.

³²⁷ ECtHR, *Schrade v. Georgia* (dec.), no 9289/08, 2 February 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

was established in the case of *Jamriška v. Slovakia*³²⁸ in which 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 (that lasted in their 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.³²⁹ Accordingly, the technical complexity of the dispute was not enough to justify its protracted duration.

It is worth mentioning further that in a number of intellectual property cases where the applicants complained about excessive length of domestic proceedings, the Court analysed those claims not only from the perspective of Article 6(1) (fair hearing) ECHR, but also from the standpoint of Article 13 of the Convention which guarantees the right to an effective national remedy.³³⁰

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.).

³²⁸ ECtHR, *Jamriška v. Slovakia*, no 51559/99, 14 October 2003, CE:ECHR:2003:1014JUD005155999.

³²⁹ Ibid., paras 29–31.

³³⁰ See, establishing a violation of both provisions, ECtHR, *Kuzin v. Russia*, no 22118/02, 9 June 2005, CE:ECHR:2005:0609JUD002211802 (civil proceedings concerning 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, 24 February 2009, CE:ECHR:2009:0224JUD003741102 (available only in French) (alleged 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. the Netherlands* (dec.), no 10470/07, 16 June 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, 23 March 2010, CE:ECHR:2010:0323DEC004005306 (proceedings in a copyright-related civil suit that lasted in their relevant part for more than six years); ECtHR, *Zarubica v. Serbia* (dec.), no 47250/07, 11 May 2010, CE:ECHR:2010:0511DEC004725007 (proceedings in a copyright-related civil suit that lasted in their relevant part 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, 19 June 2007, CE:ECHR:2007:0619DEC001121503 (civil proceedings seeking to have the applicant’s works declared ‘an innovative proposal’ and to obtain remuneration that lasted in their relevant part four years and five months before three levels of jurisdiction); ECtHR, *Rapos v. Slovakia*, no 25763/02, 20 May 2008, CE:ECHR:2008:0520JUD002576302 (civil proceedings in the applicant’s action in a design dispute that lasted more than twelve years for

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 what would be adopted in connection to non-IP cases.³³¹ The case of *Denev v. Sweden*³³² stands out in this general pattern. There, a finding of violation of Article 6(1) (length) ECHR arose, mainly, not out of the 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 decisive for the registration of the applicant's design, which, although normally taking one month at each level, lasted for almost four years in the applicant's case. 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 given the fact that it would have been about to expire in view of the five-year limitation on the period of protection calculated *from the date of the filing of a design application*. The Human Rights Commission agreed, holding that there had been a violation of Article 6(1) (reasonable time) of the Convention.³³³ It noted that

special 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.³³⁴

two levels of jurisdiction). On the relationship between Article 6(1) (reasonable time) and Article 13 (effective remedy) ECHR, see D J Harris, M O'Boyle, E P Bates and C M Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edition, Oxford, Oxford University Press, 2009) 570–572.

³³¹ See in this sense J Griffiths, 'Enforcement of Intellectual Property Rights and the Right to a Fair Trial' *supra* note 254, observing at p. 443 that '[t]here 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'.

³³² ECommHR, *Denev v. Sweden* (report (31)), no 25419/94, 14 January 1998, CE:ECHR:1998:0114REP002541994. On this case, see C Holtz, *Due Process for Industrial Property* *supra* note 292, 76, 172, 203, 393–394 and 485.

³³³ ECommHR, *Denev v. Sweden* (report (31)), no 25419/94, 14 January 1998, CE:ECHR:1998:0114REP002541994, para 38.

³³⁴ *Ibid.*, para 37. Cf. ECtHR, *Kristiansen and Tyvik v. Norway*, no 25498/08, 2 May 2013, CE:ECHR:2013:0502JUD002549808, discussed above.

5.9 Further Guarantees in Criminal Proceedings

Whereas the above-discussed fair trial guarantees apply to both civil and criminal proceedings, the ECHR provides some additional safeguards to the parties to criminal cases. These are likewise featured in a number of intellectual property decisions.³³⁵ The most interesting example is probably the guarantee of legality which was at stake in the case of *Ashby Donald* discussed above.³³⁶ There, the applicants complained (alongside a violation of their freedom to impart information) about a restrictive interpretation by national courts of the internal copyright exception allowing the reproduction of artistic works for news reporting.³³⁷ As already mentioned, the French courts ruled the exception in question (on which the applicants built their defence) ‘inapplicable to the creations of the seasonal fashion industries and articles of fashion’³³⁸ depicted on the applicants’ photographs. According to the applicants, such an interpretation ‘enlarged the scope of application of the offence of counterfeiting’,³³⁹ thereby running afoul of the principle enshrined in Article 7 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), having reiterated that the Strasbourg Court’s role was limited to verifying the compatibility of the effects of such an interpretation with the Convention. In the present case, the ECtHR observed: ‘the Supreme Court decided on the scope of

³³⁵ On the rights of defence, see ECommHR, *EVORA B.V. v. the Netherlands* (dec.), no 32601/96, 3 December 1997, CE:ECHR:1997:1203DEC003260196 (trademarks); ECtHR, *Eskelinen and Others v. Finland*, no 43803/98, 8 August 2006, CE:ECHR:2006:0808JUD004380398 (trade secrets); ECtHR, *Hanževački v. Croatia*, no 17182/07, 16 April 2009, CE:ECHR:2009:0416JUD001718207 (copyright – software). On the entrapment defence, see ECtHR, *Volkov and Adamskiy v. Russia*, nos 7614/09 and 30863/10, 26 March 2015, CE:ECHR:2015:0326JUD000761409 (copyright – software).

³³⁶ ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French) (see section 2.1.2 above).

³³⁷ Article L. 122-5 9° of the French Intellectual Property Code of 1 July 1992 (available in French) <http://www.wipo.int/wipolex/en/text.jsp?file_id=322949> accessed December 2017.

³³⁸ ECtHR, *Ashby Donald and Others v. France*, no 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908 (available only in French), para 20, translation by the International Review of Intellectual Property and Competition Law: 45(3) IIC 354 (2014).

³³⁹ *Ibid.*

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.³⁴⁰

5.10 Enforcement of a Final Judicial Decision

The last procedural guarantee that gave rise to a number of cases in respect of intellectual property proceedings is the right to the timely enforcement of final court decisions. Thus, an eleven-year delay in enforcing the final judgment ordering the State-owned company to compensate the applicant for an unauthorised use of his invention was found contrary to both Article 6(1) (enforcement of a final court decision) ECHR and Article 1 of Protocol No. 1 (protection of property) ECHR.³⁴¹ On another occasion, a failure to enforce a final court judgment awarding the applicant royalties for the use of a patent which was attributable to several procedural errors on the part of domestic courts had likewise resulted in a finding of a violation of the Convention.³⁴² On the other hand, a delay of almost five years in complying with a court judgment obliging the private debtor to pay the applicant damages for copyright infringement was not deemed inappropriate in terms of Article 6(1) ECHR in view of the private nature of a dispute and the applicant's own failure to display the necessary diligence in enforcing the judgment.³⁴³

CONCLUSION

A broader influence of human rights law on the European legal order has not bypassed the area of intellectual property.³⁴⁴ In this process, a special role has devolved to the ECtHR as a principal guarantor, on the supranational level, of human rights protection in Europe.

³⁴⁰ Ibid., para 23.

³⁴¹ ECtHR, *Abramiuc v. Romania*, no 37411/02, 24 February 2009, CE:ECHR:2009:0224JUD003741102 (available only in French).

³⁴² ECtHR, *I.D. v. Romania*, no 3271/04, 23 March 2010, CE:ECHR:2010:0323JUD000327104 (available only in French).

³⁴³ ECtHR, *Cerăceanu v. Romania (no. 1)*, no 31250/02, 4 March 2008, CE:ECHR:2008:0304JUD003125002 (available only in French).

³⁴⁴ Ch Geiger, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in A Ohly (ed.), *Common Principles of European Intellectual Property Law* (Tübingen, Mohr Siebeck, 2012) 223.

So far the central focus has been on the Convention property and freedom of expression clauses. With regard to the former, the Strasbourg Court made it clear that Article 1 of the First Protocol to the ECHR applies to intellectual property as such and that its scope of influence is not limited to the 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 made possible because of the horizontal effect of the ECHR which imposes on States Parties to the Convention the positive obligation to ensure, primarily through their respective judicial systems, that the individual rights protected by the ECHR are not unduly restrained. However, the right to property being among the rights in respect of which the margin of appreciation accorded to domestic authorities ‘usually deploys its full effect’,³⁴⁵ the national determinations on the applicants’ IP rights are unlikely to be overturned in Strasbourg, 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 ECHR, as sometimes emphasised by some scholars,³⁴⁶ should thus certainly not be overstated.³⁴⁷

With regard to the right to freedom of expression and information, likewise, the Court has developed an extensive body of case law in the area of intellectual property protection. It allowed, in particular, an external freedom of expression defence 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 ECHR argument in order to support an IP claim.

The Convention 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

³⁴⁵ P Ducoulombier, ‘Interaction between Human Rights’ *supra* note 115, 46.

³⁴⁶ See, for example, R Burrell and D Gangjee, ‘Trade Marks and Freedom of Expression – A Call for Caution’ (2010) 41(5) IIC 544.

³⁴⁷ See further Ch Geiger, ‘Implementing Intellectual Property Provisions in Human Rights Instruments’ *supra* note 60, 661.

to privacy has broader (though largely theoretical, still) implications for the area of moral rights. Some case law has further emerged in relation to the right to not be discriminated against.

Not only material rights, but also the procedural guarantees of Article 6 (fair trial) ECHR 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.³⁴⁸

The already existing case law of the Strasbourg Court on IP that was the focus of this chapter, the Court's increased interest in approaching this type of (essentially private law) dispute from the external human rights perspective,³⁴⁹ and the recent developments in the European legal arena, including an obligation of the EU to accede to the ECHR in the future – all this highlights the need for IP lawyers and judges to seriously rethink the role of the ECtHR judicial practice vis-à-vis the intellectual property framework of the EU and probably to study it more carefully.

³⁴⁸ See, for the most remarkable example in the context of a reasonable time guarantee, ECommHR, *Denev v. Sweden* (report (31)), no 25419/94, 14 January 1998, CE:ECHR:1998:0114REP002541994, discussed above.

³⁴⁹ Out of almost 100 intellectual property disputes resolved by the Convention organs since the end of the 1960s, more than sixty cases were decided in the years 2000–2018. This comes to an average rate of 3.5 IP cases per year for the period from 2000 until June 2018 in comparison with the rate of slightly higher than one case per year for the period from 1968 until 1999. As of June 2018 an additional seven IP cases are pending before the Strasbourg Court.