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Fundamental Rights and European IP Law – the case of Art 17(2) of the EU Charter

Jonathan Griffiths and Luke McDonagh

Introduction

There is a large and ever-growing literature on the relationship between fundamental rights and intellectual property law.¹ Particular attention has been devoted to a number of specific issues. These include the impact of the rights to health, medicine and life on patent law,² the potential conflict between freedom of expression and the laws of copyright and trade marks³ and the privacy implications of intellectual property remedies and sanctions.⁴ These issues, amongst others, have been explored in a range of national and international legal contexts. However, the role of fundamental rights within European Union (EU) intellectual property law has not yet been fully explored.⁵ It is, nevertheless, likely to become a subject of increasing significance. Following the coming into force of the Lisbon Treaty, EU bodies have clear obligations to take fundamental rights into consideration in all their activities.⁶

¹ See for example, C Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union” [2006] *International Review of Intellectual Property and Competition Law* 371; T Mylly, *Intellectual Property and European Economic Constitutional Law* (Vaajakoski, Gummerus Kirjapaino Oy, 2009); J Cornides, ‘Human Rights and Intellectual Property, Conflict or Convergence?’ [2004] *Journal of World Intellectual Property* 1423; P Torremans (ed), *Intellectual Property & Human Rights* (Kluwer, 2008); L Helfer and G Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP, 2011); D Matthews, *Intellectual Property, Human Rights and Development, The Role of NGOs and Social Movements* (Edward Elgar, 2011); W Grosheide (ed), *Intellectual Property Rights and Human Rights: A Paradox* (Edward Elgar, 2009).

² See D Matthews, ‘Intellectual Property Rights, Human Rights and the Right to Health’ in W Grosheide (ed), *Intellectual Property Rights and Human Rights: A Paradox* (Edward Elgar, 2009); H Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OUP, 2007); D Matthews, *Intellectual Property, Human Rights and Development, The Role of NGOs and Social Movements* (Edward Elgar, 2011).

³ NW Netanel, *Copyright’s Paradox* (OUP, 2008); J Griffiths & U Suthersanen, *Copyright & Free Speech* (OUP, 2005); C Geiger, ‘Trade Marks & Freedom of Expression – the Proportionality of Criticism’ [2007] IIC 317; J Griffiths, ‘Is there a Right to an Immoral Trade Mark?’ in P Torremans (ed), *Intellectual Property & Human Rights* (Kluwer, 2008), 309; *Laugh it Off Promotions CC v South African Breweries International (Finance) BV* [2005] ZACC 7; [2005] BCLR 743 (Constitutional Court, South Africa); *Alles Wird Teurer* [1999] ETMR 49 (KG Berlin Court of Appeal); *Sté Gervais Danone v Société Le Riveau Voltaire, Société Gandhi, Valentin Lacambre* [2003] ETMR 321; *Association Greenpeace France v SA Société Esso* [2003] ETMR 867 (Cour d’appel de Paris); *SA Société des Participations du CEA v Greenpeace France et al* [2003] ETMR 870 (Cour d’appel de Paris).

⁴ See, for example, S Catal, ‘Privacy v Piracy,’ *Yale Journal of Law and Technology* 7 (2004), 222; J Griffiths, ‘Criminal Liability for Intellectual Property Infringement in Europe – the Role of Fundamental Rights,’ in C Geiger (ed), *Criminal Enforcement of Intellectual Property: A Blessing or a Curse?* (Edward Elgar, 2011). See also *Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM)* (C-70/10) (AG Cruz Villalón), Opinion of 14 April 2011.

⁵ Although, see C Geiger, “Copyright’s Fundamental Rights Dimension at EU level” in E Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) 27; T Mylly, *Intellectual Property and European Economic Constitutional Law* (Vaajakoski, Gummerus Kirjapaino Oy, 2009).

⁶ For a thorough assessment of the application of the EU Charter post-Lisbon, see P Craig, *The Lisbon Treaty: Law Politics, and Treaty Reform* (OUP, 2010). See also S Peers, *EU Justice and Home Affairs Law*, 3rd ed (OUP, 2011). For a general assessment of fundamental rights in an EU context see P Craig and G De Burca, *EU Law: Text, Cases and Materials*, 4th ed (OUP, 2007) 379-427. See also D Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter Recht, 2007) and T Ahmed and I de Jesús Butler, ‘The European Union and Human Rights: An International Law Perspective,’ [2006] *European Journal of International Law* 771. For an

Under Art 6(1) of the Treaty of European Union (TEU), rights granted under the Charter of Fundamental Rights of the EU (“the EU Charter”)⁷ have the same legal value as those established under the foundational treaties. Furthermore, under Art 6(3) TEU:

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the union’s law.’⁸

In such circumstances, a fundamental rights dimension applies to all areas of law within the EU’s competence, which clearly includes most areas of intellectual property law. The obligation to comply with fundamental norms applies not only to the EU legislature, the Court of Justice of the European Union and other EU bodies, but also to national institutions when acting within the sphere of EU competence.

The enhanced status of the rules and jurisprudence of fundamental rights law under the Lisbon arrangements is likely to have an impact in a number of different areas of intellectual property law. However, in this chapter, we intend to focus on only one particularly interesting aspect of the relationship between these two bodies of law. Art 17(2) of the EU Charter grants intellectual property itself a fundamental status, providing that:

‘Intellectual property shall be protected.’

The intention and effect of this provision are uncertain.⁹ Nevertheless, it has already been referred to on a number of occasions within the EU’s intellectual property system. In this chapter, we seek to address some of the uncertainty concerning the aim and scope of Art 17(2) by exploring the interpretation of its historical antecedents. In so doing, we hope to dispel a number of misconceived claims that have been made about its supposed effects.

Fundamental Rights in EU Intellectual Property Law

Even prior to the coming into force of the Lisbon Treaty, the relevance of fundamental rights to intellectual property law had been acknowledged by the institutions of the EU. Fundamental rights have, for example, been advanced as justification for legislative activity on a number of occasions. In the Information Society Directive, it was claimed that:¹⁰

early example of the impact of the EU Charter in intellectual property law, see *Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM)* (C-70/10) (AG Cruz Villalón); Opinion of 14 April 2011.

⁷ EU Charter of Fundamental Rights, as signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

⁸ The EU is itself under an obligation to accede to the ECHR as a result of Article 6(2) Treaty on European Union (‘TEU’), original treaty signed at Maastricht, 7 February 1992, and amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, entered into force on 1 December 2009. The Council of Europe introduced Protocol No. 14 ECHR (entered into force 1 June 2010) in order to allow the EU to become a party to the ECHR.

⁹ See C Geiger, ‘Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope’ [2009] *European Intellectual Property Review* 115.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.06.2001).

‘The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.’¹¹

In patent law, the recitals to the Directive on the legal protection of biotechnological inventions make a similar claim:

‘Whereas pursuant to...the Treaty on European Union, the Union is to respect fundamental rights, as guaranteed by the European convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’¹²

The Enforcement Directive is also presented as serving goals grounded in respect for fundamental rights:

‘This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter.’¹³

On occasion, such assertions of compatibility with fundamental rights norms have also been tested before the EU courts in the context of intellectual property law. Notably, for example, it was argued in *The Netherlands v European Parliament and EU Council*¹⁴ that the fundamental right to human dignity was infringed by the Directive on biotechnological inventions. The Netherlands, supported by Norway and Italy, argued that the patenting of any invention derived from human DNA constituted an affront to the fundamental right to human dignity and integrity because it envisaged using the human body as a ‘means to an end’. The ECJ rejected this assessment, noting that Article 5(1) of the Directive clearly states that the human body cannot constitute a patentable invention during its various stages of formation and development. Furthermore, no element of the human body is patentable of itself; inventions are only patentable when they combine a natural element with a technical process with the purpose of undertaking an industrial application.

In copyright law, the Court of Justice has also heard challenges to the compatibility of EU legislation with fundamental norms. In *Laserdisken*,¹⁵ the validity of Art 4(2) of the Information Society Directive was questioned by the proprietor of a business selling copies of cinematographic works, who argued that it violated the right to freedom of expression protected under Art 10 of the ECHR.¹⁶ In particular, it was claimed that the public’s right of access to information, a right falling within the ambit of Art 10, was breached by Art 4(2)’s

¹¹ Ibid, recital 3.

¹² Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, (OJ L 213, 30.7.1998), recital 43. See also recital 16.

¹³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), recital 32.

¹⁴ C-377/98 [2001] 3 CMLR 49.

¹⁵ C-479/04 [2007] 1 CMLR 6.

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

prohibition of national rules providing for ‘international exhaustion of rights’ in the case of copyright and related rights. In rejecting the challenge, the ECJ held that, even if Art 4(2) were to be regarded as an interference with the right established under Art 10(1) ECHR, its effects were justified by the need to protect intellectual property.

As demonstrated by these two cases, frontal challenges to the compatibility of intellectual property legislation with the norms of fundamental rights law have not been successful in the Court of Justice. Nevertheless, the Court has confirmed that EU legislation must be interpreted in a manner that secures effective protection for fundamental rights. This was made clear in the judgment in *Promusicae*,¹⁷ which concerned a national application for an order requiring an ISP to disclose the identity of clients engaged in unlawful file-sharing. The Court held that, in the absence of specific EU rules, national courts or other relevant authorities are obliged to arrive at a ‘fair balance’ between the rights to privacy of the ISP’s customers on the one hand and the right-holders’ rights to property and to an effective remedy on the other. Similar fundamental rights constraints have also been noted in relation to copyright exceptions in *Stichting de Thuisakopie v van der Lee*¹⁸ and, in trade mark law, in proceedings concerning the attempted registration of “immoral” marks at OHIM.¹⁹

Examining Article 17(2)

As noted above, the meaning of Article 17(2)’s short instruction that “intellectual property shall be protected” is far from certain. Commentators have noted that the phrasing of the English version of the provision differs subtly from that in other languages.²⁰ For example, in French, Art 17(2) states that ‘*La propriété intellectuelle est protégée*’ and the German version declares that ‘*Geistiges Eigentum wird geschützt*’. These could be translated as “intellectual property is protected”, rather than as ‘intellectual property *shall be* protected’. Such ambiguities of translation serve only to heighten the mystery surrounding the provision. How then are we to understand its intended effect? One possible interpretation, which seems to accord closely with the French and German versions, would be that Art 17(2) simply declares, as a matter of fact, that intellectual property is protected within the EU and, perhaps, that such protection serves to promote the fundamental norms embodied in the Charter. However, such a purely descriptive reading seems unlikely. Art 17(2), after all, is to be found in the Charter of Fundamental Rights of the EU, a constitutional document of declaratory and aspirational significance. Such a factual and descriptive interpretation would be out of place in that context. At the opposite end of the spectrum of potential meanings, Art 17(2) may be argued to be the constitutional expression of a maximalist approach to intellectual property. As such, could it perhaps be intended to require EU bodies, and national authorities acting within the scope of EU law, to accord intellectual property the highest possible degree of

¹⁷ *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* (C-275/06) [2008] ECR I-271. See now also *Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM)* (C-70/10) (AG Cruz Villalón); Opinion of 14 April 2011.

¹⁸ *Stichting de Thuisakopie v van der Lee* (C-462/09), Opinion, 10 March 2011 (AG Jääskinen) and Judgment of the Court, 16 June 2011 (as yet unreported). In particular, the judgment notes that: ‘A ‘fair balance’ must be maintained between the rights and interests of the authors, who are to receive the fair compensation, on one hand, and those of the users of protected works, on the other’ [25].

¹⁹ See, for example, *Application of Kenneth (trading as Screw You)* [2007] ETMR 7 (OHIM, Grand Board).

²⁰ See C Geiger, ‘Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope’ [2009] *European Intellectual Property Review* 115; A Peukert, ‘Intellectual Property as an End in Itself?’ [2011] *European Intellectual Property Review* 67, 68-70.

protection at all times? Some right-holder organisations would undoubtedly find such an interpretation appealing. However, in reality, it is just as implausible as the purely descriptive reading canvassed above. EU intellectual property law is a complex body of rules under which the interests of right-holders give way to public and third party interests in a variety of ways. The EU institutions have shown an increasing urge to introduce flexibility within the framework of intellectual property law. Against such a background, the enigmatic formula of Art 17(2) surely cannot have been intended to form the basis for a radical disruption of this settled balance or for a system under which the policy options available to EU law-makers are radically curtailed.

A more plausible interpretation has been advanced by Geiger, who suggests that Art 17(2) should be read as confirmation that intellectual property is a form of property covered by Art 17(1)'s general property guarantee.²¹ There are a number of reasons for believing this interpretation to be correct. First, it makes sense of the overall structure of Art 17, under which Art 17(2) is subservient to the more generally worded Art 17(1). Secondly, as is the case with other provisions in the Charter, it would give explicit recognition to the interpretation of the equivalent Article in the Charter's predecessor, the ECHR, by the European Court of Human Rights. As discussed further below, that Court has, on a number of occasions, confirmed that intellectual property is a form of property that is covered by the right to peaceful enjoyment of possessions.²² If this interpretation is correct, the text of Art 17(1) is clearly crucial to the determination of the meaning and scope of Art 17(2). Art 17(1) provides that:

‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.’

This right establishes a number of related guarantees (including, for example, guarantees against deprivation and use) and sets out the conditions under which interferences with lawfully acquired possessions are permissible. Cases involving *deprivation* of ‘possessions’ are only permitted where, *inter alia*, compensation is paid. Simple *use* of ‘possessions’, however, may be ‘regulated by law in so far as is necessary for the general interest’.

Art 17(1) has its historical origin in Art 1, Protocol 1 of the ECHR and in the jurisprudence of the European Court of Human Rights on that provision.²³ Art 1, Protocol 1 provides that:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in

²¹ See C Geiger, ‘Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope,’ [2009] *European Intellectual Property Review* 115.

²² See cases discussed below. See also *Smith Kline and French Laboratories Ltd v the Netherlands* (1990) 66 DR 70, 79 (European Commission of HR); *Melnichuk v Ukraine* (2006) 42 EHRR 42.

²³ Note, for example the explicit reference to the general requirement to pay compensation in the case of deprivation of possessions. See *Lithgow v United Kingdom* (1986) 8 EHRR 324.

accordance with the general interest or to secure the payment of taxes or other contribution or penalties.’

There are differences between the two provisions. Art 17(1) offers a more general, idealised form of protection and omits some of the specific detail to be found in Art 1, Protocol 1.²⁴ Nevertheless, there are close similarities in overall structure. Both Articles apply to ‘possessions’ and permit interferences with the enjoyment of those possessions in ‘the general interest’. Similarly, both provisions have a sliding scale of impact – with right-holders appearing to be protected more strongly against *deprivation* of possessions than simple *use* of possessions.

Given this historical relationship and these similarities of structure, it can be assumed that the extensive jurisprudence of the European Court of Human Rights on the application of Art 1, Protocol 1 will be relevant to the interpretation of Art 17(1) of the Charter and, in so far as the Charter’s property guarantee applies to intellectual property, to the interpretation of Art 17(2). The Charter and the ECHR have different functions. As applied to EU institutions, the Charter is a constitutional document and has the potential to have direct impact in proceedings between private parties. The ECHR, by contrast, is an international treaty and binds directly only state parties. Nevertheless, this structural distinction ought not to affect the interpretation of core concepts shared by both property guarantees, including ‘possessions’, ‘the general interest’, ‘deprivation’ and ‘use’. The concept of the ‘margin of appreciation’, which has played a significant role in the Strasbourg jurisprudence on Art 1, Protocol 1, will undoubtedly have diminished relevance within the EU legal system. Nevertheless, the European Court of Human Rights’ reasons for according a broad zone of discretion will apply equally under EU law. Legislatures and executive bodies will generally be in a better position than courts to identify the appropriate balance between private property rights and other complex social interests in particular cases. It can therefore reasonably be supposed that an understanding of the European Court of Human Rights’ jurisprudence on Art 1, Protocol 1 can continue to provide valuable help in resolving some of the current uncertainty concerning the meaning and scope of Art 17(2). Accordingly, it is to this jurisprudence that we now turn.

Examining the meaning of Article 1, Protocol 1 of the European Convention on Human Rights

The European Court of Human Rights has settled the limits of the right to peaceful enjoyment of property in a number of important respects.²⁵ Article 1, Protocol 1 states that:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

²⁴ See, for example, the specific references to international law and to the payment of taxes in Art 1, Protocol 1, ECHR.

²⁵ For an examination of the case law on this right, see A van Rijn, ‘Right to the Peaceful Enjoyment of One’s Possessions,’ in P van Dijk, F Van Hoof, A Van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed (Intersentia Publishers, 2006) 863; DJ Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed (OUP, 2009) 655.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

The Strasbourg Court has confirmed that this Article establishes three related rights - the general right to the peaceful enjoyment of property and the specific rights against deprivation of property and against the regulation of the use of property.²⁶ The first element, the right to the peaceful enjoyment of possessions, is of a general nature and may come into play in cases in which there is no deprivation or control of the use of property, but where the enjoyment of the property is nonetheless interfered with.²⁷ For instance, in the case of *Sporrong and Lönnroth v Sweden*, expropriation permits were issued by the state in relation to a number of privately owned properties in central Stockholm in expectation of urban development. The existence of the expropriation permits meant that the properties were much less attractive for buyers than they would have otherwise been. The Court found that, as the owners remained free to sell or dispose of the property, there had been no deprivation of property in accordance with the second element. However, the right to peaceful enjoyment of property under the first sentence of the first paragraph was relevant because the owners’ peaceful enjoyment of the property had been disrupted. The right not to be deprived of property under the second sentence of the first paragraph of the Article will be applicable where there has been a formal transfer of ownership²⁸ or where de facto expropriation has taken place.²⁹ Typical examples of the regulation of a property’s use under the second paragraph of the Article are provided by the exercise of planning restrictions³⁰, rent control powers³¹ or powers of taxation.³²

The concept of ‘possessions’ under Art 1, Protocol 1 has also been interpreted by the Court, which has confirmed that the protected rights apply only to ‘existing possessions’. These include rights arising by virtue of legitimate expectations (such as the legitimate expectation that proper administrative procedures will be followed).³³ An example of a case in which legitimate expectations were protected is provided by *Pressos Compania Naviera SA v Belgium*. Following a number of shipping accidents involving the alleged negligence of state employees, the Belgian state enacted specific legislation to prevent tort claims from being brought in relation to losses incurred by private individuals. The Court held that the failure to

²⁶ The three factors were first identified by the European Court of Human Rights in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 85. For discussion of the Article’s structure, see DJ Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed (OUP, 2009) 666-672.

²⁷ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 85. See also *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293.

²⁸ See, for example, *The Former King of Greece and Others v. Greece* (2001) 33 EHRR 21, in which a formal transfer of property from a natural person to the state was held to breach Art 1, Protocol 1.

²⁹ *Sporrong and Lönnroth v Sweden* [1982] 5 EHRR 85. In this case, the Court found that, because the owners were nonetheless free to sell or dispose of the property, there had been no formal or de facto expropriation of property. On the other hand, in *Papamichalopoulos v Greece* (1993) 16 EHRR 440, the Court found that there was a de facto expropriation of property amounting to deprivation under Art 1, Protocol 1. In *Papamichalopoulos*, the property in question comprised of a piece of land formally owned by the applicants but upon which the Greek navy had constructed a naval base. The title in the property remained with the applicants but due to the actions of the state it was held that the applicants’ rights under the second aspect of Article 1, Protocol 1 had been breached. See also *Brumarescu v Romania* (2001) 33 EHRR 36.

³⁰ *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319.

³¹ *Mellacher v Austria* (1989) 12 EHRR 391.

³² *Gasus Dosier- und Fordertechnik v the Netherlands* (1995) 20 EHRR 403.

³³ *Marckx v Belgium* (1979) 2 EHRR 330. See also *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36.

fulfil the prior existing legitimate expectation that a claim in tort would be possible constituted an interference with the applicant's rights under Art 1, Protocol 1.³⁴ In *Pine Valley Developments Ltd v Ireland*³⁵ the case concerned an applicant who had purchased a plot of land for which planning permission for industrial development had been granted. However, subsequent to the purchase of the land, the Irish Supreme Court upheld a decision that the grant of planning permission had been illegal and as a result had been void *ab initio*. The Strasbourg Court held that because the applicant was entitled to rely on the legitimate expectation that planning permission had been granted, there had been an interference with the applicant's rights under Art 1, Protocol 1.

Art 1, Protocol 1 does not, however, cover claims to be entitled to property in future. As Harris et al have explained:

‘The Convention protects an applicant's existing possessions and assets against interference. It is not a right to be put into the possession of things one does not already have, however strong the individual's interest in this happening may be.’³⁶

Thus, for example, in *Marckx v Belgium*,³⁷ the applicant claimed that a national law restricting the inheritance rights of children born to unmarried parents breached Art 1, Protocol 1. The Court disagreed, holding that the property guarantee under the ECHR does not guarantee the right to acquire possessions in future, whether through intestacy or via voluntary disposition.³⁸

Whichever of three rights established under this Article is at issue, the Court will apply a ‘fair balance’ test in deciding whether an interference with the right can be justified. The application of this test requires the public interest and the affected fundamental rights to be balanced in proportionate manner.³⁹ In investigating this issue, the Court has accorded states a considerably wider margin of appreciation than has been permitted in the case of interferences with other qualified rights protected under the ECHR. Particular flexibility has been shown where the interference at issue can be defined as ‘use’ rather than as total deprivation of property. However, even in the case of deprivation, the Court has accepted that

³⁴ *Pressos Compania Naviera SA v Belgium* (1997) 21 EHRR 301.

³⁵ *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319.

³⁶ DJ Harris et al, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed (OUP, 2009) 660.

³⁷ *Marckx v Belgium* (1979) 2 EHRR 330.

³⁸ See also *Inze v Austria* (1987) 10 EHRR 394, where an illegitimate child who had already inherited part of an estate was able to make arguments based on Article 1, Protocol 1 in relation to other aspects of the inheritance because his interest in the estate constituted an “existing possession”. See, however, the case of *X v the Federal Republic of Germany* (1979) 18 DR 170, where the facts concerned a change to the law which reduced the amount chargeable as a notary fee. A notary argued that this affected his ability to earn future revenue. The Court rejected the argument that he had a ‘possession’ for the purpose of Article 1, Protocol 1. The court stated that the mere expectation that the state legal regulations on notary fees would not be reduced could not be considered a property right. In *Müller v Austria* (1975) 3 DR 25 the Court held that a person could claim his or her own pension contributions as a ‘possession’ under Article 1, Protocol 1. Furthermore, the Court acknowledged that the right may be affected by the way the pension fund is distributed. Nonetheless, the Court held that there was no right to claim that any particular amount of final pension payment was guaranteed by Art 1, Protocol 1.

³⁹ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 85. In this case it was found that there had been no fair balance and therefore that the interference with the right under Art 1, Protocol 1 could not be justified.

private property interests may legitimately be regulated in the ‘general interest’.⁴⁰ An example of this deference is provided by *James v United Kingdom*,⁴¹ which concerned the transfer of privately-owned properties to longstanding tenants at less than market value. The United Kingdom argued that this transfer was in accordance with national legislation and was in the ‘public interest’ as an attempt to combat social injustice. The Court found that the aim of the legislation was reasonable and the means of achieving it were not disproportionate. The Court went on to say that it would not intervene, so long as a national authority’s assessment of the public interest was not manifestly without reasonable foundation. It also noted that, even in the case of a deprivation of property, it would not always be necessary for full compensation to be paid. As long as compensation is proportionate, the terms of Article 1, Protocol 1 will be satisfied. States are also granted a wide margin of appreciation in assessing proportionality.⁴² The Court’s willingness to allow extensive leeway to states under Art 1, Protocol 1 means that this provision has served predominantly as a guarantee of legality and fair procedure, rather than as a strongly entrenched bulwark for private property.⁴³

Intellectual property under Art 1, Protocol 1

The relatively loose standard of review described above has also been apparent in the few cases in which the Court has given direct consideration to the application of Art 1, Protocol 1 to intellectual property.⁴⁴ The case of *Anheuser-Busch Inc v Portugal*⁴⁵ is the most famous of these. The proceedings in that case arose from the long-running dispute between the American company, Anheuser-Busch Inc, and the Czech brewer, Budějovický Budvar. Anheuser-Busch claimed that the Portuguese court had violated Art 1, Protocol 1 in upholding the national authority’s refusal to register its application for registration of the trade mark, ‘Budweiser’. The decision to refuse the application had been based on the fact that Budějovický Budvar owned a registered ‘protected geographical indication’ for ‘Budweiser Bier’, a registration which the national decision-maker held to take precedence over Anheuser-Busch’s trade mark application by virtue of the complex effect of an international treaty on domestic law. The Court held that the mere application for trade mark registration could qualify as a ‘possession’ for the purposes of Art 1, Protocol 1 and, therefore, that Anheuser-Busch’s claim fell within the scope of the protected right. The

⁴⁰ For discussion of the ‘margin of appreciation’ under the ECHR see *Handyside v United Kingdom* (1976) 1 EHRR 737; DJ Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed (OUP, 2009) 11-14.

⁴¹ *James v United Kingdom* (1986) 8 EHRR 123. See also *Scollo v Italy* [1995] 22 EHRR 514.

⁴² See also *AGOSI v United Kingdom* (1986) 9 EHRR 1. A further example of a justifiable interference is provided by *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309, where a licence to serve alcohol at a restaurant was withdrawn by the state due following a dispute over taxation issues. The Court decided that while a restaurant’s licence to serve alcohol could constitute a possession, there was no interference with the right under Article 1, Protocol 1 because the withdrawal of licence was lawful, proportionate and in the general interest.

⁴³ *Hentrich v France* (1994) 18 EHRR 440.

⁴⁴ See cases discussed below. See also *Smith Kline and French Laboratories Ltd v the Netherlands* (1990) 66 DR 70, 79 (European Commission of HR); *Melnychuk v Ukraine* (2006) 42 EHRR 42. For discussion, see L. Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ in P Torremans (ed), *Intellectual Property & Human Rights* (Leiden, Kluwer, 2008) 25; J. Weiss, ‘Commercializing Human Rights: Trademarks in Europe After Anheuser-Busch v Portugal,’ [2011] *Journal of World Intellectual Property* 176 and B Goebel, ‘Geographical Indications and Trademarks in Europe,’ 95 *Trademark Reporter* (2005), 1165.

⁴⁵ *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36.

application constituted a possession because an applicant had a legitimate expectation that it would be handled fairly by national authorities and because there was evidence that such applications were, as a matter of fact, tradeable. However, having held that the application was covered by the property guarantee, the Court noted that the national court had simply interpreted an uncertain aspect in national intellectual property law and it was not the Court's role to review such a determination of the competing claims to entitlement to a mark, stating that:

‘...[T]he Court reiterates that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable.’⁴⁶

A similar conclusion was reached in *Dima v Romania*,⁴⁷ which concerned a design submitted to a government-sponsored competition and which was ultimately chosen as an official state emblem. The dispute in the national courts centred on the question of who ought to be recognised as the ‘author’ of the emblem – Dima, the original creator, or the Romanian Parliament, which had commissioned the design. Dima claimed that the use of his creation without payment breached his rights under national copyright law. The Romanian Supreme Court decided that the Parliament was to be deemed the ‘author’ of the design in such circumstances and therefore that no fee was payable. Dima brought a complaint under the ECHR, claiming that this decision violated his rights under Art 1, Protocol 1. However, his claim was held to be inadmissible.⁴⁸ The national court had simply resolved a dispute about the interpretation of the scope of a property right in national law in a manner that was not arbitrary and, therefore, it was inappropriate for the Strasbourg Court to intervene.

By contrast, the case of *Balan v Moldova*⁴⁹ demonstrates that there are limits to this deference in cases in which a state effectively expropriates an intellectual property right. *Balan* concerned a photographer's work, which had been used by the state without payment in the production of national identity cards. The photographer had succeeded in a legal action against the state in March 1999 and had been awarded an amount of compensation regarding use of the photograph up to that date. However, the state continued to use the applicant's photograph on identity cards until May 2000. The applicant received no further compensation for this period of use and the applicant brought proceedings before the national court, seeking compensation for the use of his creation by the state on identity cards between March 1999 and May 2000. The Moldovan Supreme Court refused this claim, holding that the applicant was not entitled to compensation for the use of the photograph because he had already received compensation resulting from the earlier successful legal action and had not requested a prohibition on future use during the earlier action. Balan applied to the European Court of Human Rights, claiming that his rights under Art 1, Protocol 1 had been violated. In this instance, by contrast with *Anheuser-Busch* and *Dima*, the Court found that the photographer's rights had been breached. The national court's assessment that the applicant had tacitly accepted the State's use of his photograph was untenable. In fact, its application of national law appeared not even to have been compatible with the Convention's conception of

⁴⁶ Ibid, [83].

⁴⁷ *Dima v Romania* (58472/00), admissibility decision of 26 May 2005.

⁴⁸ A separate procedural complaint under Art 6(1), ECHR was subsequently upheld, see *Dima v Romania* (58472), Judgment of 16th November 2006.

⁴⁹ *Balan v Moldova* (19247/03), Judgment of 29 January 2008.

‘lawfulness’. In any event, whether the national court had acted lawfully or not, it had interfered with a copyright interest protected under national law disproportionately and without justification. Accordingly, it had failed to strike a ‘fair balance’ between the interests of the parties to the national proceedings.

The true scope of Article 17(2)

Having investigated the case-law on Art 1, Protocol, 1 and having seen that this jurisprudence must guide the meaning and scope of Art 17(2) of the Charter, it is now possible to investigate the likely impact of Art 17(2) upon EU intellectual property law in greater detail. As an initial step, it may be helpful to identify certain situations in which it will *not* apply. There are certain claims to which it will have no relevance at all. As we have seen, Art 17(2) regulates interferences with *existing* possessions only and cannot, therefore, form the basis of a claim to property that has no current legally-recognised form. Art 17(2) will not, therefore support a claim to be entitled to intellectual property protection where none is currently enjoyed. A perfume manufacturer would not, for example, be able to rely upon it in seeking to argue that its products were entitled to copyright protection in a jurisdiction which had not previously protected perfume under copyright law. Equally, it will not apply to claims by existing right-holders to additional exclusive rights. Thus, for example, proponents of a right to control the second-hand trade in legitimately distributed reproductions of copyright works would not be able to argue in favour of the introduction of such a right on the basis of Art 17(2).

A second important limitation on the application of Art 17(2) is provided by the principle that legitimate decisions about the boundaries of existing intellectual property rights will not violate the property guarantee where they are not unlawful or manifestly disproportionate.⁵⁰ As a result, for example, a claimant who argues that an exclusion from patentability has been wrongly applied to his invention could not rely on Art 17(2). Similarly, a copyright owner who disputes the over-broad reading of a copyright exception or limitation by the ECJ, or a national court, will not be able to plead Art 17(2) in support of a stricter reading. Finally, the fact that, even where an interference with an existing possession is established, extensive leeway is permitted for the regulation of property in the general interest will also limit the impact of this provision in intellectual property law.

Despite these limitations, it is nevertheless possible to identify situations in which Art 17(2) may have an impact in European intellectual property law. One such situation is exemplified by the *Balan* Judgment described above. The fundamental guarantee of the peaceful enjoyment of intellectual property rights will prohibit any arbitrary, or manifestly disproportionate, refusal to register a claim to an intellectual property right or to uphold a clearly valid claim. This effect of the fundamental right to intellectual property falls very close to the core of protection offered by the European property guarantee.⁵¹ Such violations of the basic principles of legality may, at first sight, seem unlikely to occur very often. However, it is important to bear in mind that the concept of ‘legality’ has been interpreted broadly by the Strasbourg Court. Legal regulation must be both reasonably ascertainable and

⁵⁰ See discussion of *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36 above.

⁵¹ This will be the case even when that guarantee is interpreted in its narrowest form (a form described by Helfer as the ‘rule of law’ paradigm). See L Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ in P Torremans (ed), *Intellectual Property & Human Rights* (Kluwer, 2008), 25, 51.

reasonably predictable if it is to be entitled to be described as “law” for the purpose of the ECHR.⁵² Accordingly, in the case of an unforeseeably unfavourable interpretation of the scope of an intellectual property right, or of an exception to that right, a right-holder may be entitled to rely upon Art 17(2) in objecting to that interpretation.

A further potential situation in which Art 17(2) may have an impact arises as a result of the European Court of Human Rights’ recognition that Art 1, Protocol 1 will, to some extent, require the establishment of enforcement mechanisms that allow property right-holders to seek redress for interferences with their property rights. This will be the case, even where the interference in question has been committed by a third party.⁵³ Art 17(2) may also have relevance where an EU or national authority abolishes, or curtails the scope of, existing intellectual property rights. In such a case, there would be a clear interference with an existing possession which would only be permissible if justifiable under the Charter. Consider, for example, a decision taken by an EU or national authority to reduce the term of protection of an intellectual property right⁵⁴ or to introduce a new limitation upon an existing intellectual property right. Such decisions would undoubtedly fall within the scope of Art 17(2), although they would be likely to be considered as ‘uses’ rather than ‘deprivations’.⁵⁵ This potential impact of Art 17(2) may, at first sight, appear to place a significant obstacle in the path of balanced policy-making. However, it is important to bear in mind that decision-makers are granted a very wide margin of appreciation in determining the necessity of interfering with the enjoyment of possessions in the general interest under Art 1, Protocol 1. It can be suggested that this deferential approach ought to continue to apply under Art 17(2).⁵⁶

⁵² Article 7 ECHR states that:

‘(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general law recognised by civilised nations’.

The principle of legality requires that laws be sufficiently clearly formulated to be reasonably predictable in their operation, so that it is possible for individuals to regulate their conduct in line with the ‘law’. For application of the principle, see *Kafkaris v Cyprus* (2009) 49 EHRR 35; *SW & CR v UK* (1996) 21 EHRR 363. In the intellectual property context, see *Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM)* (C-70/10) (AG Cruz Villalón); Opinion of 14 April 2011.

⁵³ See *Sovtransavto Holding v Ukraine* (2004) 38 EHRR 44; *Broniowski v. Poland* (2004) EHRR 1, 56 (Grand Chamber); *Iatridis v Greece* (2000) 30 EHRR 97; *Immobiliare Saffi v. Italy* (1999) EHRR 73, 90–92 (Grand Chamber). Helfer has described this broader understanding of the impact of the property guarantee as the ‘enforcement paradigm’ for human rights intervention in intellectual property law. See L Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ in P. Torremans (ed), *Intellectual Property & Human Rights*, (Kluwer, 2008), 25, 51, noting that the maintenance of effective enforcement mechanisms is also a requirement of TRIPS.

⁵⁴ The provision of transitional protection for existing right-holders may, of course, remove any issue relating to the property guarantee.

⁵⁵ The case law from the European Court of Human Rights is useful in the context. As noted in *Lithgow v United Kingdom* (1986) 8 EHRR 324, ‘deprivation’ will only occur where all rights in the property are extinguished. Furthermore, as noted in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 85 and *Baner v. Sweden* (1989) 60 DR 125, *de facto* deprivation will only occur where an interference with the rights of the property owner are so extensive as effectively to deprive the owner of the property, even where he, she or it retains the formal title.

⁵⁶ L Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ in P. Torremans (ed), *Intellectual Property & Human Rights*, (Kluwer, 2008), 25, 51–52. Helfer has stated that an expansive view of the role of the ECHR, under which the European Court of Human Rights would have broader powers to rule on cases involving ‘balancing’ IP protection with other rights such as freedom of expression and privacy, would not be in line with the spirit of Art 1 Protocol 1, or with current ECHR jurisprudence.

Conclusion

The admission of intellectual property to the category of EU fundamental rights is clearly related to broader trends towards ‘propertisation’ in intellectual property law. Peukert has noted that descriptions of intellectual property as a fundamental right underpin a ‘self-sufficient property logic’ that has developed in intellectual property law.⁵⁷ He suggests that recent ECJ jurisprudence in this area has aligned itself with this ‘property logic’, through acceptance of the notion that maintaining the highest possible level of intellectual property protection is always desirable.⁵⁸ In such a climate, it is not surprising that advocates of stronger intellectual property rights have already sought to rely upon the fundamental rights status of intellectual property rights. In this concluding section, we briefly consider a number of such claims.

An example of such an argument can be seen in the submission of the Motion Picture Association (MPA) to a recent United Kingdom consultation exercise on a proposal to expand the scope of certain copyright exceptions and limitations.⁵⁹ The MPA’s submission reminded national authorities that:

“[I]n weighing the various proposals, it should be borne in mind that copyright is a fundamental right...”⁶⁰

On the face of it, this statement is accurate. Copyright undoubtedly falls within the ambit of Art 17(2).⁶¹ However, in the context of the consultation, the statement appears to be intended to dissuade the United Kingdom authorities from expanding the scope of the statutory copyright exceptions. It implies that copyright’s status as a fundamental right militates against the liberalisation of the existing regime of exceptions. This, as we have learned from a closer analysis of the jurisprudence on Art 1, Prot 1, is not really accurate. The case-law indicates that, as long as a legislator acts legally (in the Strasbourg sense), does nothing that is manifestly disproportionate and applies a procedure that is fair, it will have a high degree of discretion in framing laws ‘in the general interest’, even where such laws interfere with the enjoyment of private ‘possessions’. It is important that law-makers understand the true scope of Art 17(2) and are not deterred from serving the general interest through misplaced fear of committing a violation of fundamental rights.

Rhetorical references to intellectual property’s status as a fundamental right are not only to be found in submissions by lobbyists. They have also recently begun to appear in arguments advanced before the EU courts. *Eva-Maria Painer* is a reference to the ECJ from Austria in

⁵⁷ A Peurket, ‘Intellectual Property as an End in Itself?’ [2011] *European Intellectual Property Review* 67, 69-70.

⁵⁸ Nonetheless, there are also some recent cases in which the ECJ has not necessarily taken a ‘maximalist’ approach to IP protection. See, for example, (C-49-09P) *Lego Juris v OHIM* [2010] ECR 0000 [43]-[48]; (C-236/08 to C-238/08) *Google/Louis Vuitton* [2010] ECR 0000 [75]-[98]; (C-428/08) *Monsanto/Cefetra* [2010] ECR 0000, [43]-[50].

⁵⁹ UK-IPO, *Taking Forward the Gowers Review of Intellectual Property – Second Stage Consultation on Copyright* (2009).

⁶⁰ At the time of writing, the submissions have not been published by the UK-IPO. The submission of the MPA is on file with the authors.

⁶¹ See also Art 27, Universal Declaration of Human Rights, adopted and proclaimed at the General Assembly of the United Nations on 10 December 1948.

which a claimant photographer argues that failure to protect ‘portrait photographs’ in national copyright law would violate Article 17(2).⁶² No clear justification for this argument is provided and, with the benefit of a careful assessment of Art 17(2)’s true scope, it can be seen that the claim is unsustainable. As noted above, as long as procedure is fair and conclusions are not arbitrary or manifestly disproportionate, there will be no relevant ‘interference’ where a national court has simply determined the previously uncertain boundaries of a national property right. The claimant’s argument in *Painer* shares the same flaws as those of the applicants in *Anheuser-Busch* and *Dima*.

In an earlier section of this chapter, we quoted the recital to the Enforcement Directive (IPRED), which claims Art 17(2) as a justification for legislative intervention. The form of words employed in that recital was subsequently repeated verbatim in the preamble to the ill-fated draft Directive on criminal enforcement of intellectual property rights (IPRED 2):

‘This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of the Charter.’⁶³

These words suggest that IPRED2’s harmonisation and expansion of criminal sanctions in the field of intellectual property law is motivated by a requirement to act ‘in accordance with’ Art 17(2). We have noted above that Art 1, Protocol 1 requires parties to the ECHR to implement systems permitting the enforcement of property rights and it has been suggested that this principle will extend to intellectual property rights under Art 17(2). Nevertheless, it cannot reasonably be suggested that Art 17(2) requires the introduction of any *specific* form of enforcement mechanism. While criminal sanctions may be the only permissible response to certain violations of fundamental rights,⁶⁴ there is nothing to suggest that such sanctions are mandatory in the case of intellectual property infringements. In this instance, it is difficult to escape the conclusion that the recital’s reference to fundamental rights is little more than an attempt to bolster the draft legislation’s claim to legitimacy through reference to fundamental norms. The increasing prevalence of such ill-founded rhetoric is disturbing. It is not only misleading, but may eventually lead to scepticism of all claims based on fundamental rights in the sphere of intellectual property law. The more things that are claimed as being ‘fundamental’ or ‘human’ rights, the greater the risk that rights language will become less persuasive. It is accordingly important that claims concerning the scope and effect of Art 17(2) are advanced, and scrutinised, carefully.

⁶² *Eva-Maria Painer v Standard VerlagsGmbH* C-145/10 (AG Trstenjak); Opinion of 12th April 2011.

⁶³ Amended Proposal for a Directive of the European Parliament and of the Convention on criminal measures aimed at ensuring the enforcement of intellectual property rights COM (2006) 168 final, 26th April 2006, recital 12.

⁶⁴ See, for example, *X & Y v The Netherlands* (1986) 8 EHRR 235; *MC v Bulgaria* (2005) 40 EHRR 459; *A v UK* (1999) 27 EHRR 611; *Opuz v Turkey* (2010) 50 EHRR 28; *Siliadin v France* [2006] EHRR 16.