

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Managing Editor: Alison McDonnell

Common Market Law Review

Europa Instituut

Steenschuur 25

2311 ES Leiden

The Netherlands

e-mail: a.m.mcdonnell@law.leidenuniv.nl

tel. + 31 71 5277549

fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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INTELLECTUAL PROPERTY UNDER THE CHARTER: ARE THE COURT'S SCALES PROPERLY CALIBRATED?

PETER OLIVER AND CHRISTOPHER STOTHERS*

Abstract

Unusually, the Charter of Fundamental Rights of the EU contains a provision (Art. 17(2)) expressly recognizing the right to the protection of intellectual property. With the notable exception of Luksan, the ECJ case law on this provision relates to cases in which the right to IP is pitted against other Charter rights. The Court has been driven to seek a “fair balance” between the rights at stake, an exercise which can only be carried out on a case-by-case basis, thus engendering considerable legal uncertainty. What is more, in several cases the Court has given more limited guidance than it might have done; the recent ruling in McFadden is encouraging, however. But the Court by no means bears sole responsibility for this legal uncertainty: courts are ill equipped to solve such complex policy issues; and, had it not been for the numerous gaps and ambiguities in the relevant EU legislation, the Court would not have had to step in so frequently.

1. Introduction

Recent years have seen a raft of landmark judgments on intellectual property (“IP”) decided by the Court of Justice, in which the Charter of Fundamental Rights of the EU¹ has been raised.² The occasion is therefore ripe to explore the Court’s approach to IP as a fundamental right, and in particular to consider

* Respectively: visiting Professor, Université Libre de Bruxelles, and Barrister, Monckton Chambers; and Partner, Arnold & Porter (UK) LLP, and visiting Professor, University College London. The authors wish to thank Thomas Bombois, Enrico Bonadio, Jonathan Griffiths and Philippa Watson for their advice and comments on an earlier version of this article, but responsibility for any errors rests with the authors alone. All websites last visited 29 Jan. 2017.

1. The current version of the Charter is published in O.J. 2007, C 303/1 and again in O.J. 2012, C 326/391.

2. E.g. Case C-275/06, *Promusicae v. Telefónica*, EU:C:2008:54; Case C-70/10, *Scarlet Extended*, EU:C:2011:771; Case C-277/10, *Luksan v. van der Let*, EU:C:2012:65; Case C-360/10, *SABAM v. Netlog NV*, EU:C:2012:85; Case C-510/10, *DR and TV2 Danmark A/S v. NCB – Nordisk Copyright Bureau*, EU:C:2012:244; Case C-283/11, *Sky Österreich*, EU:C:2013:28; Case C-314/12, *UPC Telekabel Wien v. Constantin Film Verleih*, EU:C:2014:192; Case C-201/13, *Deckmyn v. Vandersteen*, EU:C:2014:2132; Case C-580/13,

whether that approach diverges from its position regarding other forms of property.

The benefits of IP cannot be seriously contested.³ In a recent Communication, the Commission has written: “Intellectual property-intensive sectors account for 39% of GDP and for 35% of jobs in the EU...A recent study by the Office for Harmonisation in the Internal Market (OHIM) has shown that only 9% of SMEs in Europe own IP rights, but that – on average – those SMEs that do own such rights generate 32% more revenue per employee than those that do not.”⁴ On the other hand, there is a school of thought which advocates paring back the scope of IP, especially when it comes to copyright.⁵ One leading exponent of this view is Harvard Professor Lawrence Lessig.⁶ In Europe, this movement has led to the establishment of Pirate Parties, which have enjoyed some success in Germany and Sweden and led to the election of one Member of the European Parliament.⁷ This is part of

Coty Germany v. Stadtsparkasse Magdeburg, EU:C:2015:485; Case C-170/13, *Huawei Technologies Co v. ZTE Corp*, EU:C:2015:477; Case C-484/14, *McFadden v. Sony Music*, EU:C:2016:689.

3. IP covers a broad range of rights, but the cases primarily consider patents (Case 15/74, *Centrafarm v. Sterling Drug*, EU:C:1974:114), trade marks (Case 16/74, *Centrafarm v. Winthrop*, EU:C:1974:115), copyright (Case 55/80, *Musik-Vertrieb Membran v. GEMA*, EU:C:1981:10), design rights (Case 144/81, *Keurkoop v. Nancy Kean Gifts*, EU:C:1982:289) and geographical denominations (Case C-47/90, *Delhaize v. Promalvin*, EU:C:1992:250 and Case C-3/91, *Exportur v. LOR*, EU:C:1992:420). Whether business secrets should be regarded as intellectual property is the subject of some controversy. For the purposes of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, O.J. 1994, L 336/214), they are treated as such: Arts. 1(2) and 39. On the other hand, recitals 1, 2 and 39 in the preamble to Directive 2016/943 of the European Parliament and the Council on the protection of trade secrets (O.J. 2016, L 157/1) clearly suggest that for the purposes of that instrument the contrary applies. Considerations of space preclude an examination of the case law on business secrets within the confines of this article.

4. Communication on Upgrading the Single Market, COM(2015)550 final, pp. 14–15.

5. See generally Torremans, para 17(2).05 in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights – A Commentary* (Beck/Hart Publishing/ Nomos, 2014).

6. E.g. *Code Version 2.0* (Basic Books, 2006), especially Chs. 1 and 10, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic, 2008), especially the Conclusion, and “In Defense of Piracy”, *Wall Street Journal* 11 Oct. 2011 <www.wsj.com/articles/SB122367645363324303>. See also Landes and Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003).

7. The MEP in question, Julia Reda, was the *rapporteur* for the Parliament’s resolution of 9 July 2015 on the reform of EU copyright law <www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0273> Particularly heated controversy surrounded the “freedom of panorama” (i.e. the right of third parties to disseminate photographs or other images of buildings or works of art permanently located in public places) which some MEPs have sought to remove: <juliareda.eu/2015/06/fop-under-threat/>. See *Politico* 3 July 2015 <www.politico.eu/article/alder-panorama-drama-reda-copyright-report/>. In view of the controversy surrounding this issue (together with some other copyright issues), the Commission launched a public consultation on 23 Mar. 2016, <

a much broader debate about how far-reaching fundamental rights of an economic nature are or should be.

At all events, as we shall see, under the ECHR and in EU law, there is no room for the claim made by the United Nation's Special Rapporteur on Cultural Rights that "intellectual property rights are not human rights":⁸ the Grand Chamber of the European Court of Human Rights has held that Article 1 of Protocol 1 ("A1P1") to the ECHR on the right to property covers IP;⁹ and Article 17(2) of the EU Charter of Fundamental Rights ("the Charter") states: "Intellectual property shall be protected."

Every Bill of Rights worthy of the name recognizes the right to property. At the same time, by definition this right can never be absolute like hard-core rights such as the rights to human dignity¹⁰ and freedom from torture.¹¹ Most fundamental rights are subject to exceptions, but the right to property is "relative" *par excellence*. That is not least because "in this world nothing can be said to be certain, except death and taxes" (thus quoth Benjamin Franklin). This could explain the unusually broad public interest exceptions built into the provisions laying down the right to property in A1P1 and Article 17(1) of the Charter. As one would expect, IP is generally subject to these exceptions like other forms of property.¹²

The structure of the present article reflects the fact that the right to IP is so closely intertwined with the right to property generally – both under A1P1 and under Article 17 – that it is impossible to consider the former without the

single-market/en/news/commission-seeks-views-neighbouring-rights-and-panorama-exception-on-eu-copyright>, which attracted 6203 replies <ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-results-public-consultation-role-publishers-copyright-value>. This ultimately led to the adoption of a Commission proposal for a new directive on copyright in the information society COM(2016)596 final; see the accompanying press release of 14 Sept. 2016 <europa.eu/rapid/press-release_IP-16-3010_en.htm>, although this does not mention "freedom of panorama".

8. Statement made on 11 Mar. 2015 at the 28th session of the Human Rights Council <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15764&LangID=E>.

9. ECtHR, *Anheuser-Busch v. Portugal*, Appl. No. 73049/01, judgment of 11 Jan. 2007.

10. This follows clearly from Art. 1 of the Charter, according to which human dignity is "inviolable".

11. Case C-404/15, *Aranyosi*, EU:C:2016:198, para 86.

12. Put another way, as the Delhi High Court recently held, "copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations." (*Oxford University v. Rameshwari Photocopy Services*, 16 Sept. 2016, para 80) <www.worldipreview.com/news/copyright-not-a-divine-right-says-delhi-hc-12256>.

latter. Before considering Article 17 of the Charter, which concerns the right to property, we must first focus our attention on the close links between the ECHR and the Charter (section 2); and then we shall examine A1P1 (section 3). Only after that will we turn to Article 17 itself (section 4). In section 5, we shall consider very briefly whether IP is treated differently from other forms of property. Our conclusions are set out in section 6.

2. The close links between the Charter and the ECHR

As the reader will be aware, the Court of Justice first alluded to the ECHR in *Nold*¹³ back in 1974, just eleven days after it was ratified by the last Member State, namely France; and since then the Court has repeatedly held that the ECHR enjoys “special significance” in the European Union.¹⁴ Consequently, until the Charter came into its own, the case law of the Court of Justice on the right to property was drawn in particular from the jurisprudence of its counterpart in Strasbourg on A1P1.

Moreover, according to Article 52(3) of the Charter, insofar as rights enshrined in that instrument correspond to rights guaranteed by the ECHR, “the meaning and scope” of those rights are the same, although that does not prevent Union law “providing more extensive protection”. Finally, Article 6(3) TEU now provides: “Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” Accordingly, the ECHR must necessarily be the starting-point for an examination of the right to property (intellectual and otherwise) in Union law.

As we shall see in section 4.3 below, there is at least one judgment of the ECJ which appears to run counter to the case law of its counterpart in Strasbourg. Moreover, the ECJ has frequently decided cases in this field without referring to that case law, and sometimes without any mention of A1P1 itself. Especially since the entry into force of the Treaty of Lisbon, that is scarcely surprising; and it does not follow necessarily that in all the judgments concerned the Court has disregarded the case law of the ECtHR.

13. Case 4/73, *Nold v. Commission*, EU:C:1974:51, para 13.

14. E.g. Case C-274/99 P, *Connolly v. Commission*, EU:C:2001:127, para 37; Case C-94/00, *Roquette Frères v. Directeur général de la concurrence*, EU:C:2002:603, para 25; Joined Cases C-20 & 64/00, *Booker Aquaculture v. Scottish Ministers*, EU:C:2003:397, para 65 and Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission (Kadi I)*, EU:C:2008:461, para 283.

3. The right to property under the ECHR

3.1. *To what extent is this right purely economic?*

In *Airey v. Ireland*, the ECtHR held that, while the rights enshrined in the ECHR are of an “essentially civil and political” character, “many of them have implications of a social or economic nature”.¹⁵ Unsurprisingly, however, the ECtHR has frequently asserted that economic rights are less deserving of protection than political and civil rights – regardless of whether the party concerned is a natural or a legal person. In particular, companies frequently enjoy more limited economic rights under the ECHR than natural persons. One of the present authors has explored this issue elsewhere,¹⁶ and there is no reason to dwell on it here. Instead, we shall concentrate specifically on issues relating to the right to property. Generally speaking, this right is quintessentially economic; the first sentence of A1P1 is one of the very few provisions of the ECHR and its Protocols to mention the rights of legal persons explicitly.¹⁷ The *raison d’être* of commercial companies is to acquire and retain assets, and if such property could be confiscated arbitrarily and without due process of law, their function would be wholly undermined with grave consequences for society.¹⁸ Accordingly, companies generally enjoy this right on the same terms as individuals.

One caveat should be entered, however. In two cases relating to A1P1, the ECtHR has held that a legal entity, unlike an individual taxpayer, can be expected to take professional advice.¹⁹ More recently, in another case on this provision, the ECtHR has suggested that the distinction is not so much between natural and legal persons as between economic actors and individuals acting in a private capacity, ruling: “It is the role of a competent entrepreneur

15. ECtHR, *Airey v. Ireland*, Appl. No. 6289/73, judgment of 9 Oct. 1979, para 26.

16. Oliver, “The Protection of Privacy in the Economic Sphere within the European Union”, (2009) CML Rev., 1443; Oliver and Bombois, “La liberté d’expression commerciale en droit de l’Union européenne” in *Annuaire de Droit de l’Union européenne 2014* (Editions Panthéon-Assasse, 2015), 3; Oliver, “Companies and their Fundamental Rights: a Comparative Perspective”, (2015) ICLQ, 661; also Oliver, *The Fundamental Rights of Companies – European and US Law Compared* (Hart Publishing, forthcoming).

17. Another is Art. 10 ECHR, which contains a sentence stating: “This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema *enterprises*” (emphasis added). Finally, Art. 34 ECHR, entitled “Individual Applications”, provides: “The Court may receive applications from any person, non-governmental organisation or group of individuals...” See Emberland, *The Human Rights of Companies – Exploring the Structure of ECHR Protection* (OUP, 2006).

18. For a striking illustration of such a breach, see ECtHR, *Yukos v. Russia*, Appl. No. 14902/04, judgment of 31 July 2014, discussed in the text accompanying *infra* note 72.

19. ECtHR, *Spacek v. Czech Republic*, Appl. No. 26449/95, judgment of 9 Nov. 1999, para 59; *Yukos v. Russia* (*supra* note 18), para 559.

to ensure that he or she is in possession of all relevant information before investing or conducting transactions, as well as to ensure that the transactions and investment are fit for purpose.... Before incurring heavy investment-related expenditure as they did, the applicants should have at all stages ensured that their actions were in full conformity with domestic law.”²⁰ The applicants were a company and its owner and manager; the ECtHR followed the same approach with regard to all three applicants.²¹

Moreover, there is one category of property which is rightly treated as more than a mere economic asset: private homes. The right to “the home” is specifically guaranteed by Article 8 ECHR, and unsurprisingly the ECtHR attaches considerable importance to this.²²

Turning specifically to IP, we are lucky to be able to draw on this very recent statement by Advocate General Wahl: “broadly speaking, intellectual property rules are meant to confer certain exclusive rights regarding the exploitation of creations of the intellect in order to foster creativity and innovation. Those exclusive rights are nothing but *sui generis* forms of monopolies which may limit the free circulation of goods or services. Thus, by their very nature, intellectual property rules are mostly trade-related”.²³ This case concerns the scope of Article 207 TFEU, which confers exclusive competence on the EU to conclude agreements covering *inter alia* the “commercial aspects of intellectual property”. Surely, the Advocate General’s assertion that most IP rights are economic in nature can be transposed to the present context. What of moral rights? Moral rights, as defined by Article 6*bis* of the Berne Convention,²⁴ are independent of an author’s economic rights and remain with the author even if the economic rights are transferred. They are the right to claim authorship of a copyright work (right of paternity) and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to that work (right of integrity). By definition, only natural persons can enjoy moral rights. There is a dearth of case law on the status of

20. ECtHR, *Crash 2000 OOD v. Bulgaria*, Appl. No. 49893/07, decision of 17 Dec. 2013, para 63.

21. Equally, the ECtHR has declared that “the level of diligence expected from an entity engaged in a commercial activity may be higher than that required from a natural person”: *Elcomp v. Poland*, Appl. No. 37492/05, judgment of 19 Apr. 2011, para 41, confirmed in *Pietka v. Poland*, Appl. No. 3441/02, judgment of 16 Oct. 2012, para 61. The first case concerned a company, the second a partnership.

22. E.g. ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, judgment of 10 May 2001, paras. 165 et seq. and *Akdivar v. Turkey*, Appl. No. 21893/93, judgment of 16 Sept. 1996, paras. 83 et seq.

23. Opinion of A.G. Wahl in Opinion procedure 3/15, *Marrakesh Treaty*, EU:C:2016:657, para 56.

24. Berne Convention for the Protection of Literary and Artistic Works, most recently amended 28 Sept. 1979.

moral rights under AIP1 (and indeed under the Charter).²⁵ However, as Advocate General Wahl stated in the same passage, it seems clear that moral rights are not of a commercial (i.e. economic) nature, a view which has been endorsed in Opinion procedure 2/15 by Advocate General Sharpston.²⁶

3.2. *AIP1: the provision and the principles*

Bizarre as it may seem, the ECHR itself, signed in 1950, contains no provision at all on the right to property. This was largely due to the opposition of the United Kingdom, where the Labour Government was wedded to a planned economy and was in the process of implementing a large-scale programme of nationalization.²⁷ Shortly afterwards, however, the First Protocol was signed. Article 1 is drafted in the following terms:

“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.

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 of other contributions or penalties.”

As has been observed, even after the negotiations on this provision had begun, “the differences between States were considerable and the provision finally adopted guarantees only a much qualified right, allowing the State a wide power to interfere with property”.²⁸ No doubt, that goes a long way towards explaining why this provision is so nebulous.

The right to property enshrined in AIP1 covers the right to retain property, to dispose of it or to transfer it,²⁹ but not to acquire it: the “peaceful

25. But see ECtHR, *Melnychuk v. Ukraine*, Appl. No. 28743/03, decision of 5 July 2005.

26. Opinion, cited *supra* note 23, para 56; the Court decided the case on other grounds, but see para 85 of its Opinion 3/15, EU:C:2017:114. See also Opinion of 21 Dec. 2016, paras. 424 et seq. especially 437.

27. Marston, “The United Kingdom’s Part in the Preparation of the European Convention on Human Rights, 1950”, 42 ICLQ (1993), 796, 813; Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001), p. 768, and Smyth, *Business and the Human Rights Act 1998* (Jordans, 2000), pp. 10–11.

28. Harris, O’Boyle and Warwick, *Law of the European Convention on Human Rights*, 3rd ed. (OUP, 2014), p. 862.

29. ECtHR, *Marckx v. Belgium*, Appl. No. 6833/74, judgment of 13 June 1979, para 63. Thus the unlawful and unjustified withdrawal of a licence to operate a business is in breach of AIP1: *Capital Bank v. Bulgaria*, Appl. No. 49429/99, judgment of 24 Nov. 2005.

enjoyment” of possessions can only refer to existing possessions,³⁰ which raises particular issues in relation to applications for IP rights.

At all events, the category of possessions protected by A1P1 is very broad,³¹ covering: an existing professional practice or business,³² including the goodwill;³³ a licence to carry on an economic activity;³⁴ planning permission;³⁵ the vendor’s contractual retention of ownership until the purchaser has paid the final instalment;³⁶ an enforceable arbitral award³⁷ or judgment debt;³⁸ and a welfare benefit to which the applicant has an enforceable right under domestic law.³⁹ Even a “legitimate expectation” of obtaining an asset will itself be protected under A1P1 in certain circumstances. Thus, it was held in *Centro Europa 7 v. Italy* that, by granting the applicant company a television broadcasting licence but not granting it any broadcasting frequency, Italy was in breach of that provision.⁴⁰ Similarly, a claim to property qualifies for protection under A1P1, where the person in whom it is vested has a “legitimate expectation” that she will recover it, on the

30. *Marckx* (*supra* note 29), para 50; ECtHR, *van der Musselle v. Belgium*, Appl. No. 8919/80, judgment of 23 Nov. 1983, para 48; *Kopecký* (*infra* note 41), para 35(d); *Stec* (*infra* note 39), para 53 and *Anheuser-Busch* (*supra* note 9), para 64.

31. See generally Burgorgue-Larsen, *La Convention européenne des droits de l’homme* (LGDJ, 2012), pp. 173 et seq.; Harris, O’Boyle and Warwick, *op. cit. supra* note 28, p. 863 et seq.; Meyer-Ladewig, *Europäische Menschenrechtskonvention*, 3rd ed. (Nomos, 2011), p. 413 et seq.; Sudre, *Droit européen et international des droits de l’homme*, 12th ed. (Presses Universitaires de France, 2015), p. 836 et seq.; van Dijk et al. (Eds.) *Theory and Practice of the European Convention on Human Rights* 4th ed. (Intersentia, 2006), p. 865 et seq.

32. ECtHR, *van Marle v. Netherlands*, Appl. No. 8543/79, judgment of 26 June 1986; *Wendenburg v. Germany*, Appl. No. 71630/01, decision of 6 Feb. 2003.

33. *Wendenburg*, cited *supra* note 32.

34. ECtHR, *Tre Traktörer Aktiebolag v. Sweden*, Appl. No. 10873/84, decision of 7 July 1989, para 53 (liquor licence); *Fredin v. Sweden*, Appl. No. 12033/86, judgment of 18 Feb. 1991, para 41 (licence to exploit gravel pit); *Rosenzweig v. Poland*, Appl. No. 51728/99, judgment of 28 July 2005, para 49 (licence to run bonded warehouse); and *Vékony v. Hungary*, Appl. No. 65681/13, judgment of 13 Jan. 2015, para 29 (licence to sell tobacco). In all these cases, the relevant licence had been withdrawn.

35. ECtHR, *Pine Valley Developments Ltd. v. Ireland*, Appl. No. 12742/87, judgment of 29 Nov. 1991, paras. 51–53.

36. ECtHR, *Gasus Dossier and Fördertechnik v. Netherlands*, Appl. No. 15375/89, judgment of 23 Feb. 1995, para 53.

37. ECtHR, *Stran Greek Refineries v. Greece*, Appl. No. 13427/87, judgment of 9 Dec. 1994.

38. ECtHR, *Asito v. Moldova*, Appl. No. 40663/98, judgment of 8 Nov. 2005, para 59.

39. ECtHR, *Stec v. United Kingdom* (dec.), Appl. No. 65731/01, decision of 6 July 2005, para 51.

40. ECtHR, *Centro Europa 7 v. Italy*, Appl. No. 38433/09, judgment of 7 June 2012; see also *Grazinger v. Czech Republic* (dec.), Appl. No. 39794/98, decision of 10 July 2002, para 69.

basis that that claim rests on a sufficiently solid basis in national law, as where there is settled law of the domestic courts in her favour.⁴¹ On the other hand, no “legitimate expectation” arises where there are conflicting authorities on the relevant issue of domestic law.⁴² Equally, future earnings are not “possessions”.⁴³

In the light of this summary, it is plain that in certain cases, the line between what falls within the scope of A1P1 and what does not is very thin.⁴⁴

Two key pronouncements of the ECtHR clarify the relationship between the three sentences of A1P1. In *Sporrong v. Sweden*, the Court stated that each of these sentences lays down a “distinct rule”, as follows:

“The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property.... The second rule covers deprivation of possessions and subjects it to certain conditions.... The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.”⁴⁵

Further elucidation came in the following passage of the judgment in *James v. United Kingdom*: “The three rules are not, however, ‘distinct’ in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.”⁴⁶

The boundaries between the three rules are fluid and indeed the ECtHR does not always identify the relevant category.⁴⁷ It has been suggested that “the identification of the type of interference is less important to the outcome of a

41. ECtHR, *Kopecký v. Slovakia*, Appl. No. 44912/98, judgment of 28 Sept. 2004, para 52, and *Anheuser-Busch* (*supra* note 9), para 65. See also the text accompanying *infra* note 80.

42. *Kopecký* (*supra* note 41), para 50, and *Anheuser-Busch* (*supra* note 9), para 65.

43. ECtHR, *Ian Edgar (Liverpool) Ltd v. United Kingdom* (dec.), Appl. No. 37683/97, decision of 25 Jan. 2000; *Kopecký* (*supra* note 41), para 35.

44. Witness the different approaches followed by the Second Chamber (together with the two concurring judges in the Grand Chamber) and the majority of the Grand Chamber in *Anheuser-Busch*, as explained in section 3.3 *infra*.

45. ECtHR, *Sporrong v. Sweden*, Appl. No. 7151/75, judgment of 23 Sept. 1982, para 61.

46. ECtHR, *James v. UK*, Appl. No. 8793/79, judgment of 21 Feb. 1986, para 37, confirmed in *Anheuser-Busch* (*supra* note 9), para 62.

47. E.g. ECtHR, *Papamichalopoulos v. Greece*, Appl. No. 14556/89, judgment of 24 June 1993 and *Stretch v. UK*, Appl. No. 44277/98, judgment of 24 June 2003. Similarly, although only the second sentence of A1P1 expressly requires restrictions on property rights to be “provided for by law”, it has been held that this requirement applies to all three rules set out in that article: ECtHR, *Iatridis v. Greece*, Appl. No. 31107/96, judgment of 24 Feb. 1999, para 58.

case than is the process involved in the application of the ‘fair balance’ test’.⁴⁸ Under the latter test, the ECtHR determines whether a fair balance has been struck between the requirements of the protection of the individual’s fundamental rights and the pursuit of a legitimate public interest objective.⁴⁹ Indeed, the search for this balance “is inherent in the whole of the Convention and is also reflected in the structure of [A1P1]”.⁵⁰ There must be “a reasonable relationship between the means employed and the aims pursued”.⁵¹ No fair balance is struck where an “individual and excessive burden” is borne by the persons concerned.⁵²

In this context, “the notion of ‘public interest’ is necessarily extensive”.⁵³ In particular, “the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely”.⁵⁴ States are usually allowed considerable leeway in a wide range of matters, including economic or social policy,⁵⁵ town planning⁵⁶ and environmental protection.⁵⁷

Consequently, even though compensation is usually due in respect of a fully fledged *de jure* or *de facto* deprivation of property effected in law or in fact,⁵⁸ the right to full compensation is not guaranteed in all circumstances because legitimate public interest objectives, “such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value”.⁵⁹ In exceptional circumstances, no compensation will be due at all.⁶⁰

48. Harris, O’Boyle and Warwick, op. cit. *supra* note 28, at 876.

49. *Sporrong* (*supra* note 45), para 69; ECtHR, *National & Provincial Building Society v. UK*, Appl. No. 21319/93, judgment of 23 Oct. 1997, para 80.

50. *Ibid.*

51. *National & Provincial Building Society* (*supra* note 49), para 80.

52. *Sporrong* (*supra* note 45), para 73.

53. *James* (*supra* note 46), para 46.

54. *Ibid.*

55. *Ibid.*

56. *Sporrong* (*supra* note 45), para 69; *James* (*supra* note 46), para 46; *National & Provincial Building Society* (*supra* note 49), para 80.

57. ECtHR, *Hamer v. Belgium*, Appl. No. 21861/03, judgment of 27 Nov. 2007, para 78.

58. *James* (*supra* note 46), para 54 and *Lithgow and others v. UK*, Appl. No. 9006/80, judgment of 8 July 1986, para 120. In both passages, the Court observed that otherwise the protection afforded by A1P1 would be “largely illusory”. For an example of *de facto* expropriation, see *Papamichalopoulos* (*supra* note 47), paras. 41 et seq.

59. *James* (*supra* note 46), para 54.

60. An exceptional case in which compensation was not due for a deprivation of property was ECtHR, *Jahn v. Germany*, Appl. No. 46720/99, judgment of 30 June 2005, Grand Chamber, which concerned the transitional arrangements for ownership of agricultural land immediately before and after the reunification of Germany; see especially para 116.

When considering whether an interference with a property right is justified, the ECtHR will have regard to a wide range of factors.⁶¹ As one would expect, it considers the severity of the interference,⁶² the importance of the interests at stake,⁶³ the nature of the harm⁶⁴ and whether compensation was awarded.⁶⁵ In addition, the ECtHR takes other considerations into account such as whether an effective remedy is available,⁶⁶ whether appropriate transitional measures have been put in place⁶⁷ and (where the applicant has failed to take the appropriate advice) whether the applicant is an “entrepreneur” or an individual acting in a personal capacity.⁶⁸

Despite the considerable latitude enjoyed by the Contracting Parties, a number of notable actions have been successful. Thus in *Sporrong* Sweden fell foul of AIP1 by imposing an expropriation order coupled with a construction ban on the applicant’s land; these measures were never executed and were only lifted after more than twenty years. France was found to have breached this provision by compelling small landowners to accept hunting on their land against their moral convictions.⁶⁹ Other especially controversial breaches were committed by Greece: in one case the military occupied the applicant’s land for many years without compensation,⁷⁰ and in another a statute was enacted cancelling an arbitral award against the State.⁷¹ Both proceedings resulted in the award of substantial damages. Perhaps the most spectacular case of all is *Yukos v. Russia*, where the defendant was ordered to pay €1.9 billion damages for imposing an exorbitant and arbitrary tax bill on the mammoth applicant company, resulting in its demise.⁷²

61. Tulkens, “La Réglementation de l’Usage des Biens dans l’Intérêt general: la Troisième Norme de l’Article 1er du Premier Protocole de la Convention européenne des Droits de l’Homme” in *Propriété et Droits de l’Homme* (Bruylant, 2006).

62. ECtHR, *Valico v. Italy* (dec.), Appl. No. 70074/01, decision of 21 Mar. 2006.

63. *Ibid.*

64. ECtHR, *Housing Association of War Disabled v. Greece*, Appl. No. 3585902, judgment of 13 July 2006, para 38.

65. *Ian Edgar* (*supra* note 43) and *Vékony* (*supra* note 34), para 35.

66. *Sporrong* (*supra* note 45), para 73 and *Capital Bank v. Bulgaria* (*supra* note 29), paras. 138–139 and *Vékony* (*supra* note 34), para 34.

67. *Vékony* (*supra* note 34), para 34. The lack of such measures may also lead the ECJ to find restrictions on free movement to be unjustified as being disproportionate: Case C-309/02 *Radlberger*, EU:C:2004:799, paras. 80–81 (goods) and Case C-98/14, *Berlington Hungary*, EU:C:2015:386, paras. 76 et seq. (services).

68. See the cases referred to in *supra* notes 20 and 21.

69. ECtHR, *Chassagnou v. France*, Appl. No. 25088/94, judgment of 29 Apr. 1999, para 85.

70. *Papamichalopoulos* (*supra* note 47).

71. ECtHR, *Stran Greek Refineries v. Greece*, Appl. No. 13427/87, judgment of 21 Nov. 1994.

72. *Supra* note 18. The ECtHR also found a breach of Art. 6 ECHR by reason of the numerous and grave procedural irregularities committed by Russia in prosecuting Yukos for tax fraud.

3.3. *Intellectual property*

In view of the very broad construction placed by the ECtHR on the word “possessions”, it is scarcely surprising that in its landmark judgment in *Anheuser-Busch v. Portugal*⁷³ the Grand Chamber found that IP is covered by this concept. Before considering that ruling, it is necessary to cast a look at the earlier case law.

Three Decisions of the European Commission of Human Rights are worthy of note. In *Smith Kline and French Laboratories Ltd v. Netherlands*,⁷⁴ it had found that a Dutch patent was a “possession” within the meaning of A1P1, but also that the conduct of the Dutch Patent Office in granting a compulsory licence was clearly in accordance with A1P1, since it “pursued a legitimate aim of encouraging technological and economic development” and was proportionate. In *British-American Tobacco Company Ltd v. the Netherlands*,⁷⁵ the European Commission of Human Rights held that A1P1 did not apply to an application for a patent which had been rejected by the competent national authority; the reason was that A1P1 does not confer any right to acquire property.⁷⁶ Similarly, in *Lenzing AG v. United Kingdom*,⁷⁷ where a European patent had been revoked by a Board of Appeal of the European Patent Office and the former owner then sought to challenge the effect of that in the United Kingdom, the European Commission of Human Rights agreed that a patent was a “possession”. However, it noted that the “possession” at issue in the case was not the revoked patent but the right to pursue a legal claim in the courts in the United Kingdom, and there had been no interference with that right.

73. *Anheuser-Busch* (*supra* note 9). See Helfer, “The New Innovation Frontier? Intellectual Property and the European Court of Human Rights”, 49 *Harvard Int. L.J.* (2008), 1.

74. No. 12633/87, Commission decision of 4 Oct. 1990, Decisions and Reports 66, p. 70.

75. Commission opinion of 19 May 1994, paras. 71–74, Series A No. 331.

76. See *supra* note 30. Subsequently, the case was referred to the Court, which declined to rule on this particular point: ECtHR, *British-American Tobacco v. Netherlands*, Appl. No. 19589/92, judgment of 20 Nov. 1995, para 91.

77. No. 38817/97, Commission decision of 9 Sept. 1998, unreported. See also *Lenzing AG v. Germany*, No. 39025/97, Commission decision of 9 Sept. 1998, unreported. The following convoluted challenges were the sequels to inadmissible attempts to challenge European Patent Office decisions directly: *Heinz v. Contracting States also Parties to the European Patent Convention*, No. 21090/92, Commission decision of 10 Jan. 1994, 94 Decisions and Reports 136, 144 (finding no competence to examine complaints about the fees of the European Patent Office), followed in *Reber Systematik GmbH v. Germany*, No. 27410/95, Commission decision of 12 Apr. 1996, 22 EHRR 98 (no competence to examine a complaint about refusal by the European Patent Office to admit an appeal out of time).

In *Melnychuk v. Ukraine*,⁷⁸ the ECtHR found that AIP1 applied to IP (*in casu* copyright, which, unlike patents and trade marks, is not registered). The applicant claimed that the national courts had violated his copyright by permitting a newspaper to print highly critical reviews of his book of poetry and to refuse to print his “obscene and abusive” response. However, the ECtHR held that, in rejecting the applicant’s claim, the national courts had acted in accordance with domestic copyright law giving full reasons for their decisions; so the decision was not contrary to AIP1 on grounds of arbitrariness or manifest unreasonableness.

As already mentioned, the *locus classicus* is the ruling of the Grand Chamber in *Anheuser-Busch v. Portugal*. The case arose from one of many skirmishes over the “Budweiser” name between the American company Anheuser-Busch Inc and its Czech rival Budějovický Budvar. Anheuser-Busch sought to register “Budweiser” as a trade mark in Portugal in 1981, and after extensive negotiations and litigation this was initially registered in 1995. However, Budějovický Budvar challenged the trade mark registration, claiming that the “Budweiser” trade mark would infringe the appellation of origin “Českobudějovický Budvar”, which indicated a product from the Czech town of České Budějovice (“Budweis” in German) and which had been protected since 1987 under a bilateral agreement between Portugal and Czechoslovakia. In 2001, the Portuguese Supreme Court upheld the challenge.

Anheuser-Busch lodged an application against Portugal, claiming a violation of its rights under AIP1. In 2005, that was rejected by the Second Chamber of the ECtHR.⁷⁹ That Chamber took the view that, while IP was clearly a possession, a mere application for a trade mark was not a possession until final registration (including the outcome of any post-registration challenges by third parties). At Anheuser-Busch’s request, the case was referred to the Grand Chamber, which rejected the action on different grounds. The Grand Chamber held unanimously that AIP1 applies to IP – the first ruling on the point by that formation of the ECtHR. By a majority of thirteen judges to four, the Grand Chamber took the view that AIP1 was engaged, for the following reasons:

“It is true that the registration of the mark... would only become final if the mark did not infringe legitimate third-party rights, so that, in that sense, the rights attached to an application for registration were conditional. Nevertheless, when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the

78. *Supra* note 25.

79. *Supra* note 9.

applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were recognized under Portuguese law, even though they could be revoked under certain conditions.⁸⁰

This accords with the normal understanding of most IP practitioners, according to which applications for IP rights such as trade marks or patents are regarded as property rights which may be assigned, licensed or in some cases even asserted before they are granted by the relevant authority. An application may not be determined for months or even years. Even if the rights sought are granted, they may later be invalidated *ab initio* by the IP office and/or a court following a challenge by a third party. On this basis, it is logical to recognize the existence of an IP right from the moment at which a party lodges an application to register it.

At all events, the ECtHR went on to consider whether there had been interference with that right and noted that its role, particularly in cases which turn on difficult questions of interpretation of national law, is to ensure that the decisions of the national courts were not flawed by arbitrariness or otherwise manifestly unreasonable.⁸¹ There was no basis for such a conclusion in this case and so there was no breach.⁸²

Of the four judges giving separate opinions, two concurred with the result but preferred the reasoning of the Second Chamber to the effect that in the circumstances the mere application for registration of the trade mark did not amount to a “possession” or even a “legitimate expectation”. They gave four reasons in support of this position. Many of these turned on the uncertainties in the IP system about whether the application would be registered (although as explained above, on this reasoning it is unclear whether a registered mark would ever become a possession). The other two judges dissented and found that there had been a breach of A1P1 on the grounds that there had been unlawful interference by the retrospective application of the 1987 agreement to the 1981 application.

In *Balan v. Moldova*,⁸³ the ECtHR again held that copyright (in this case, in a photograph taken by the applicant which had been used without his consent by the Moldovan Ministry of Internal Affairs as a background for identity cards) constituted a possession under A1P1. This time it went on to hold that

80. *Supra* note 7, para 78; on “possessions” based on a “legitimate expectation”, see *supra* note 41 and the accompanying text.

81. Para 83.

82. Paras. 84–85.

83. ECtHR, *Balan v. Moldova*, Appl. No. 19247/03, judgment of 29 Jan. 2008.

there had been interference and that the government had shown no need to use that particular photograph.⁸⁴

*Ashby Donald v. France*⁸⁵ concerned a group of fashion photographers who had been convicted of criminal counterfeiting for publishing in breach of copyright their photographs of a series of fashion parades. Unsurprisingly, the ECtHR ruled that this constituted an interference with the claimants' freedom of expression under Article 10 ECHR. However, it also found that this interference was justified on the basis of the following reasoning: while fashion photography attracts widespread interest, the publication of such photos carries less weight than a contribution to a political debate and must be regarded as a form of purely commercial expression; in these circumstances, the protection of IP must prevail.⁸⁶ Of course, this case differs from the others discussed here, because the applicants invoked Article 10, since by definition they could not rely on A1P1. Nevertheless, this ruling is in point here, because the ECtHR followed essentially the same approach to justification as under A1P1.

Finally, in *Neij v. Sweden*,⁸⁷ the Court followed a similar approach in rejecting the Article 10 claims against the criminal convictions of the operators of The Pirate Bay website relating to the infringement of copyright in music, films and computer games by facilitating file-sharing. For the same reasons as in *Ashby Donald*, the applicants were unable to rely on A1P1.

In conclusion, the Court has taken a relatively broad approach in regarding IP as a "possession", including applications for IP, but has been respectful of national courts and legislation when considering whether interference with such possessions can be justified. It has also recognized the rights of IP owners when balancing IP with other protected rights, in particular the freedom of expression.

84. The Court ordered damages of €5000 and costs and expenses of €2000, plus interest. Here there was no dispute over the subsistence of the copyright, in contrast to *Dima v. Romania*, Appl. No. 58472/00, decision of 26 May 2005, where the ECtHR found that the domestic courts had not been arbitrary in determining that the applicant lacked copyright in designs for a new national emblem and seal for Romania; see the extensive discussion by Helfer, op. cit. *supra* note 73.

85. ECtHR, *Ashby Donald v. France*, Appl. No. 36769, judgment of 10 Jan. 2013.

86. *Ibid.*, paras. 39 et seq. In keeping with the principle that economic rights are less deserving of protection under the ECHR than other rights, commercial expression is granted less protection than political, religious or artistic expression: ECtHR, *Hertel v. Switzerland*, Appl. No. 25181/94, judgment of 25 Aug. 1998, para 47 and *Verein gegen Tierfabriken v. Switzerland*, Appl. No. 24699/94, judgment of 28 June 2001, para 66. See Oliver and Bombois "La liberté d'expression commerciale en droit de l'Union européenne" *Annuaire de Droit de l'Union européenne 2014* (Editions Panthéon-Assasse, 2015), 3.

87. ECtHR, *Neij v. Sweden* (dec.), Appl. No. 40397/12, decision of 19 Feb. 2013.

4. EU Law

4.1. *Article 345 TFEU*

Article 345 TFEU, which dates back to the original Treaty of Rome, reads: “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.” Like the omission of property from the original ECHR, this provision appears to have been conceived primarily to show that nationalization is compatible with the Treaty.⁸⁸ Indeed, it has been described as “an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership” and as indicating that, as a general rule, the Treaties do not preclude either the nationalization or the privatization of undertakings.⁸⁹

Although Article 345 is not couched in terms of rights, it could have been interpreted as conferring rights on private parties and could perhaps have mutated into a fundamental rights provision. As it is, arguments based on Article 345 have generally received short shrift. In particular, claims that it constitutes an exception to the fundamental freedoms enshrined in the Treaties have been roundly dismissed, whether IP⁹⁰ or other rights⁹¹ are at stake. Similarly, the Court dismissed the argument advanced by *British American Tobacco* in support of its claim that Directive 2001/37 on tobacco products⁹² was incompatible with Article 345 on the basis that it restricted the use of their trade marks. The Court asserted that the Directive “does not impinge in any way on the rules governing the system of property ownership in the Member States within the meaning of [Article 345]” and that that provision “is irrelevant in relation to any effect produced by the Directive on the exercise of the manufacturers of tobacco products of their trademark rights over the products”.⁹³ In short, parties seeking to enforce their property rights

88. Neri and Sperl, *Répertoire du Traité CEE* (Luxembourg, 1960) p. 410; see also Written Question 346/80 O.J. 1980, C 213/6; and Ramaekers, *European Union Property Law* (Intersentia, 2013), p. 108 et seq.

89. Case C-105/12, *Essent Nederland*, EU:C:2013:677, paras. 29 and 30.

90. E.g. Case 24/67, *Parke, Davis v. Centrafarm*, EU:C:1968:11; Case 32/65, *Italy v. Commission*, EU:C:1966:42, and Case 30/90, *Commission v. UK* (compulsory patent licences), EU:C:1992:74, para 18. All these cases concerned free movement of goods.

91. See Case C-483/99, *Commission v. France* (golden shares), EU:C:2002:327, para 44 (free movement of capital), confirming Case 182/83, *Fearon v. Irish Land Commission* EU:C:1984:335, para 7 (freedom of establishment), and Case C-302/97, *Konle v. Austria*, EU:C:1999:271, para 38 (capital).

92. O.J. 2001, L 194/26.

93. Case C-491/01, *The Queen v. Secretary of State for Health ex parte British American Tobacco and others*, EU:C:2002:741, para 148. That case is discussed further *infra*, see text accompanying notes 190 et seq.

will gain little traction from this provision. Such parties will be far better advised to invoke the line of case law which harks back to the seminal judgments on fundamental rights and the right to property in *Internationale Handelsgesellschaft*⁹⁴ and *Nold*,⁹⁵ and now Article 17 of the Charter. The case law of the ECJ on the right to property spans three distinct periods: (i) the period prior to the promulgation of the first version of the Charter in December 2000;⁹⁶ (ii) the intermediate period between that date and the entry into force of the Treaty of Lisbon on 1 December 2009, when the Charter had been promulgated but was not binding;⁹⁷ and (iii) the period beginning on the latter date when the Charter became binding by virtue of Article 6(1) TEU.

There is no need to devote a separate sub-section of this article to each of these three periods. The reason is that the introduction and development of the Charter do not appear to have altered the Court's approach – except that it has of course referred less frequently to A1P1 and the case law of the ECtHR in recent years. No doubt, the predominant reason is that despite its very different wording Article 17 of the Charter reproduces the substance of A1P1. Furthermore, it was only to be expected that the case law would move seamlessly from phase (ii) to phase (iii), since the Court was already respecting the Charter *de facto* during phase (ii).⁹⁸ Indeed, in *Orange Polska v. Commission*, the General Court recently held that the entry into force of the Treaty of Lisbon had not “substantially changed” the content of the right to a fair trial and the rights of the defence;⁹⁹ the same appears to apply to the right to property.

94. Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, EU:C:1970:114.

95. Case 4/73, *Nold*.

96. See *supra* note 1.

97. From a very early stage, the General Court had regard to the Charter (Case T-112/98, *Mannesmannröhren-Werke v. Commission*, EU:T:2001:61 and Case T-54/99, *max.mobil v. Commission*, EU:T:2002:20), as did the advocates general (e.g. A.G. Mischo in Joined Cases C-20 & 64/00, *Booker Aquaculture*, EU:C:2001:469, para 126, and A.G. Tizzano in Case C-173/99, *The Queen v. Secretary of State for Trade and Industry ex parte BECTU*, EU:C:2001:81, para 27). The Court did not acknowledge the existence of the Charter until its ruling in Case C-540/03, *European Parliament v. Council* (family reunification), EU:C:2006:429, para 38 where it endorsed the general view that the Charter had persuasive force.

98. In a number of cases decided since December 2009 (e.g. Cases C-279/09, *DEB*, EU:C:2010:811 and Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105), the Court has applied the Charter, even though the material facts arose before the Charter became binding with the entry into force of the Lisbon Treaty. That position appears logical, given that the Court had already been applying the Charter *de facto* for some time. In contrast, in Case C-316/13, *Fenoll*, EU:C:2015:200, paras. 45–47 the Court ruled to the opposite effect. Both *DEB* and *Åkerberg Fransson* were decided by the Grand Chamber; *Fenoll* was decided by a Chamber of five judges.

99. Case T-486/11, *Orange Polska v. Commission*, EU:T:2015:1002, para 95.

It is thus appropriate to begin by considering Article 17 before exploring the case law on property generally and then focusing specifically on the case law relating to IP.

4.2. *Article 17 of the Charter: An analysis*

The right to property, including IP, is now enshrined in Article 17 of the Charter, which reads as follows:

- “1. 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.
2. Intellectual property shall be protected.”¹⁰⁰

As mentioned earlier, Article 52(3) provides that Charter rights which correspond to rights guaranteed by the ECHR have the same “meaning and scope”, although that does not prevent Union law “providing more extensive protection”. Moreover, Articles 6(1) TEU and 52(7) of the Charter require the courts to have regard to the official Explanations to the Charter.¹⁰¹ These Explanations state that Article 17 is “based on” A1P1, adding that “the meaning and scope of the right [under Article 17] are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided there”.

At first sight, this may seem surprising, since the language of Article 17 appears to differ substantially from that of A1P1, not least because Article 17 – unlike A1P1 – expressly mentions the need to pay fair compensation in certain cases. However, the two provisions display

100. As already mentioned, Art. 6(3) TEU provides *inter alia* that fundamental rights “as they result from constitutional traditions common to the Member States” constitute general principles of EU law. However, little purpose would be served by examining those “constitutional traditions” here. Even prior to the advent of the Charter, references to national law on the right to property were rare; Opinion of A.G. Capotorti in Case 44/79, *Hauer*, EU:C:1979:290 is exceptional; see also paras. 116–126 of Opinion in Joined Cases C-20 & 64/00, *Booker Agriculture*, delivered after the initial proclamation of the Charter.

The preamble to the Charter states that it aims to make fundamental rights “more visible”, which might suggest that it is declaratory of pre-existing rights; see para 77 of the Opinion of A.G. Mengozzi in Case C-341/05, *Laval*, EU:C:2007:809.

101. O.J. 2007, C 303/17, 1. See Jacqu e “The Explanations Relating to the Charter of Fundamental Rights of the European Union” in Peers et al., *op. cit. supra* note 5, p. 1715 and Ziller “Le fabuleux destin des Explications relatives   la Charte des droits fondamentaux de l’Union europ enne” in *Chemins d’Europe – M langes en l’honneur de Jean-Paul Jacqu e* (Daloz, 2010), p. 765.

significant similarities. For a start, their general structure is essentially the same: the first sentence of each sets out the right to property, the second sentence concerns deprivation of property and the third provides that States may control the use of property in the public interest. Furthermore, nothing in either provision suggests a right to acquire property.¹⁰² Even the reference to the right to compensation in Article 17(1) does not constitute a departure from A1P1, since the ECtHR has read into that provision the right to compensation in certain circumstances;¹⁰³ and “fair” compensation within the meaning of Article 17(1) cannot be equated to “full” compensation.

Having said that, Article 17 must of course be interpreted in the light of the other provisions of the Charter, notably Article 16 on the right to conduct a business.¹⁰⁴ Logic would suggest that the two provisions must be mutually exclusive.¹⁰⁵ It would follow that the concepts of “possessions” and “property” under Article 17 are narrower than that under A1P1, because the ECtHR defined those concepts broadly to compensate for the lack of a provision on the right to conduct a business.¹⁰⁶ In fact, the ECJ frequently refers to Articles 16 and 17 in the same breath without necessarily distinguishing between them.¹⁰⁷ While an overlap between the two provisions appears unorthodox, it cannot be ruled out, since they are inextricably linked.¹⁰⁸ In any case, the material scope of Article 17 closely matches that of A1P1.¹⁰⁹

102. It would appear that at one stage of the negotiations it was proposed that the right to acquire property should be expressly set out in the Charter: Depenheuer, commentary on Art. 17, para 2 in Tettinger and Stern (Eds.), *Europäische Grundrechtecharta* (Beck, 2006).

103. See *supra* note 58 and the accompanying text.

104. The latter right, which was referred to in Case 4/73, *Nold*, is not enshrined in the ECHR. Rather, it derives from the constitutions of a number of Member States (e.g. Art. 12(1) of the German Basic Law, and Arts. 45(3) and 41 of the Irish and Italian Constitutions respectively). See Bernsdorff’s commentary on Art. 16 of the Charter in Meyer (Ed.) *Charta der Grundrechte der Europäischen Union*, 4th ed. (Nomos, 2014), p. 294 and Schmidt, *Die unternehmerische Freiheit im Unionsrecht* (Duncker & Humblot, 2010) p. 70 et seq.

105. Wollenschläger in Peers et al., op. cit. *supra* note 5, para 17(1).21.

106. Wollenschläger, *ibid.* For examples of such rulings, see *supra* notes 32 to 35.

107. E.g. Case 44/79, *Hauer*, EU:C:1979:290, para 32; Case 265/87 *Schröder* EU:C:1989:303, paras. 13 et seq.; Case C-210/03, *Swedish Match*, EU:C:2004:802, paras. 72 et seq.; and Case C-1/11, *Interseeroh*, EU:C:2012:194, para 43. Wollenschläger (*ibid.*) recognizes this: para 17(1).2.

108. Oliver, “What Purpose does Article 16 of the Charter Serve?” in Bernitz, Groussot and Schulyok (Eds.), *General Principles of EU Law and European Private Law* (Wolters Kluwer, 2013), at p. 281, 296. An analogous problem arises as between Arts. 7 and 8 of the Charter, both of which originated in Art. 7 ECHR: Oliver, “Privacy and data protection: The rights of economic actors”, in Bernitz, de Vries and Weatherill (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart Publishing, 2015), at p. 287.

109. It has been held that a market share is not property, since it “constitutes only a momentary economic position exposed to the risks of changing circumstances”: Case

Moreover, Article 17 must be read subject to the general exception clause in Article 52(1), under which “any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.” How this provision relates to the exception clauses set out in the second and third sentences of Article 17(1) itself, which are also very broad, is far from obvious: does Article 52(1) provide for the possibility of limitations and derogations additional to those enshrined in Article 17(1)?¹¹⁰

On another point, one should not overlook the stipulation in Article 52(1) that limitations on Charter rights must respect the “essence” of those rights. A restriction which fails to meet that condition – however extreme the harm which it is expected to prevent – is unlawful *per se* and cannot be justified by recourse to the principle of proportionality. This rule, which is rooted in the case law of the ECtHR¹¹¹ and in several national constitutions,¹¹² was already recognized by the Court of Justice prior to the Charter.¹¹³ With the judgment

C-280/93, *Germany v. Council* (bananas), EU:C:1994:367, para 79, confirmed in Case C-154/04, *Alliance for Natural Health*, EU:C:2005:449, para 128. Similarly, “the protection of the right to property afforded by Article 17 of the Charter does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but applies to rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit”; Case C-398/13P, *Inuit Tapiriit Kanatami*, EU:C:2015:535, para 60 and case law cited there.

110. Similarly, the right to data protection in Art. 8(1) of the Charter is subject to the exceptions contained in paras. 2 and 3 of the same article. Again, the link between these exceptions and the general derogation in Art. 52(1) is unclear.

111. ECtHR, *Stubbings v. UK*, Appl. No. 22083/93, judgment of 22 Oct. 1996, para 52 (limitation period under Art. 6(1) ECHR), *Matthews v. UK* Appl. No. 24833/94, judgment of 18 Feb. 1999, paras. 63–65 (right to vote under Art. 3 of Protocol 1), *Heaney and McGuinness v. Ireland*, Appl. No. 34720/97, judgment of 21 Dec. 2000, para 58 (privilege against self-incrimination under Art. 6(1) ECHR), *Goodwin v. United Kingdom* Appl. No. 17488/90, judgment of 11 July 2002, para 101 (right to marry under Art. 12 ECHR) and *Sahin v. Turkey*, Appl. No. 44774/98, judgment of 10 Nov. 2015, para 161 (right to education under Art. 2 of Protocol 1).

112. E.g. Art. 19(2) of the German Basic Law; see also Borowsky, commentary on Art. 52, para 23a., in Meyer op.cit. *supra* note 104.

113. E.g. Case 4/73, *Nold*, para 14 and Case 5/88, *Wachauf*, EU:C:1989:321, para 18; Case C-177/90, *Kühn* EU:C:1992:2, para 17; Case C-292/97, *Karlsson*, EU:C:2000:202, para 45; Case C-154/04, *Alliance for Natural Health*, para 126 and Case C-453/03, *ABNA*, EU:C:2005:741, para 87. In these cases, the Court speaks of “the very substance” of the right concerned. Plainly, this term has the same meaning as “the essence”: Case T-187/11, *Trabelsi*, EU:T:2013:273, para 81.

in *Schrems*, this rule has now come to the fore: it was held there that legislation which grants public authorities access to all electronic communications violates the essence of Article 7 of the Charter;¹¹⁴ and that a measure which totally bars access to justice breaches the essence of Article 47.¹¹⁵ Quite what is meant by “the essence” is still not clear, however.¹¹⁶ At all events, it seems reasonable to suppose that in principle any restriction on the right to property which impinges on its very essence entitles the owner to fair compensation within the meaning of Article 17(1).¹¹⁷

For present purposes, a particularly striking feature of Article 17 is the fact that IP is expressly mentioned in paragraph 2 “because of its growing importance and Community secondary legislation”.¹¹⁸ However, that paragraph is by no means free of ambiguity: it does not make it clear whether IP is protected to the same extent as other forms of property. Nor do the Explanations cast much light on this issue, since on this point they simply state: “The guarantees laid down in paragraph 1 shall apply as appropriate to IP.” What is “appropriate” in this context remains a matter for discussion and speculation. Could it ever be appropriate to grant more protection (or less protection) to IP than to other forms of property? In any case, the Court has held that there is “nothing whatsoever in the wording of [Article 17(2)] or in the Court’s case law to suggest that that right is inviolable and must for that reason be absolutely protected.”¹¹⁹ This ruling lays to rest the concern expressed by one author¹²⁰ that Article 17(2) provides for the broadest possible right to IP.

4.3. *Property other than IP: The case law*

As already mentioned, we shall consider here the case law on the right to property since its inception, thereby covering all three phases mentioned in section 4.1 above.

114. Case C-362/14, *Schrems*, EU:C:2015:650, para 94.

115. *Ibid.*, para 95.

116. According to the Explanations on Art. 1 of the Charter (cited *supra* note 101), any restriction on a Charter right which harms the dignity of another person goes to the essence of that right as well as constituting a breach of Art. 1 itself.

117. Sudre (op. cit. *supra* note 31) at p. 849 lists a number of ECtHR cases which in his view involved an interference with the right to property going to the essence of that right, including *Sporrong* (*supra* note 45) and *Papamichalopoulos* (*supra* note 47); but the ECtHR did not always employ the term “essence of the right” in those cases.

118. This citation is taken from the Explanations on Art. 17 (cited *supra* note 101).

119. Case C-70/10, *Scarlet Extended*, para 43.

120. Geiger, “Intellectual Property shall be Protected. Article 17(2) of the Charter of Fundamental Rights of the European Union”, 31 E.I.P.R. (2006), 113.

The ECJ's first forays into this area of the law came in the 1970s with the seminal rulings in *Nold*¹²¹ and *Hauer*,¹²² where the Court laid down the principles which have governed the right to property in Union law ever since.

The first of these cases concerned a complex decision taken by the Commission under the ECSC Treaty involving the conditions of operation of Ruhrkohle AG. In particular, *Nold* objected to the fact that the Commission made the right to purchase coal directly from that company dependent on the conclusion of a two-year contract whereby the purchaser undertook to buy at least 6,000 metric tons a year of Ruhr coal for the domestic and small consumer sector. As a result of the Commission's decision, *Nold* lost its right to act as a direct wholesaler of Ruhr coal, as did some 60 other dealers. The company relied on a "right akin to a property right" and on the freedom to pursue a business activity. The ECJ dismissed this argument. After pointing out that under the constitutional laws of the Member States property rights "must be viewed in the light of the social function of the property and activities protected thereunder", the Court continued:

"For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested decision . . ." ¹²³

Arguably, *Hauer* is the most important of all the ECJ's judgments on the right to property. The applicant claimed that a ban on all new planting of vines imposed by a Council Regulation was in breach of her right to property. Following Advocate General Capotorti and drawing heavily on its earlier ruling in *Nold*, the Court found against her. It ruled that the contested measure could not be regarded as a deprivation of property, as the owner "remains free to dispose of it or to put it to other uses which are not prohibited".¹²⁴ Rather, it was a restriction on the use of property within the meaning of the second

121. Case 4/73, *Nold*.

122. Case 44/79, *Hauer*.

123. Case 4/73, *Nold*, paras. 14 and 15.

124. Case 44/79, *Hauer*, para 19.

paragraph of A1P1, and was therefore lawful if it was “necessary in the general interest.”¹²⁵

Finding the latter test to be insufficiently precise, the ECJ then turned to the relevant constitutional provisions of the Member States. An analysis of these laws led the Court to conclude that regard must be had to the social function of property¹²⁶ and that the contested measure “is a type of restriction which is known and accepted as lawful, in identical or similar forms, in the constitutional structure of all the Member States”.¹²⁷

Next the ECJ considered whether the restriction in issue was based on “objectives of general interest” and constituted a “disproportionate and intolerable interference with the rights of the owner impinging on the very substance of the right to property”.¹²⁸ The purpose of the contested measure was found to be two-fold: on the one hand, to establish a lasting balance on the wine market at a price level which was profitable for producers and fair to consumers and, on the other, to obtain an improvement in the quality of wines marketed.¹²⁹ Seen in this light, the measure did not entail any undue limitation on the right to property.¹³⁰ In short, the measure was justified by objectives of general interest.

A highly exceptional case in which the ECJ appeared to uphold a claim based on the right to property was *Wachauf*.¹³¹ The judgment is not entirely clear, but the most plausible reading is that a Member State was required to compensate a tenant farmer for the loss of his milk quotas (which of course he had acquired by virtue of legislation adopted under the Common Agricultural Policy), when his lease expired.¹³² In the same case, Advocate General Jacobs suggested that “that there may well be cases where the permanent loss to the tenant of the use and value of the quota on expiry of a tenancy can be viewed as a measure of expropriation.”¹³³ Arguably, the most spectacular example of a successful claim based on the right to property is *Kadi I*,¹³⁴ and a particularly

125. *Ibid.*

126. *Ibid.*, para 20. Art. 42 of the Italian Constitution also speaks of the “social function” of property.

127. *Ibid.*, para 22.

128. *Ibid.* para 23. Frequently, the ECtHR describes this as an “individual and excessive burden” (*Rosenzweig* (*supra* note 34), para 48; *Vékony* (*supra* note 34), para 32).

129. *Ibid.*, para 25.

130. *Ibid.*, para 29.

131. Case 5/88, *Wachauf*, EU:C:1989:321.

132. See Tridimas, *The General Principles of EU Law*, 2nd ed., (OUP, 2006), p. 318.

133. Case 5/88, *Wachauf*, Opinion of A.G. Jacobs, EU:C:1989:179, para 24.

134. Joined Cases C-402 & 415/05 P, *Kadi I*, paras. 354 et seq. The Court attached considerable importance to the fact that the applicant had no opportunity to put his case to the competent authorities (paras. 368 et seq.); this reflects the case law of the ECtHR (see *supra* note 66).

unusual feature of that case is that compensation had to be paid by the Union, not a Member State. But that case, concerning as it does sanctions imposed against third country nationals and companies, is clearly *sui generis*.

However, *Wachauf* and *Kadi* are very far from being typical. Let us now consider very briefly some examples of the vast majority of cases in which pleas based on property rights have failed.

A particularly harsh case is *Bostock*, where it was held that a Member State was not required to compensate a tenant farmer for the loss of his milk quotas when his lease expired.¹³⁵ The reason given by the ECJ was that milk quotas, which were allocated to the applicant pursuant to EU legislation, did not derive from his “assets or occupational activity”.¹³⁶ What makes this ruling especially surprising is that it appears to be at variance with *Wachauf*, in which the facts were essentially the same. What is more, the ruling in *Bostock* also appears to run counter to various judgments of the ECtHR such as *Tre Traktörer*:¹³⁷ milk quotas were licences to produce and market a certain quantity of milk. *Bostock* is devoid of any reference to A1P1, let alone to this case law.

Another ruling which might raise some eyebrows is *Booker Agriculture*, where a Member State was held to be under no obligation to compensate fish farmers when their stocks were destroyed in accordance with an EU Directive following an outbreak of a fish disease on their farms.¹³⁸ Amongst the reasons given by the ECJ for dismissing the action was the fact that the applicants were not deprived of the use of their farms, but were able to carry on their professional activities.¹³⁹ In addition, the Court stated that the risk of such disease was “inherent in the business of raising and selling livestock”.¹⁴⁰ Perhaps the Court was trying to convey the message that such eventualities can be covered by insurance, which may be regarded as a reasonable approach. As in *Bostock*, the Court signally failed to engage with the case law of the ECtHR on A1P1, although that is somewhat tempered by the fact that Advocate General Mischo did consider it at some length.¹⁴¹

At all events, in 2014 the ECJ confirmed its ruling in *Booker Agriculture*¹⁴² – which lends support to the view that the advent of the Charter and its

135. Case C-2/92, *Bostock*, EU:C:1994:116.

136. *Ibid.*, para 19.

137. *Tre Traktörer*, *supra* note 34; see also the other cases cited in that footnote.

138. Joined Cases C-20 & 64/00, *Booker Agriculture*.

139. *Ibid.*, para 80.

140. *Ibid.*, para 83.

141. Joined Cases C-20 & 64/00, *Booker Agriculture*, Opinion of A.G. Mischo, paras. 104 to 115.

142. Case C-56/13, *Érsekcsanádi Mezőgazdasági*, EU:C:2014:352, annotated by Lang 40 EL Rev. (2015), 89.

mutation into a binding instrument have not caused the Court to alter its approach to property rights.

The ECJ frequently finds restrictions on property rights to be justified on public interest grounds. Thus in *Alliance for Natural Health* it rejected the contention that an EU Directive on food supplements breached the manufacturers' property rights by preventing them from continuing to market their products, which did not comply with the new standards.¹⁴³ The purpose of the Directive was to protect public health and there was no evidence that it failed to do so.¹⁴⁴ Similarly, a planning restriction was upheld in *Križan* on environmental grounds.¹⁴⁵ The outcome of these rulings cannot seriously be questioned, although it might have been preferable if the ECJ had discussed the relevant ECtHR case law.

As indicated, rulings to the effect that a national or Union measure is in breach of the right to property are exceedingly rare. Does this indicate a systemic failure by the ECJ to abide by the case law of its sister court in Strasbourg? It is undeniable that the ECJ has been known to depart from the latter body of case law, and *Bostock* is a clear example. Any claim that the ECJ frequently acts in this way would be a manifest exaggeration, however.

There may be at least two explanations for this "statistical discrepancy". First, the ECJ seldom encounters such egregious infringements of the right to property as that which occurred in *Yukos*.¹⁴⁶ Second, when faced with arguments based on the right to property, the ECJ tends to be evasive and decide the case on other grounds.¹⁴⁷ Could that be because the ECJ is just as baffled as everyone else by AIP1 and the ECtHR case law relating to it?

4.4. Intellectual property: The case law

*Luksan*¹⁴⁸ concerns the existence and ownership of IP rights, and is perhaps the only judgment of the ECJ which does so in relation to fundamental rights. Then, the cases involving the balancing of IP rights with other Charter rights

143. Case C-154/04, *Alliance for Natural Health*.

144. *Ibid.*, para 129. Another example of a restriction on property being held to be justified on public health grounds is Case C-210/03, *Swedish Match*.

145. Case C-416/10, *Križan*, EU:C:2013:8.

146. *Supra* notes 18 and 72. Other examples of particularly reprehensible conduct on the part of parties to the ECHR may be seen in *Papamichalopoulos* (*supra* note 47) and *Vékony* (*supra* note 34).

147. E.g. Cases 120/86, *Mulder I*, EU:C:1988:213, para 27 (regulation invalid for breach of principle of legitimate expectation), Case C-390/12, *Pfleger*, EU:C:2014:281, paras. 57 et seq. and Case C-98/14, *Berlington Hungary*, paras. 89–91 (cases decided on the basis of Art. 56 TFEU) and Case T-496/10, *Bank Mellat*, EU:T:2013:39, para 140 (contested EU measures annulled for breach of right to effective judicial protection).

148. Case C-277/10, *Luksan*.

are explored; these constitute by far the largest category of cases. Finally, we consider how the fair balance test has been applied in two specific areas: the services of internet service providers and competition.

As we saw in section 4.1 above, the promulgation of the Charter in 2000 and its entry into force as a binding instrument in 2009 do not appear to have altered the course of the case law substantially. Accordingly, the pre-Charter case law will be considered together with the subsequent body of case law.

4.4.1. *The existence and ownership of IP rights*

Painer concerned copyright protection for a portrait photograph of the abducted schoolgirl Natascha K that had been reproduced by various newspapers.¹⁴⁹ The referring court sought guidance on the scope of that copyright under Article 1(1) of Directive 2001/29 on the harmonization of certain aspects of copyright¹⁵⁰ “in the light of” AIP1 and Article 17. However, the ECJ confined its answer to the Directive without alluding to the fundamental rights arguments.

The contrast between *Painer* and the later ruling in *Luksan* could scarcely be greater. *Luksan* arose out of a complex copyright dispute between the director and the producer of a documentary film over the ownership of two categories of copyright and related rights. The first category covered rights to exploit the film (for instance by making it available to the public). The second covered rights to receive remuneration by way of “fair compensation” for other uses (such as the right to payments arising from copyright levies paid on blank cassettes). Discussion of the Charter primarily related to the first of these rights.

Under their original agreement, the director assigned to the producer some of his exploitation rights, but not the right to make the film available to the public on digital networks or broadcast on pay TV. The contract was silent on remuneration rights. The producer then made the film available on demand on the internet and assigned the pay TV rights. The director sued, claiming he was entitled to those rights and the remuneration rights. The producer relied on provisions of Austrian copyright law, under which the producer was the initial owner of all the exploitation rights (regardless of any contract) and subject to any contract shared the remuneration rights with the director on the basis of Article 14bis(2) of the Berne Convention.¹⁵¹ The Handelsgericht Wien referred questions about the compatibility of the Austrian legislation with a

149. Case C-145/10, *Painer v. Standard Verlag*, EU:C:2011:798.

150. O.J. 2001, L 167/10.

151. Case C-277/10, *Luksan*.

raft of EU Directives, including Directive 2001/29.¹⁵² However, in its questions, the Viennese court did not refer to the Charter or indeed to fundamental rights.

In contrast, Advocate General Trstenjak gave considerable prominence to the Charter in her Opinion. In her view, the Directives in principle required that the director own the exploitation rights initially,¹⁵³ but Member States remained free to make the producer the original owner under Article 14bis(2) of the Berne Convention, on condition *inter alia* that they complied with Article 17 of the Charter (requiring that the director be guaranteed fair compensation if the producer owns the exploitation rights).¹⁵⁴ Austrian law provided no such compensation and so was clearly incompatible with Article 17 and therefore with the Directives.¹⁵⁵

As to the remuneration rights, the Advocate General merely noted that, as far as the Charter was concerned, remuneration rights provided for under Directive 2001/29 amounted to the fair compensation required by Article 17(1).¹⁵⁶ In the remainder of her Opinion, she considered whether Austrian law was compatible with the Directive, concluding that it was not because it made the director share that compensation with the producer.

The ECJ paid far less attention to the Charter.¹⁵⁷ By virtue of the Directives, the director of a film must be the initial owner of the exploitation rights and Member States were not free to make the producer the initial owner.¹⁵⁸ The Court went on to find that a national law which denied the director the exploitation rights “would be tantamount to depriving him of his lawfully acquired intellectual property rights” contrary to Article 17 of the Charter.¹⁵⁹ The Court went on to hold that national law could include a rebuttable presumption that the exploitation rights are assigned to the producer.¹⁶⁰ In other words, a default position that the producer owns the exploitation rights is acceptable, provided it could be altered by contract. Having said that, the

152. Council Directive 92/100 on rental and lending rights (O.J. 1992, L 346/61), Council Directive 93/93 harmonizing the term of protection of copyright and certain related rights (O.J. 1993, L 290/9) and Council Directive 2001/29 (*supra* note 150). At the material time, Directive 92/100 was no longer in force and had been replaced by codifying Directive 2006/115 of the Parliament and the Council (O.J. 2006, L 376/28); the Court therefore referred to the latter Directive rather than its predecessor.

153. Case C-277/10, *Luksan*, paras. 84–115.

154. Paras. 103–134.

155. Paras. 135–144.

156. Para 163.

157. It took the view that Austria was no longer competent to implement Art. 14bis(2)(b) of the Berne Convention and that there was therefore no need to consider any additional conditions (para 64).

158. Case C-277/10, *Luksan*, para 53.

159. *Ibid.*, para 70.

160. Paras. 73–87.

Court did not add the Advocate General's further requirement based on the Charter that the director receive fair compensation where there was an assignment to the producer. Agreeing with the Advocate General that the remuneration rights should all belong to the director,¹⁶¹ the Court did not discuss the Charter in that context.

The reliance placed by the Advocate General on Article 17 to require compensation to the director is controversial, and was wisely avoided by the ECJ. Indeed, it is by no means obvious why the Court mentioned the Charter at all: once it had found that the Directives required the director to be the first owner of the exploitation rights, what need was there to allude to the Charter? As Griffiths has put it, the Court's finding on Article 17 appears to be "primarily rhetorical, serving merely to bolster" its finding that the exploitation rights were vested in the director by virtue of the Directives.¹⁶² Moreover, even supposing that Article 17 was relevant at that point, why did the Court simply find that there had been an interference with the IP right without considering whether that interference could have been justified?¹⁶³

Perhaps more interesting is the fact that the ECJ did not refer to Article 17 when it was considering the rebuttable presumption of transfer. The Advocate General's approach, in essence, reflects a paternalistic concern that, if the allocation of rights is left to be decided in the contract between the parties, directors will be unable to ensure adequate compensation for their rights (e.g. in the form of additional payment at the outset or some share of the film's proceeds). The Advocate General recognized that such protection had been included in other areas of copyright law (e.g. Directive 92/100 on rental and lending rights).¹⁶⁴ A more common example is the right of employers to the rights to patent the inventions made by their employees in the course of their work. Generally speaking, employees receive no further compensation beyond their salary, but they may do so in certain cases of particular benefit.¹⁶⁵ The Advocate General rightly noted that such an approach had

161. Paras. 96 to 109. See Leistner, "Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives", 51 CML Rev. (2014), 559, 587–588.

162. Griffiths: "Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law", (2013) EL Rev., at 65, 77; (this article strongly criticizes the judgment on other grounds which are not in point here). A.G. Trstenjak had also referred to Art. 17, although she reached a somewhat different conclusion (paras. 131–144 of her Opinion in Case C-277/10, *Luksan*).

163. Griffiths, *op. cit. supra* note 162, 76.

164. Opinion in Case C-277/10, *Luksan*, para 117. On this Directive, see *supra* note 152. See also the proposals for "fair compensation" and "fair remuneration" in Arts. 12 and 14–16 of the proposal in COM(2016) 593 final (*supra* note 7).

165. For example, in the UK where the invention or patent is of "outstanding benefit" to the employer – see UK Patents Act 1977, section 40 (as amended). This has been relied on infrequently, although corresponding provisions in Germany are triggered more often.

been considered and not adopted by the legislature in relation to the point in question, but proceeded to reach the same result under Article 17.

Such issues clearly need to be considered and in some cases it may be necessary to address unequal bargaining positions with unwaivable rights to compensation, although it is far from clear why that should depend on the default allocation. In other words, if there is unequal bargaining position such that the producer will always obtain the exploitation rights in negotiation, why is it relevant whether the director will hold them in the absence of an agreement? However, it would be very unwise to try to address these issues under Article 17 save in exceptional cases, and it is welcome that the ECJ was not tempted to do so.

4.4.2. *Balancing IP against other rights and interests: The fair balance test.*

By definition, as we noticed at the outset, the right to property cannot be absolute. That is also reflected in the language of A1P1 and the case law of the ECtHR. Furthermore, ever since *Nold*, its very first case on property, the ECJ made it plain that the same holds good in EU law;¹⁶⁶ and this is clearly set out in the wording of Article 17. Moreover, in *Scarlet Extended* the Court stated in no uncertain terms that the same applies to IP under Article 17(2).¹⁶⁷

In the cases considered below, IP rights were pitted against other rights and freedoms enshrined in the Charter. In such cases, just like the ECtHR¹⁶⁸ and indeed the German Constitutional Court,¹⁶⁹ the ECJ applies a “fair balance” test.¹⁷⁰ As the Grand Chamber stated in *Sky Österreich*, “the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of

166. E.g. Case 4/73, *Nold*, para 14; Case C-491/01, *British American Tobacco*, para 149 and cases cited there.

167. See the text accompanying *supra* note 119.

168. *Supra* notes 49 to 53.

169. Thus in its judgment of 31 May 2016 in the *Kraftwerk* case (1 BvR 1585/13) that court followed the same approach <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html> with a press release in English <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-029.html>, see *infra* note 213.

170. See also, EU Human Rights Guidelines on Freedom of Expression Online and Offline adopted on 12 May 2014 by the Council of the EU <eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf>. Annex I to those Guidelines contains the following statement: “Restricting freedom of expression in order to protect intellectual property rights: Blocking access to websites on the grounds of copyright protection could constitute a disproportionate restriction of freedom of opinion and expression. Any restrictions must comply with the three part cumulative test set out in paragraph 20 of these Guidelines.” By necessary implication, this entails a balancing test.

those different rights and freedoms and a fair balance between them”.¹⁷¹ This fair balance test, which is a variant of the principle of proportionality,¹⁷² is applied whether the right to property is in conflict with an enforceable Charter right¹⁷³ or merely an aspirational “principle” within the meaning of Article 52(5) of the Charter.¹⁷⁴ This balancing test is applied in the same way to measures taken by the Member States¹⁷⁵ and to EU measures.¹⁷⁶

Just like the principle of proportionality, the fair balance test is inherently vague. Consequently, cogent reasoning of judgments is especially important if they are to be persuasive and ensure legal certainty.¹⁷⁷ Kleinlein made the same point when he wrote: “The more rational judicial balancing is, the less problematic its justification is.”¹⁷⁸ Thus a high degree of consistency between the judgments is required – and the ECJ must demonstrate that it is ensuring such consistency. The only effective way to achieve this is for the Court to compare the case in hand with important precedents and explain why it is following them (or not doing so). If this looks to many readers like a common lawyer’s approach, the answer can only be: yes it is, but that does not alter the fact that it is the only effective means of ensuring consistency in circumstances where the question is not addressed by a detailed legislative code.¹⁷⁹

The Books of Proverbs tells us: “A false balance is an abomination to the Lord; but a perfect weight is His delight.”¹⁸⁰ The present authors do not profess to know whether this body of case law has incurred the displeasure of the Almighty, but it has plainly failed to find favour with a number of mortals. One author has blamed the lack of clarity on the ECJ for using its discussion

171. Case C-283/11, *Sky Österreich*, para 60; see also Case C-275/06, *Promusicae*, paras. 65–66.

172. This is strongly suggested by the Court in *Sky Österreich*, paras. 50 et seq.

173. As in Case C-283/11, *Sky Österreich* and Case C-275/06, *Promusicae*.

174. Case C-12/11, *McDonagh*, EU:C:2013:43, paras. 59–65 on the EU’s duty under Art. 38 of the Charter to “ensure a high level of consumer protection”.

175. Case C-70/10, *Scarlet Extended*, paras. 45 et seq. and Case C-170/13, *Huawei*, para 42.

176. See the cases mentioned in *supra* notes 171 and 174.

177. Griffiths has written that “the concept of ‘fair balance’ is, without further elucidation, vacuous and unhelpful”: *op. cit. supra* note 162, at 74.

178. Kleinlein “Judicial lawmaking by judicial restraint? The potential of balancing in international economic law”, 12 GLJ (2011), 1141,1167. See generally Petersen “How to compare the length of lines to the weight of stones: Balancing and the resolution of value conflicts in constitutional law”, 14 GLJ (2013),1387.

179. Indeed, Griffiths highlights how the Court’s application of fundamental rights has resulted in “the generation of new rules in a previously unoccupied zone of the *acquis*” (*op. cit. supra* note 159), at 73. This is part of a broader concern particularly among IP academics that the Court is harmonizing copyright beyond the *acquis*, as memorably discussed by Bently, “Harmonisation by Stealth: Copyright and the ECJ”, paper presented at the Fordham Conference 2012: <fordhamipconference.com/wp-content/uploads/2010/08/Bently_Harmonisation.pdf>.

180. Proverbs 11.1.

of the Charter as “window dressing” to support other conclusions rather than to determine the case,¹⁸¹ and there is certainly some basis to that criticism. Another has complained that as a result of this approach a contested measure will be upheld unless it is manifestly imbalanced, and that the prospects of a successful challenge are therefore “rather slim”.¹⁸² No doubt, that is correct. However, that would seem to be inherent in a situation involving two competing rights: if the measure is not in absolutely perfect balance between right A and right B, then at least it serves one or other of those rights. However, it is self-evident that, where the “essence” of one of those rights is not respected,¹⁸³ then by virtue of Article 52(1) of the Charter the measure cannot stand.¹⁸⁴

In any case, what possible alternative to the fair balance test could there be?¹⁸⁵

What is more, in fairness to the Court it must be pointed out that by definition case law is a blunt instrument for deciding such complex and often multi-faceted issues. Ideally, this task should be fulfilled by the EU legislator, which is in a far better position to weigh up the issues and the interests at stake and sound out the experts; and, because the Court must show deference to EU legislation, the legislator’s choices usually withstand judicial scrutiny.¹⁸⁶ Thus the Court is only called upon to decide these issues when the other institutions have failed to do so – as has often proved to be the case in relation to IP.¹⁸⁷

181. Griffiths, *op. cit. supra* note 159, at 74.

182. Anagnostaras, “Balancing conflicting fundamental rights: The *Sky Österreich* paradigm”, (2014) *EL Rev.*, 111.

183. Thus in Case C-283/11, *Sky Österreich*, the Court asserted that the contested measure did not affect “the core content” of the Charter right concerned (para 49). By “core content” the Court no doubt means the “essence” of the right. The Court is not always very consistent in its use of terminology!

184. See section 4.2 *supra*.

185. In this context, it is also important to be mindful of the requirement in Art. 13(1) TEU that the Union “ensure the consistency...of its policies and actions”.

186. Thus Recital 1 of the Commission’s proposal for a new Directive on copyright in the information society (*supra* note 7) states *inter alia*: “A fair balance of rights and interests between right holders and users should be safeguarded.” Similarly, the Court has held that Directive 2001/29 (*supra* note 150) aims to strike a fair balance between the rights and interests of authors and those of users of protected subject-matter: Case C-201/13, *Deckmyn*, para 26 and cases cited there. See generally Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing, 2015), *passim*.

187. Needless to say, legislation is of no assistance unless it settles the point in issue; see Case C-275/06, *Promusicae*, where an array of EU legislative acts was in issue, but none of them provided a solution to the question concerned. Equally, in Case C-28/08 P, *Commission v. Bavarian Lager*, EU:C:2010:378 (which was unrelated to intellectual property), the EU

4.4.3. *The case law on balancing: General.*

In *Metronome Musik*,¹⁸⁸ the dispute related to Article 1(1) of Directive 92/100 on rental and lending rights,¹⁸⁹ which conferred on the copyright holder the right to prohibit the rental or lending of copyright works. Metronome obtained an injunction preventing Hokamp, the defendant, from continuing its business of rental of compact discs. When Hokamp challenged that injunction as an unlawful interference with its fundamental rights and in particular its freedom to pursue a trade or profession, the Landgericht Köln made a reference to the ECJ asking whether Article 1(1) was compatible with human rights. Hokamp did not claim that this provision interfered with its own IP rights. Finding that the restrictions on Hokamp's business were properly justified *inter alia* by the need to protect Metronome's IP rights, the Court upheld the validity of Article 1(1).

By contrast, in *British American Tobacco*,¹⁹⁰ the Court found against the holders of IP rights. There, various tobacco manufacturers challenged the implementation of the Tobacco Advertising Directive¹⁹¹ in the High Court of England and Wales, claiming that the Directive was invalid on a range of grounds. The Directive required large warning labels and prohibited certain descriptors, which the manufacturers claimed infringed their right to property by curtailing (and in some cases preventing) the use of their trade marks, in particular Japan Tobacco's "Mild Seven" trade mark. The case was referred to the ECJ for a preliminary ruling. Like Advocate General Geelhoed,¹⁹² the Court held that the restrictions were justified, since they aimed to ensure a high level of health protection and the restrictions were proportionate (requiring warning labels, thus reducing space available for displaying trade marks, and prohibiting the use of trade marks suggesting that a particular product is less harmful than others).¹⁹³

legislator had adopted a Directive and a Regulation which partially overlapped, without specifying with sufficient clarity the relationship between them; the Court was left to solve the conundrum.

188. Case C-200/96, *Metronome Musik*, EU:C:1998:172, para 21.

189. *Supra* note 152.

190. Case C-491/01, *British American Tobacco*.

191. *Supra* note 92.

192. Opinion of A.G. Geelhoed in Case C-491/01, *British American Tobacco*, EU:C:2002:476, paras. 264–278.

193. Case C-491/01, *British American Tobacco*, paras. 147–153. See also, Case C-547/14, *Philip Morris*, EU:C:2016:325, paras. 147 et seq., where the Court found that the restrictions on labelling cigarette packets in the new Tobacco Products Directive (Directive 2014/40 (O.J. 2014, L 127/1) struck a fair balance between public health and the freedom of expression under Art. 11 of the Charter. One of the authors (Oliver) appeared for Action on Smoking and Health (ASH), which intervened before the High Court of England and Wales in a somewhat similar case, *British American Tobacco UK Ltd and others v. Secretary of State for Health*. Green J

This ruling is scarcely surprising. The Court has always attached the greatest importance to public health.¹⁹⁴ As we saw above, public health has been held to prevail over property rights in other cases.¹⁹⁵ In *BAT*, the Court did not allude to the Charter, which had only been proclaimed two years earlier and was not yet binding.¹⁹⁶ Article 35 of the Charter, according to which a high level of health care shall “be assured in all the Union’s policies and activities”, bears all the hallmarks of an aspirational “principle” within the meaning of Article 52(5) rather than an enforceable right. However, the substance of Article 35 is also to be found in Articles 9 and 168(1) TFEU.

In *Laserdisken*,¹⁹⁷ the Court ruled in favour of the rights holders, as it had in *Metronome Musik*. The case concerned Article 4(2) of the copyright Directive 2001/29,¹⁹⁸ which provides for the exhaustion of copyright within the EU. *Laserdisken* contested the validity of that provision, arguing that copyright should be exhausted even where goods had only been placed on the market in a third country. It claimed *inter alia* that this amounted to a breach of Article 10 ECHR on the freedom of expression, which involves the right to impart and receive information. (Art. 11 Charter, which was not referred to in the case, also covers both rights in express terms.)

The ECJ dismissed both branches of this contention. As to the right to impart information (generally known as “speaker’s rights”), it pointed out that the copyright owner could decide freely where to place his products on the market, and that his freedom of expression was therefore not impaired in any way.¹⁹⁹ That finding appears unassailable. In contrast, as to the right to receive

rejected the claimants’ argument to the effect that the Standardised Packaging of Tobacco Products Regulations 2015, which impose further restrictions on the use of trade marks on cigarette packets, contravene a number of provisions of EU law as well as A1P1 [2016] EWHC 1169 (Admin) <www.judiciary.gov.uk/judgments/british-american-tobacco-others-v-department-of-health>. The appeal lodged by three of the claimants was subsequently dismissed by the Court of Appeal [2016] EWCA Civ. 1182.

194. Thus the Court has consistently held that public health is the most important of all the grounds of justification set out in Art. 36 TFEU: e.g. Case 104/75, *De Peijper*, EU:C:1976:67, para 15; Case C-473/98, *Toolex*, EU:C:2000:379, para 38 and Case C-322/01, *DocMorris* EU:C:2003:664, para 103.

195. See Case C-154/04, *Alliance for Natural Health* and Case C-210/03, *Swedish Match*.

196. In para 259, the A.G. mentioned Art. 17 in passing, but preferred to base his opinion on respect for pre-Charter fundamental rights. It was not until 2006 that the Court began referring to the Charter (see note 97 *supra*). In any case, as mentioned in section 4.1 *supra*, the transformation of the Charter into a binding instrument on the entry into force of the Treaty of Lisbon does not appear to have altered the substance of the Court’s case law.

197. Case C-479/04, *Laserdisken*, EU:C:2006:549.

198. Directive 2001/29 on the harmonization of certain aspects of copyright, cited *supra* note 150.

199. Case C-479/04, *Laserdisken*, para 63.

information (“hearer’s rights”), this claim was rejected in the most laconic terms: the Court declared that the contested provision was justified by the need to protect IP, without any further elaboration.²⁰⁰ While the Court’s reasoning is indeed woefully inadequate, it does not follow that this result is incorrect. The policy choice had been made after extensive discussion by the EU legislative bodies and, as Advocate General Sharpston noted, while it was legitimate for the claimant to disagree with that choice, “the Court is not the appropriate forum in which to pursue the point”.²⁰¹

Another dispute arose in *DR and TV2 Danmark*,²⁰² where the Court adopted a broad interpretation of the provision in Directive 2001/29 which empowered Member States to exempt from copyright ephemeral recordings “made by broadcasting organizations by means of their own facilities and for their own broadcasts”. This exception was held to extend to recordings made by a third party pursuant to a subcontract with the broadcaster.²⁰³ The Court added that, thanks to this broad interpretation, broadcasting organizations would enjoy greater freedom to conduct a business pursuant to Article 16 of the Charter without adversely affecting “the substance of copyright”.²⁰⁴ Given that the contested measure only involved a minor incursion into the broadcasters’ copyright, that finding is scarcely surprising.

The judgment contains no express mention of the right to property. However, the use of the term “the substance of copyright” may be seen as an oblique reference to Article 52(1) of the Charter. As we saw in section 4.2 above, Article 52(1) provides that restrictions on the rights and freedom recognized in that instrument must respect the “essence” of those rights and freedoms; and the words “essence” and “substance” appear to be used interchangeably in this context.²⁰⁵

200. *Ibid.*, paras. 64 to 65. For some forthright criticism of this passage, see Mylly “The Constitutionalisation of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU” in *Research Handbook on Human Rights and Intellectual Property* (Elgar, 2015), pp. 103, 110.

201. Opinion in Case C-479/04, *Laserdisken*, EU:C:2006:292, para 57. For the policy debates before the EU legislative branches, see Stothers, *Parallel Trade in Europe* (Hart Publishing, 2007), pp. 355–361. Legislation does not always fall in favour of extending IP rights. Consider, for instance, the weight given to human dignity in interpreting the Biotechnology Directive 98/44 (O.J. 1998, L 213/13) to restrict patent rights in Case C-30/10, *Brüstle v. Greenpeace*, EU:C:2011:669, annotated by Bonadio in (2012) *European Intellectual Property Review* (EIPR), 433–443. That was notwithstanding the failed challenge to the same Directive on grounds *inter alia* of human dignity in Case C-377/98, *Netherlands v. European Parliament and Council*, EU:C:2001:523.

202. Case C-510/10, *DR and TV2 Danmark*.

203. Paras. 38–56.

204. Para 57.

205. See *supra* note 113.

In *Sky Österreich*,²⁰⁶ the Court was asked to consider the validity of a provision first introduced in Directive 2007/65,²⁰⁷ which requires exclusive broadcasters of events of high interest to the public to provide access on a fair, reasonable and non-discriminatory basis to other broadcasters for short news reports, with any compensation not to exceed the additional costs in providing access to the signal. This legislation was subsequently replaced by Directive 2010/13 on audiovisual media services,²⁰⁸ the relevant provision being Article 15(6). The Austrian media authority granted Österreichischer Rundfunk, the country's public service broadcaster, the right to use short extracts from Sky's coverage of Europa League football matches effectively free of charge. Sky contested this decision before the Austrian courts. The referring court asked the ECJ whether such a decision breached A1P1 and Articles 16 and 17 of the Charter. Although Article 16 is not our concern here, a brief mention of the Court's ruling on that provision is in order, since it indirectly illustrates the Court's approach to Article 17; as mentioned earlier, the two provisions are closely linked.

Advocate General Bot found that Article 15(6) of the Directive interfered with the right to property. Nevertheless, after a thorough examination of the issues, he concluded that the Union legislation had "struck an acceptable compromise" between that right and the right to receive information which, according to Article 10 ECHR and Article 11(1) of the Charter, is inherent in the freedom of expression.²⁰⁹ He also referred to Article 11(2) of the Charter, which provides that pluralism of the media must be respected. Similarly, he found that Article 16 of the Charter was engaged, but that the interference with the right enshrined in that provision was justified.

The Court sitting in Grand Chamber also rejected Sky's claim, albeit on different grounds. In a key passage it asserted:

"The protection granted by [Article 17] does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity ..., but applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit."²¹⁰

206. Case C-283/11, *Sky Österreich*.

207. Directive 2007/65 of the European Parliament and the Council (O.J. 2007, L 332/27) amending Council Directive 89/552 on television broadcasting services (O.J. 1989, L 298/23).

208. Directive 2010/13 of the European Parliament and the Council on audiovisual media services, O.J. 2010, L 95/1.

209. Opinion of A.G. Bot in Case C-283/11, *Sky Österreich*, EU:C:2012:341, para 76.

210. Case C-283/11, *Sky Österreich*, para 34, citing Joined Cases C-120 & 121/06 P, *FIAMM v. Council and Commission*, EU:C:2008:476; see also Case C-398/13P, *Inuit*.

The Court accepted that the contractually based exclusive broadcasting rights had an asset value, but held that they could not create an “established legal position”, given that the contract was concluded after Directive 2007/65 had entered into force. Accordingly, Article 17 was not engaged.²¹¹ In this part of its judgment, the Court did not allude to the right to receive information pursuant to Article 11(1) and (2) of the Charter, as the Advocate General had done.

In addition, the Court found that Article 15(6) of the Directive constituted a restriction on the freedom to conduct a business under Article 16. However, having regard to Article 11(1) and (2) of the Charter and the limited nature of the restriction (notably because the extracts concerned could not exceed ninety seconds), the measure was held to be justified.²¹² As in *DR and TV2 Danmark*, the contested measure only involved a minor interference with copyright.²¹³

*Deckmyn*²¹⁴ involved a conflict between the right to IP and the freedom of expression in a context which is fortunately somewhat unusual. It concerned a calendar parodying a well-known comic book produced by a Mr Vandersteen, and introducing a blatantly racist element which was absent from the original. Mr Deckmyn, who edited and distributed the calendar, was a member of Vlaams Belang, the Flemish far-right party. The heirs of Mr Vandersteen brought an action for breach of copyright. Article 5(3)(k) of Directive 2001/29²¹⁵ empowers (but does not require) Member States to authorize publications which would otherwise be an infringement of copyright “for the purposes of...parody”. The Belgian court sought clarification of the meaning of “parody”.

211. Case C-283/11, *Sky Österreich*, paras. 35–40.

212. *Ibid.*, paras. 51–68. On the Court’s reasoning on Art. 16, see Oliver, *op. cit. supra* note 108. See also Case C-201/11P, *Union of European Football Associations (UEFA) v. Commission*, EU:C:2013:519. In related cases, FIFA challenged the inclusion of the World Cup on the British and Belgian lists with the same result: Cases C-204/11 & 205/11 P, *Fédération Internationale de Football Association (FIFA) v. Commission*, EU:C:2013:477.

213. Similarly, in *Kraftwerk* (*supra* note 169), the German Constitutional Court applied a fair balance test when considering whether the Basic Law (“Grundgesetz” or “GG”) permitted the use of “samples” in composing hip-hop. In this case, a “sample” consisting of a two-second sequence of rhythms from a soundtrack written by another composer had been adapted with only minor changes and blended with other pieces of music to create a new track – without the consent of the copyright holder. Regarding this as only a minor encroachment on copyright which entailed no real economic harm to the holder, the Court held that the right to property under Art. 14 GG was outweighed by the right to artistic freedom under Art. 5(3) GG.

214. Case C-201/13, *Deckmyn*.

215. *Supra* note 150.

Following Advocate General Cruz Villalón,²¹⁶ the ECJ held that, when applying the exception relating to parody, the courts must strike a fair balance between the right of protection of copyright and the freedom of expression. In considering the latter right, regard must be had to the principle of non-discrimination based on race, colour and ethnic origin enshrined *inter alia* in Article 21(1) of the Charter. Accordingly, if the referring court found that the drawing conveyed a discriminatory (i.e. racist) message, the copyright owners had “in principle” a “legitimate interest in ensuring that the work protected by copyright is not associated with such a message”.²¹⁷

The facts of *Coty Germany* were very different.²¹⁸ Coty, which owned a Community trade mark in a perfume called Davidoff Hot Water, bought a counterfeit bottle of perfume unlawfully bearing that trade mark as a trap purchase on an internet auction site. It was required to make payment to a bank account and it then sought the name and address of the owner of that account from the bank under a request for information under Directive 2004/48/EC on the enforcement of IP rights.²¹⁹ The bank refused under Germany’s banking secrecy laws. The Bundesgerichtshof sought guidance from the ECJ as to whether such laws were compatible with the Directive. The preliminary question did not refer to the Charter, but the Court noted that the question involved the balancing of the right to IP with the right to the protection of personal data, and discussed the balance required in the internet service provider cases, which will be discussed immediately below. It then held that, if indeed the German banking secrecy law prohibited supply of the information in all cases, that would not be a fair balance and would be precluded by the Directive. Regrettably, however, the Court provided no indication on how the balance should be struck, thereby failing to provide legal certainty.

Finally, as mentioned earlier, no case on moral rights has ever come before the ECJ. If it does, the Court might legitimately be tempted to attach greater importance to such rights than to other IP rights, for the reasons explained in section 3.1 above.

216. Opinion of A.G. Cruz Villalón in Case C-201/13, *Deckmyn*, EU:C:2014:458, paras. 84 to 88.

217. Case C-201/13, *Deckmyn*, para 31. In ECtHR, *Garaudy v. France*, Appl. No. 65831/01, decision of 24 June 2003, the ECtHR dismissed as inadmissible an action claiming that, by convicting the applicant of various crimes of Holocaust denial, the defendant State had breached Art. 10 ECHR on the freedom of expression. The ECtHR held that Holocaust denial was an abuse of rights within the meaning of Art. 17 ECHR. See also ECtHR, *M’Bala M’Bala v. France*, Appl. No. 25239/13, decision of 20 Oct. 2015. These cases were not mentioned in the A.G.’s Opinion or the judgment.

218. Case C-580/13, *Coty Germany*.

219. O.J. 2004, L 157/45, and corrigendum O.J. 2004, L 195/16.

The cases discussed in this section balanced rather different aspects of IP against other rights. While three were decided against the IP owners (*BAT, DR and TV2 Danmark* and *Sky Österreich*), it is difficult to discern much by way of a guiding principle, in part because of the fact-specific nature of the assessment and the very different facts of the cases. Equally, beyond broad principles there was limited guidance from the ECHR case law.

4.4.4. *Balancing: Internet service providers.*

The Court of Justice has delivered a raft of judgments in recent years relating to the widespread controversy surrounding unlawful downloading of music or other material on the internet. Given the homogeneity of the subject matter, this body of case law provides a good test of the consistency and predictability of the Court's approach in this field (albeit again with limited assistance from the ECtHR).

In *Promusicae v. Telefónica*,²²⁰ the collecting society Promusicae sought disclosure from the internet service provider Telefónica of the identities and addresses of its users which, Promusicae claimed, had been engaged in copyright infringement by unlawful sharing of songs on the peer-to-peer network KaZaA. The Juzgado de lo Mercantil No 5 de Madrid made a reference to the ECJ asking in effect whether Telefónica could be required to produce this data. A large number of provisions of EU law were in play: not only Articles 7 and 8 of the Charter (on the rights to privacy and data protection respectively) and Articles 17(2) and 47 (on the right to access to justice), but also a number of Directives none of which expressly addressed this issue.²²¹

The Grand Chamber held that in such a situation the Member States were entitled to impose an obligation to divulge personal data of the kind requested, but were not required to do so. Nevertheless, the Court did not give the Member States a completely free rein in this matter: it insisted that, when implementing and applying the directives concerned, they must allow “a fair balance between the various fundamental rights protected by the Community legal order”.²²² However, the Court failed to give any guidance as to how this balance was to be achieved. Given the inherently vague nature of the

220. Case C-275/06, *Promusicae*. See similarly the Order in Case C-557/07, *LSG v. Tele2*, EU:C:2009:107, paras. 24–29.

221. Directives 95/46 on data protection (O.J. 1995, L 281/31), 2000/31 on electronic commerce (O.J. 2000, L 178/1), 2001/29 (*supra* note 150) and 2004/48 (*supra* note 219). The subsequent cases on internet service providers also involved a large number of these Directives.

222. Para 68. For more detailed analyses of this case, see the case note by Groussot, (2008) CML Rev. 1745 and Oliver, “The protection of privacy in the economic sphere before the European Court of Justice”, 46 CML Rev. (2009), 1443, 1466–1469.

balancing exercise, this judgment can scarcely have been of much assistance to the national court. That said, it would have been foolhardy for the Court to be overprescriptive on the first occasion it considered this issue.

Subsequently, in *Bonnier Audio*,²²³ the Court was asked to go into a little more detail. It gave its blessing to a Swedish law on the basis that it allowed the same type of data to be divulged in the same circumstances on the following conditions: for an order for disclosure of the data in question to be made, there had to be clear evidence of an infringement of an IP right; the information had to be capable of facilitating the investigation into an infringement of copyright or impairment of such a right; and the reasons for the measure must outweigh the nuisance or other harm which the measure might entail for the person affected by it or for some other conflicting interest. This ruling was based in particular on the Data Retention Directive.²²⁴

Whether *Promusicae* and *Bonnier* would be decided in the same way today, now that the Court has taken a more robust approach to data protection in *Digital Rights Ireland* (“DRI”)²²⁵ and *Schrems*,²²⁶ is an open question. It should be recalled that in *DRI* the Court held the Data Retention Directive to be invalid in its entirety. Having said that, courts are likely to be sympathetic to proportionate disclosure where there is clear evidence of infringement and the data is necessary to address that.

*Scarlet Extended*²²⁷ has the distinction of being the very first case in which a measure has been found incompatible with the freedom to conduct a business under Article 16 of the Charter. Here, the burden placed on the internet service provider Scarlet Extended was rather more significant than merely disclosing customer data. Scarlet Extended had refused to install a system for filtering electronic systems that used peer-to-peer file-sharing software, so as to prevent copyright infringement. SABAM, the Belgian collecting society, obtained an injunction against Scarlet Extended requiring it to install such a system, but the Belgian court of appeal made a reference to the ECJ. After pointing out that the right enshrined in Article 17(2) of the Charter right is not inviolable, the Court followed *Promusicae*, finding that the right to IP must be balanced against other fundamental rights, such as the freedom to conduct a business as an internet service provider and the freedom of its customers to protection of their personal data and their freedom to receive or impart information, safeguarded by Articles 8 and 11 respectively. In the key passage of the ruling, the Court stated:

223. Case C-461/10, *Bonnier Audio*, EU:C:2012:219.

224. Directive 2006/24 of the European Parliament and the Council (O.J. 2006, L 105/54).

225. Case C-293/12, *Digital Rights Ireland (DRI)*, EU:C:2014:238.

226. Case C-362/14, *Schrems*.

227. Case C-70/10, *Scarlet Extended*.

“In the present case, the injunction requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those right-holders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced.

Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense. ...”²²⁸

Consequently, the Court found that the injunction failed to strike a fair balance.²²⁹

*UPC Telekabel Wien*²³⁰ concerned yet another attempt by a copyright owner to force an internet service provider to block access to websites which made available unauthorized copies of their copyright works, in this case films. The Handelsgericht Wien had required the internet service provider to forbid its customers from accessing the websites, in particular by blocking access to the domain name used by the website and any internet protocol addresses known to be used by the website. On appeal by the provider, complaining about the cost and limited effectiveness of the blocking means, the Oberlandesgericht Wien maintained the general injunction but left the means to the provider. On further appeal, the Oberster Gerichtshof asked *inter alia* whether such a general injunction was compatible with Union law, in particular with the necessary balance between the parties’ fundamental rights, as long as the provider could avoid a penalty for breach of the injunction by taking all reasonable measures. If not, it asked whether costly means which could be easily circumvented might be ordered. The key passage of the judgment, which deserves to be quoted in full, reads as follows:

“...the measures which are taken by the addressee of an injunction, such as that at issue in the main proceedings, when implementing that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorized access to the protected subject-matter or, at

228. *Ibid.*, paras. 47 and 48. At the end of para 48, the Court also referred to Art. 3(1) of Directive 2004/48 (*supra* note 219) according to which measures intended to ensure the respect of IP rights must not be unnecessarily complicated or costly.

229. *Ibid.*, para 49. Similarly, see Case C-360/10, *SABAM v. Netlog*, where the Court followed the same balancing exercise in relation to a social networking site and again found that an injunction requiring a filtering system failed to strike a fair balance.

230. Case C-314/12, *UPC Telekabel Wien*.

least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right.

Consequently, even though the measures taken when implementing an injunction such as that at issue...are not capable of leading, in some circumstances, to a complete cessation of the infringements of the intellectual property right, they cannot however be considered to be incompatible with the requirement that a fair balance be found, in accordance with Article 52(1), *in fine*, of the Charter, between all applicable fundamental rights, provided that (i) they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that they have the effect of preventing unauthorized access to protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right.”²³¹

Again, the Court sought to set the general parameters for the balancing test without overstepping its role and deciding the national case. On this it can hardly be faulted. However, it appears to have gone to the other extreme: as in *Promusicae*, this judgment can scarcely have given much guidance to the referring national court. Wordy though the passage is, it is short on specifics.²³² However, in the context of a reference which only asked whether such a general injunction to take all reasonable measures was permitted, it is hardly surprising the Court did not seek to provide more detailed guidance.

Finally, in *McFadden v. Sony Music*,²³³ the plaintiff in the main case ran a business selling and renting lighting and sound systems for events. In addition, he provided an anonymous wi-fi internet network in the vicinity of his business, so as to draw the attention of shop customers, as well as passers-by and neighbours to his company. The Bundesgerichtshof had previously held that an individual operating a wi-fi network with internet access may be liable for indirect copyright infringement if the network is not secured with a password and a third party uses it to infringe copyright. Mr McFadden, a member of the Pirate Party, intentionally did not protect his network, which he called “freiheitstattangst.de” (Freedom not Fear) after a demonstration against restrictions on data privacy. A musical work was

231. Paras. 62–63.

232. Mylly, *op. cit. supra* note 200, p. 121.

233. Case C-484/14, *McFadden*.

unlawfully offered for downloading using that network and the copyright owner wrote to Mr McFadden, who sought negative declaratory relief; the copyright owner counterclaimed for infringement. As with the previous cases discussed in this section, many EU directives were in issue; but it is not possible to consider them here.

On a reference for a preliminary ruling, Advocate General Szpunar found once again that Article 17(2) had to be balanced against other provisions of the Charter, *in casu* Articles 11 (freedom of expression) and 16. He concluded that this balancing exercise could not result in the imposition of an obligation to terminate the internet connection, password-protect the wi-fi network or monitor all traffic passing through it.²³⁴

The Court agreed as to termination or monitoring,²³⁵ but regarded the requirement to password-protect as a reasonable balance, provided that users could not act anonymously but must reveal their identity to obtain a password. Perhaps responding to some of the criticism of its previous judgments, the Court devoted some ten paragraphs to explaining the balancing exercise and setting out five factors considered: the limited restriction on Mr McFadden; the limited restriction on those using his network generally; the limited restriction on those using his network who were not infringing copyright; the dissuasive effect on those infringing copyright; and the absence of any other measure which would effectively protect copyright.

In this line of cases, the Court has made it very clear that a balancing exercise must take place. In the initial decisions, very little guidance was given on what factors must be taken into consideration, but more recently the Court has been more confident in providing its view on key factors, not only in demanding that national courts consider the balance (as in *Scarlet Extended* and in a different field *Coty Germany*) but also in providing nuanced details on those factors which are to be balanced (as in *McFadden*). The outcome of the balance is still highly unpredictable, as can be seen from disagreements between advocates general and the Court (e.g. in *McFadden*). However, the Court's more specific ruling in the latter case is encouraging.

4.4.5. *Balancing: Competition.*

The Court has a longer history of balancing the demands of IP with those of competition law, and the comparison with the balance against other fundamental rights is instructive here. A similar tension has arisen in these

234. Opinion of A.G. Szpunar in Case C-484/14, *McFadden*, EU:C:2016:170, paras. 111 et seq.

235. Here the Court referred (in para 98) to its earlier judgment in Case C-580/13, *Coty Germany*.

cases to that we see today in those relating to internet service providers.²³⁶ Broad tests laid down initially come under intense scrutiny in subsequent proceedings and the ECJ is pressed to provide ever greater detail in its answers. This generally appears uncomfortable territory for both the ECJ and national courts, with the ECJ unable to obtain a broad perspective of the issues before being asked to act quasi-legislatively.

Since the judgment in *Magill*²³⁷ and most of its progeny are well known and not very recent, they will be considered only briefly; instead, we concentrate on the recent ruling in *Huawei*,²³⁸ which raises novel and important issues and merits more detailed consideration.

Magill concerned the publication of weekly television guides. The two plaintiff broadcasters permitted the press to publish their programme schedules on a daily basis and authorized the publication of highlights of the week and published their own weekly guides. What the three broadcasters would not do was to allow the publication of a comprehensive multi-channel weekly schedule. No such schedule was available on the Irish market at all. When *Magill TV Guide Ltd* attempted to publish a guide containing such a schedule, it was prevented from doing so by the broadcasters enforcing their copyright in the listings. *Magill* lodged a complaint with the Commission, which found that this constituted a breach of what is now Article 102 TFEU, even though the broadcasters owned the copyright in the programme listings. Both the General Court and the ECJ upheld the Commission's decision.

Citing its earlier judgment in *Volvo v. Veng*,²³⁹ the ECJ found that a refusal to grant a licence cannot in itself constitute an abuse of a dominant position, but that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct".²⁴⁰ The Court accepted that the circumstances relied upon by the Court of First Instance were exceptional: (i) the refusal prevented the appearance of a new product which the broadcasters did not offer and for which there was potential consumer demand; (ii) the broadcasters reserved to themselves the secondary market of weekly television guides, excluding all competition by denying access to the basic information indispensable for a multi-channel guide; and (iii) there was

236. Analogous problems have arisen in other areas of IP law, such as the rules on repackaging of trade marked pharmaceuticals (see Stothers in Oliver et al. (Eds.), *Oliver on Free Movement of Goods in the European Union*, 5th ed. (Hart Publishing, 2010), paras. 9.52–9.60) and Supplementary Protection Certificates (see e.g. the criticism of the English High Court in *Actavis v. Sanofi* [2012] EWHC 2545 (Pat) at <www.bailii.org/ew/cases/EWHC/Patents/2012/2545.html>).

237. Joined Cases C-241 & 242/91 P, *RTE and ITP v. Commission (Magill)*, EU:C:1995:98.

238. Case C-170/13, *Huawei*.

239. Case 238/87, *Volvo v. Veng*, EU:C:1988:477, paras. 7–9.

240. Joined Cases C-241 & 242/91 P, *Magill*, paras. 49–50.

no justification for such refusal.²⁴¹ In addition, the data subject to copyright merely covered the factual listings of the broadcasts, and the copyright protection was therefore “difficult to justify in terms of rewarding or providing an incentive for creative effort”.²⁴²

Despite the Court’s assertion in *Magill* that an undertaking could only be required to grant a licence in an exceptional case and its demonstration that the facts of that case were exceptional, the ruling fuelled widespread concern that Article 102 would be used to erode IP rights extensively.²⁴³ No doubt, that was in large part because the Court did not appear to attach any particular importance to IP – in contrast with *Volvo v. Veng*, where the Court had held that “the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of its exclusive rights”.²⁴⁴

To some extent, Advocate General Jacobs’ powerful Opinion in *Bronner*²⁴⁵ and the Court’s judgment on the same lines dispelled this concern. In that case, which did not concern IP, the group with by far the largest share of the newspaper market in Austria refused to allow a smaller competitor, Oscar Bronner, to use its home-delivery service. Oscar Bronner claimed the right to use that service under the essential facilities doctrine. In its reference for a preliminary ruling, the national court asked whether such a refusal constituted an abuse of a dominant position.

The Advocate General gave three reasons why the essential facilities doctrine should be construed narrowly, the first two of which resonate strongly with the discussions above. First, “the right to choose one’s trading partners and freely to dispose of one’s property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification”.²⁴⁶ Although the case predates the Charter, this is a clear reference to principles which are now enshrined in Articles 16 and 17 of the Charter.²⁴⁷ One of the components of the freedom to conduct a business is freedom of contract.²⁴⁸ Second, “the justification in terms of competition policy for interfering with a dominant

241. Paras. 51–57.

242. Opinion of A.G. Jacobs in Case C-7/97, *Oscar Bronner*, EU:C:1998:264, para 63.

243. See the contrasting discussions in Geradin, (2004) CML Rev. 1519 and Ahlborn, Evans and Padilla (2004) *Fordham International Law Journal* 1109.

244. Case 238/87, *Volvo v. Veng*, para 8.

245. Opinion of A.G. Jacobs in Case C-7/97, *Oscar Bronner*.

246. Opinion in Case C-7/97, *Bronner*, para 56.

247. On Art. 16, see *supra* note 104.

248. See the Explanations on Art. 16 (*supra* note 101).

undertaking's freedom to contract often requires a careful balancing or conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities it has developed for the purpose of its business.”²⁴⁹ Third, “in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article [102] is to prevent distortions of competition...rather than to protect the position of particular competitors.”²⁵⁰ Finally, he stressed the exceptional circumstances of *Magill* in somewhat different terms from the Court itself.²⁵¹

In the light of all these considerations, he urged the Court to rule against Oscar Bronner – which it duly did. Although the case did not concern IP, the importance placed by the Advocate General on balancing interests gave some assurance that IP would be respected and the “exceptional” would not become the norm.

In the subsequent ruling in *IMS Health*,²⁵² the ECJ was asked a broad preliminary question on whether the particular circumstances of the case were abusive; it responded by focusing on the particular circumstances of *Magill*, expanding the concept of a “secondary market” in doing so.²⁵³ Similarly, in *Microsoft*,²⁵⁴ the Court appeared reluctant to consider whether other circumstances could be “exceptional,” but instead preferred to find that the facts of the case before it were analogous to those in *Magill*. This required a very distorted approach to the meaning of “new product”.²⁵⁵ This caution in determining when circumstances might be “exceptional” indicates the Court's concern not to move too rapidly when seeking to achieve the appropriate balance. However, retaining the existing terminology which is not readily applicable to the facts provides little certainty to business, consumers or the national court.

More broadly, however, the widely perceived risk that *Magill* would be the first step towards a broad incursion into IP rights by competition law appears to have been averted, although concerns remain in the pharmaceutical sector.²⁵⁶

249. Opinion in Case C-7/97, *Bronner*, para 57.

250. *Ibid.*, para 58.

251. *Ibid.*, para 63.

252. Case C-418/01, *IMS Health*, EU:C:2004:257.

253. Paras. 40–47.

254. Case T-201/04, *Microsoft*, EU:T:2007:289, in particular paras. 336 and 712.

255. The strained reasoning concluding in para 665.

256. In particular, in this sector there is a concern that competition authorities tend to interfere with intellectual property rights on the basis of legal analysis based on a lack of understanding of the IP system, such as the suggestion that a divisional patent application ought to lead to the launch of a new product rather than merely providing protection over a different

We can now turn to *Huawei v. ZTE*, a preliminary ruling where the Court was explicitly called upon to balance the rules on free competition (more precisely Art. 102 TFEU) against Articles 17(2) and 47 of the Charter.

Huawei, a multinational company active in telecommunications, owned a European patent which it notified to the European Telecommunications Standards Institute (ETSI) as being essential to a standard (hence a standard-essential patent or SEP), giving an irrevocable undertaking to the effect that it was prepared to grant licences on “fair, reasonable and non-discriminatory” (FRAND) terms. ZTE marketed products complying with the standard. After negotiations between Huawei and ZTE for the grant of a licence had broken down, Huawei brought an action in the German courts seeking an injunction prohibiting the infringement, the rendering of accounts, the recall of products and an award of damages. In its reference for a preliminary ruling, the Düsseldorf court asked whether bringing such an action was an abuse of a dominant position.

Taking its cue from Advocate General Wathelet,²⁵⁷ the ECJ pointed out two key differences between this case and the earlier cases just discussed.²⁵⁸ First, the patent concerned was essential to a standard established by a standardization body. Second, the proprietor had given an irrevocable undertaking to grant a licence on FRAND terms.

The Court also reiterated its ruling in the earlier cases to the effect that the exercise of an IP right could not in itself be an abuse of a dominant position.²⁵⁹ It also noted the “need for a high level of protection of intellectual property rights”, from which it followed that “in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings” so that anyone other than the proprietor is required to obtain a licence prior to any use.²⁶⁰ Accordingly, balancing these considerations, the Court held that the proprietor of an SEP is precluded by Article 102 TFEU from bringing an action for a prohibitory injunction or for the recall of products against the alleged infringer, provided that party negotiates in good faith to agree a licence (the proprietor can still seek damages or an account of profits for infringing use).²⁶¹ In essence, both parties are required to cooperate in good faith with a

aspect of an existing product. See Stothers and van Kerckhove, “Is Winter Coming? The competition chill continues in *Italian Antitrust Authority v. Pfizer (Xalatan)*”, (2014) EIPR, 729.

257. Opinion of A.G. Wathelet in Case C-170/13, *Huawei*, EU:C:2014:2391, para 70.

258. Case C-170/13, *Huawei*, paras. 48–51.

259. *Ibid.*, para 46, referring to *Volvo v. Veng and Magill*.

260. Para 58.

261. Paras. 60 and 74–75. For a discussion of the broader context, see Jones, “Standard-essential patents: Frand commitments, injunctions and the smartphone wars”, (2014) *European Competition Journal*, 1–36.

view to agreeing the terms of a FRAND licence. On this point, the Court set out in some detail the various procedural steps to be taken (e.g. before commencing legal proceedings, the proprietor must first alert the alleged infringer, providing certain information specified by the Court). As long as the alleged infringer follows these steps, the patent proprietor cannot exercise his usual rights to exclude that party from the market but must be content with monetary compensation by way of damages or royalties.

One practitioner is reported to have criticized this ruling on the grounds that “a judge-made rule that imposes procedural obligations on each party is essentially undemocratic”, adding that such matters should be determined by legislation.²⁶² Undoubtedly, the ECJ should be loath to intervene in matters of judicial procedure in the Member States; and equally clearly such matters are undoubtedly best left to the legislators. Nevertheless, it is submitted that this criticism overlooks the fact that the Court was required to decide a constitutional issue in the absence of a detailed legislative framework and could not shy away from such issues. In stark contrast to the barrister just mentioned, Körber warmly welcomes this ruling on the basis that: “Even though some issues remain unresolved, the decision addresses the main problems and comes to well-balanced results that take into consideration the interest of the SEP owners as well as those of the makers, and that ensure the functioning of intellectual property law as well as the freedom of competition.”²⁶³ We agree with Körber: in our view, this judgment does achieve a fair balance between the right to property under Article 17 of the Charter and the right of access to the courts under Article 47, although as with the internet service provider case law it leaves several issues for future calibration.

5. Is IP treated differently from other forms of property?

The controversial ruling in *Luksan* creates the impression that the ECJ favours IP over other forms of property. However, what appears at first sight to be an extremely rare finding by the Court of a breach of Article 17 – even though the conduct of the Member State concerned can scarcely be described as egregious – turns out on closer examination to be nothing of the

262. *Global Competition Review* 12 July 2016, referring to a speech by barrister O’Donoghue <globalcompetitionreview.com/news/article/41473/huawei-sep-ruling-essentially-undemocratic-uk-barrister-says>.

263. Körber, “Abuse of a dominant position by legal actions of owners of standard-essential patents”, 53 CML Rev. (2016) 1107, 1116.

sort. In reality, Article 17 intruded into this case where it had no rightful place. Thus *Luksan* may be regarded as something of a rogue case in this context.

As with other forms of property, the right to IP tends to be raised in relatively unusual cases which involve either balancing this right against one or more other fundamental rights or a determination of particularly thorny issues within IP itself. Neither type of case is particularly well suited to the straitjacket of proceedings in the ECtHR, which is not used to considering IP and so runs the risk of excessive deference to national courts or deciding on the basis of an incomplete understanding. At the same time, in the broader discussions before the ECJ the property rights issues are frequently not determinative, as seen particularly in *Luksan* but also in the cases on internet service providers.

Accordingly, IP does not appear to be treated differently from other forms of property. While the courts generally respect both categories of property, they have relatively little hesitation in limiting the right to property where they regard this as necessary to give appropriate weight to other fundamental rights.

6. Conclusion

At the outset, we noticed how crucial IP is for the modern economy. Consequently, one can only welcome the fact that, in the body of case law considered here, the ECJ has attached considerable importance to protecting it. At the same time, like the right to other forms of property, the right to IP is not absolute, but must be weighed against other Charter rights and other interests; and in cases such as *Magill* and *Scarlet Extended* the Court has been robust in finding that IP cannot prevail, where such a conclusion is appropriate. Indeed, Mylly's lament that "references to fundamental rights have often strengthened already strong IP protection"²⁶⁴ seems hard to square with a long line of cases in which precisely the opposite occurred: *Magill*, *BAT*, *Scarlet Extended*, *SABAM*, *DR and TV2 Danmark*, *Sky Österreich*, *Deckmyn* and *Philip Morris* are clear examples.

Mylly is on firmer ground when he states that "references to fundamental rights have often...led to problems".²⁶⁵ At least, one problem stands out: the lack of legal certainty in many cases where the Court applies the fair balance test – as the Court must, since there is no alternative means of reconciling conflicting fundamental rights. The limited guidance from the ECJ in a number of instances has left the national courts to fend for themselves;

264. Mylly, *op. cit. supra* note 200, p. 104.

265. *Ibid.*

ProMusicae, *UPC Telekabel Wien* and *Coty Germany* are glaring examples of this, although the national courts must also bear some responsibility where the questions referred were very restricted, as in the two latter cases. Having said that, the increased willingness of the Court in *McFadden* to engage in a detailed consideration of the legal issues arising out the specific facts is a promising new development. What is more, the nature of fundamental rights in this field is such that the value of these judgments as precedents is not always clear, particularly where the involvement of multiple rights requires the application of the fair balance test. By its very nature, this test is highly fact-specific, and the complexity of many of the cases make it difficult to draw more detailed principles from and between cases. That is why it is of the essence that the ECJ does its utmost to ensure consistency when applying fundamental rights and provides cogent reasoning to demonstrate that it is doing so.

By their very nature, courts are ill equipped to lay down policy solutions to these complex, technical and sensitive issues – all the more so when those solutions should be generally applicable. For both clarity and consistency, the best course is for calibration to be effected by the EU legislature. Its failure to do so – and on occasion even to ensure consistency between different directives – has been particularly problematic in the internet service provider cases, where the ECJ and national courts have evidently been left struggling. Unsurprisingly, where the EU legislature has found a specific solution to a conflict of fundamental rights, the Court tends to show deference, whether that solution favours IP (as in *Metronome* and *Laserdisken*) or competing fundamental rights (as in *BAT and DR* and *TV2 Danmark*). However, given the strong interest groups in this area, as reflected in the thousands of responses to the “right to panorama” consultation,²⁶⁶ this challenge is unlikely to be embraced by the EU legislature in the short term. In the meantime, those facing the rather wobbly scales might take little comfort from the fact that they are assisting in an important calibration operation.

266. See *supra* note 7.

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