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# Privatizing Human Rights? Creating Intellectual Property Rights From Human Rights Principles

David S. Welkowitz

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**PRIVATIZING HUMAN RIGHTS? CREATING  
INTELLECTUAL PROPERTY RIGHTS FROM HUMAN  
RIGHTS PRINCIPLES**

*David S. Welkowitz\**

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## I. INTRODUCTION

When one contemplates the universe of human rights violations, intellectual property rights probably are not first, or even tenth, on the list of things that come to mind. Human rights violations usually call to mind such things as violence against a civilian populace by government authorized (or government incited) forces, suppression of unpopular views, violations of fundamental due process rights, especially regarding criminal trials, and so on. If one contemplates economic issues at all under the rubric of human rights, it probably will be in the form of a population living in poverty, educational deprivations, and the like, again normally perpetrated (or neglected) in some manner by persons acting on behalf of or at the behest of a government. Private harms of the sort normally at issue in intellectual property situations ordinarily are not the stuff of human rights issues.<sup>1</sup> Thus, you may be surprised to

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1. This is not to say that intellectual property issues do not involve government action. Some intellectual property problems clearly do involve governmental agencies, whose approval may be required before certain intellectual property rights come into existence. In the United States, patents must be issued by the Patent and Trademark Office (PTO) before patent rights exist and PTO review is required before trademark registrations are issued. Trademark rights in the United States can exist without governmental approval, though certain trademark rights accrue only upon registration. In other countries, trademark rights exist only after registration with the government.

learn that human rights agreements, such as the Universal Declaration of Human Rights, contain express provisions favoring the existence of intellectual property rights.<sup>2</sup> You may be equally surprised to learn that the European Court of Human Rights (“ECHR”), the designated arbiter of claims brought against countries for violations of the European Convention on Human Rights (the “Convention”), has heard a number of cases involving intellectual property rights, including cases brought by corporate entities.<sup>3</sup> In our globalized economy intellectual property rights holders have begun to invoke human rights laws and treaties to protect their interests.<sup>4</sup> These uses of human rights agreements raise a number of interesting and potentially troubling questions, especially for the future of human rights enforcement. The purpose of this paper is to examine some of those questions.

This article focuses on one human rights treaty, the Convention, and the possible uses of its provisions to secure and expand intellectual property rights (“IP rights”). Although the Convention does not contain any provision specifically referencing IP rights, it does contain several provisions that could be used to expand IP rights. Furthermore, the existence of a substantial body of interpretive case law from the ECHR affords us a more detailed perspective on the manner in which the Convention could be used to further IP rights. Finally, the group of countries adhering to the Convention, though all part of Europe, represent a somewhat diverse collection of governments, from the U.K. to Germany, to the Czech Republic, to the former constituent states of the Soviet Union (including Russia), to Turkey. Although not completely representative of a range of possible human rights viewpoints, it is a sufficiently diverse group to provide a useful window into the problem.<sup>5</sup>

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*See, e.g.,* C. PROP. INTELL. 712-1 (Fr.). Copyrights in U.S. works must be registered with the Copyright Office before a suit is initiated. 17 U.S.C. § 411(a) (2012).

2. Article 27(2) of the Universal Declaration of Human Rights provides: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr> (last visited July 20, 2011).

3. *See, e.g.,* Balan v. Moldova, App. No. 19247/03, ¶ 34 (Eur. Ct. H.R. Jan. 29, 2008) (HUDOC); Anheuser-Busch, Inc. v. Portugal, App. No. 73049/01, (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber).

4. Intellectual property is not the only strange bedfellow with human rights. Hedge funds threatened to go to the ECHR if Greece were to default on its debts. Landon Thomas Jr., *Hedge Funds May Sue Greece if it Tries to Force Loss*, N.Y. TIMES, Jan. 18, 2012, at B1.

5. *See* Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council*

In a 2008 article, Professor Laurence Helfer outlined several possible frameworks that the ECHR might use to review intellectual property disputes under one provision of the Convention: Article 1 of the First Protocol.<sup>6</sup> I do not propose to challenge either Professor Helfer's premises or his concerns that certain approaches to the problem by the ECHR could have untoward consequences for the stability of IP rights and for human rights enforcement.<sup>7</sup> However, I do intend to suggest several ways that the ECHR could become enmeshed in IP rights disputes, not only under Article 1, but under other provisions of the Convention, such as Article 8 (dealing with rights of privacy) and Article 10 (dealing with free speech and free press). I will suggest that the ECHR's case law makes it increasingly likely that IP rights holders and potential rights holders will invoke the Convention to secure and expand IP rights. I do so not from a conviction that the ECHR *should* be involved in such matters, or that the court should expand IP rights, but because I believe that the ECHR's involvement is inevitable and that its precedent makes IP rights expansion not unlikely. Thus, to the extent that human rights advocates believe that such involvement by the ECHR will have negative consequences, this article can serve as a wake-up call to the possible world that lies ahead.

The article begins with a brief examination of the Convention, followed by a discussion of provisions relevant to IP rights and some recent cases in the ECHR that raised the issue of using human rights provisions in an intellectual property context. Building on these cases and provisions, the article raises the following issues: (1) In what ways could the Convention be interpreted to expand or even create particular IP rights?; (2) Will the use of the Convention in these situations have unforeseen effects on IP rights as they are now understood?; (3) Who are the likely beneficiaries of the use of the Convention in intellectual property cases?; (4) What effect could the use of the Convention have on attempts to create a more global intellectual property law?; and (5)

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of Europe, and the Idea of Pilot Judgments (Nov. 4, 2008) (unpublished Legal Studies Research Paper No. 08/135, University of Sydney Law School) at 4, *available at* <http://ssrn.com/abstract=1295652> (noting the diversity of the European Union).

6. Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008). As explained more fully below, Article 1 of the First Protocol is a Convention provision that protects property rights. It is somewhat analogous to the Takings Clause of the United States Constitution, but has important differences as well. U.S. CONST., amend. V. For a more general discussion of human rights and IP rights see Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007).

7. See, e.g., Helfer, *New Innovation*, *supra* note 6, at 51-52.

Could such uses weaken human rights protections in more traditional situations?

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS: BACKGROUND AND RELEVANT PROVISIONS

### A. *Background*

The European Convention on Human Rights arose from the rubble of World War II and the human rights abuses during the period from the end of World War I to the end of World War II. In May, 1949, ten countries signed the Treaty of London, establishing the Council of Europe.<sup>8</sup> A year and a half later, in November, 1950, the members of the Council signed what is formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms—the European Human Rights Convention.<sup>9</sup> The Convention has been amended by fourteen protocols since its inception, adding to the list of rights protected.<sup>10</sup> The Convention is administered by the Council of Europe.<sup>11</sup>

The Convention now has forty-seven signatories, half of which have been added since the beginning of 1990.<sup>12</sup> All of the members of the European Union are also members of the Council of Europe and adhere to the Convention.<sup>13</sup> The potential reach of the Convention is thus much broader than the European Union. Although the Council of Europe does not have enforcement mechanisms as robust as those of the EU, this does not leave the Convention impotent. The Council has its own judicial body, the European Court of Human Rights, based in

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8. See *The Council of Europe in Brief*, COUNCIL OF EUROPE, <http://www.coe.int/aboutCoe/index.asp?page=datesCles&l=en> (last visited May 2, 2013).

9. European Human Rights Convention, Sep. 3, 1953, 213 U.N.T.S. 221 [hereinafter *Convention*]. The text of the Convention can be found at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited May 2, 2013). The United Nations already had promulgated the Universal Declaration of Human Rights, *supra* note 2, in 1948. See *History of the Document*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, [www.un.org/en/documents/udhr/history.shtml](http://www.un.org/en/documents/udhr/history.shtml) (last visited Oct. 8, 2012).

10. See *Treaty Office*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> (last visited Oct. 8, 2012).

11. The Council has a web site providing a portal for its activities. See [www.coe.int](http://www.coe.int) (last visited Mar. 20, 2012).

12. Many of the new members, including Russia, were former Soviet Bloc countries, or were part of the former Soviet Union. See *47 Countries, One Europe*, COUNCIL OF EUROPE, [www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en](http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en) (last visited Feb. 12, 2012).

13. Great Britain has incorporated the Convention into its Human Rights Act 1998—at least regarding actions of public authorities. See, e.g., *Campbell v. MGN Ltd.*, [2004] E.M.L.R. 15 (H.L.) [¶ 49]; Human Rights Act, 1998, c. 42 (U.K.).

Strasbourg, France.<sup>14</sup> The Strasbourg Court<sup>15</sup> hears cases brought by individuals against countries alleged to have violated the Convention,<sup>16</sup> and issues written decisions that include a rationale. Although the ECHR has no direct enforcement vehicle, members of the Council of Europe (whose members are contracting parties to the Convention) have agreed to abide by the Court's decisions.<sup>17</sup> And, to a great extent, it appears that they do so, at least in Western Europe.<sup>18</sup>

The Convention also influences European law through implementation of the Convention into the domestic law of various countries. Great Britain's 1998 Human Rights Act did so, and its courts have looked to the decisions of the ECHR for interpretive guidance.<sup>19</sup> Although the EU has not adopted the Convention as EU law, its principles have been incorporated into the jurisprudence of the European Court of Justice ("ECJ").<sup>20</sup> Both of these mechanisms tend to make the Convention a part of the legal regimes of member countries.<sup>21</sup>

14. The Court was created in 1959. Prior to November 1, 1998, human rights complaints were handled in the first instance by the Commission on Human Rights, which was created in 1954. See *The Court in Brief*, EUROPEAN COURT OF HUMAN RIGHTS, [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_en\\_bref\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf) (last visited July 21, 2011). It was not until Protocol #11 was adopted in 1998 that a full-time court was established and that member states were required to allow individual complaints to be brought against them (previously the country had to consent to such suits) as opposed to complaints by one member country against another.

15. For convenience and to distinguish it from the European Court of Justice, I will sometimes refer to the European Court of Human Rights as the Strasbourg Court.

16. Convention, *supra* note 9, at art. 34. Article 34 of the Convention gives individuals the right to bring actions in the ECHR. Article 33 gives member countries the right to "refer to the Court any alleged breach of the provisions of the Convention" by another member country. *Id.* at art. 33.

17. See *id.* at art. 39, ¶ 4 (dealing with friendly settlements); *Id.* at art. 46, ¶ 2 (dealing with judgments). The Committee of Ministers of the Council is responsible for the execution of the ECHR's judgments. It maintains a Department for the Execution of Judgments of the Court. The Committee can refer cases to the ECHR if, *inter alia*, a country is refusing to abide by a judgment.

18. See, e.g., *Von Hannover v. Germany*, App. No. 59320/00 (Eur. Ct. H. R. July 28, 2005) (Judgment—Just Satisfaction—Friendly Settlement) (HUDOC) (Germany agrees to pay €15,000 in compensation and expenses). Moreover, to the extent that Convention member countries wish to join the EU, their willingness to abide by the ECHR's interpretation of the Convention no doubt will be relevant to the admission decision. Many countries directly implement the ECHR's judgments. See *Execution of Judgments of the ECHR*, COUNCIL OF EUROPE, [www.coe.int/t/dghl/monitoring/execution/Presentation/About\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp) (last visited Feb. 16, 2012).

19. See *Campbell v. MGN Ltd.*, [2004] E.M.L.R. 15 (H.L.) [254-55]; *Ferdinand v. MGN Ltd.*, [2011] EWHC 2454 (Q.B.).

20. See, e.g., Andrew Williams, *Human Rights and the European Court of Justice: Past and Present Tendencies* (Apr. 5, 2011) (unpublished Legal Studies Research Paper No.2011-06, University of Warwick School of Law) at 5, 9-11, available at <http://ssrn.com/abstract=1803138>.

21. *But cf.* *Murray v. Express Newspapers plc*, [2007] EWHC 1908 [¶¶ 60-62] (Ch.D.) (British courts are bound to follow House of Lords decisions in cases of conflict with European

### B. *Pertinent Provisions of the Convention for IP Rights*

Undoubtedly, the ECHR influences the laws of member states. But this still leaves the question: what is the connection between the Convention and intellectual property? To answer this question, we need to identify provisions of the Convention pertinent to IP rights and discuss the methodology used by the ECHR to decide cases brought under those provisions.

Because we are discussing intellectual *property*, it seems sensible to start with a provision dealing with property rights. The Convention contains such a provision, namely Article 1 of the First Protocol, which provides as follows:

#### Protection of Property:

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 or other contributions or penalties.<sup>22</sup>

Article 1<sup>23</sup> looks a bit like the Takings Clause of the Fifth Amendment to the United States Constitution.<sup>24</sup> That is, it appears to protect against a governmental appropriation of property. The Constitution refers to “private property” being “taken” while Article 1 refers to “peaceful enjoyment of . . . possessions.” These are not necessarily identical concepts, although, as indicated in the discussion below, the concept of a “possession” is very similar to “property.”<sup>25</sup> It may seem a stretch to apply Article 1 to intangible intellectual property rights; however, it is notable that the United States Supreme Court has applied the Takings Clause to intellectual property.<sup>26</sup> Article 1 was the focus of Professor

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Court of Human Rights decisions).

22. See Convention, *supra* note 9, at protocol 1, art. 1.

23. References to “Article 1” should be presumed to refer to Article 1, First Protocol, unless otherwise specified.

24. The Takings Clause provides: “nor shall private property be taken for public use, without just compensation.” U.S. CONST., amend. V.

25. The concept of a “possession” under Article 1 is discussed *infra* text at notes 123 to 136. It is also worth noting that the *title* of Article 1 refers to “property,” even if the text of the provision does not.

26. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets treated as



Helfer's discussion of the ECHR's approach to IP rights disputes.<sup>27</sup> The ECHR has held that Article 1 is applicable to IP rights,<sup>28</sup> and Article 1 will play an important role in the analysis to be presented here. However, there are two other provisions of the Convention that are less directly related to property rights, but whose interpretation may have a significant impact on IP rights and on the application of Article 1 to IP cases. Those two provisions are Article 8 and Article 10 of the Convention, which provide, respectively, as follows:

Article 8—Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>29</sup>

Article 10—Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

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property under the Takings Clause). *But cf.* *Zoltek Corp. v. United States*, 442 F.3d 1345, 1349-53 (Fed. Cir. 2006) (patentee could not use Takings Clause as basis for claim against government for using patented invention).

27. Helfer, *New Innovation*, *supra* note 6.

28. *See, e.g.*, *Balan v. Moldova*, App. No. 19247/03, ¶¶ 34-35 (Eur. Ct. H.R. Jan. 29, 2008) (copyright); *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, ¶ 10 (Eur. Ct. H.R. Oct. 11, 2005) (Chamber opinion); *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber) (trademark registration application).

29. *See* Convention, *supra* note 9, at art. 8.

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>30</sup>

At first glance, it might not appear that these articles have any direct connection with intellectual property. Article 10, the rough analogue to the First Amendment in the United States, clearly could *limit* IP rights, but it seems an unlikely source for creating or expanding them. However, as discussed below, the manner in which the right to free expression is interpreted may make it less of a barrier to IP rights than one might believe, and may make it a *source* of IP rights. Article 8, particularly subsection 2, appears to afford protection from unwarranted *governmental* intrusion. Nevertheless, as will be seen, Article 8 is a broader and more affirmative right than it may appear on its face, possibly giving rise to IP rights.<sup>31</sup>

These three provisions form the basis of the argument that the Convention may be used to expand intellectual property rights.

### III. KEY PRINCIPLES FOR IP RIGHTS EXPANSION

#### A. *Starting Points: Von Hannover v. Germany—The ECHR's Decision*

Although it might seem more logical to begin with Article 1, the property rights provision, I prefer to begin with Article 8, because its jurisprudence affects the analysis of other provisions, including Article 10 and Article 1. One decision from the ECHR in particular brought privacy issues to the forefront of IP rights and related rights, and provides a convenient starting point for the discussion of the ECHR's analytical framework. That case, *Von Hannover v. Germany*,<sup>32</sup> was a suit by Princess Caroline of Monaco, complaining that photographers were invading her privacy by taking (and publishing) pictures of her and her family in various non-official public and private settings.

In *Von Hannover*, Princess Caroline of Monaco, who lives most of the time in Paris, complained about a number of photographs published by three German magazines.<sup>33</sup> The photographs included several of her

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30. *Id.* at art. 10.

31. *See infra* Part III. B.

32. *Von Hannover v. Germany*, App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004). As discussed below, there was a second *Von Hannover* case in the ECHR, decided eight years later. It also dealt with photographs taken of Princess Caroline and her family. *Von Hannover v. Germany* (no. 2), App. No. 40660/08 (Eur. Ct. H.R. Feb. 7, 2012).

33. The pictures were taken while the Princess was in France, where she maintains an apartment. *Von Hannover*, App. No. 59320/00 at ¶ 8. However, they were published by German

with her children, some of her in public places, one in a restaurant (with a boyfriend), and some taken of her while she was on vacation.<sup>34</sup> She sued the publications in the German courts, claiming violations of her right to privacy, her rights to control her image under the German Copyright Act, and, perhaps notably, her personality rights under the German Basic Law.<sup>35</sup> The trial court and first level appellate court ruled that German law did not grant relief because of Princess Caroline's status as a kind of public figure.<sup>36</sup> On further appeal, the court ruled that the photos of her in the restaurant—as a “secluded place”—were a violation of her right to privacy, but that the others were not.<sup>37</sup> From this ruling Princess Caroline appealed to the Federal Constitutional Court of Germany,<sup>38</sup> whose ruling the ECHR quoted at some length.

The Federal Constitutional Court issued what was considered a landmark decision, ruling that, although publication of some of the pictures in question violated Princess Caroline's right to privacy, several others did not.<sup>39</sup> In its ruling, the Federal Constitutional Court balanced her right to privacy under German law against the right of free expression found in the German Basic Law.<sup>40</sup> In its opinion, the court specifically held that entertainment is worthy of protection under the concept of free expression.<sup>41</sup> It also held that the press was entitled to a certain “margin of manoeuvre” to decide what is in the public interest to print.<sup>42</sup> Applying these principles, the court found that some of the

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periodicals. *Id.* at ¶ 10.

34. *Id.* at ¶¶ 11-17.

35. *Id.* at ¶ 18. It is also interesting that her suit—in German courts—sought relief against the publications under French law. *Id.* at ¶ 19.

36. *Id.* at ¶¶ 19, 21. The German court found her to be a figure “*par excellence*.” *Id.* at ¶¶ 19, 21, 23. The courts enjoined republication of the photographs in France, but under French law. *Id.* at ¶ 19.

37. *Id.* at ¶ 23.

38. *Id.* at ¶ 24.

39. *Id.* at ¶ 25.

40. *Id.* at ¶ 25 (¶ 1 of the quoted portion of the Constitutional Court's opinion).

41. *Id.* at ¶ 25 (quoting from paragraph (b) of the Constitutional Court's opinion). A portion of the German court's opinion was as follows:

The fact that the press fulfills the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law. The formation of opinions and entertainment are not opposites. Entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information. Moreover, there is a growing tendency in the media to do away with the distinction between information and entertainment both as regards press coverage generally and individual contributions, and to disseminate information in the form of entertainment or mix it with entertainment (“infotainment”). Consequently, many readers obtain information they consider to be important or interesting from entertaining coverage.

42. *Id.* at ¶ 25 (quoting from paragraph (a) of the German Constitutional Court opinion).

pictures, taken while she was with her children and in secluded areas, were overly intrusive.<sup>43</sup> Others, however, even some in semi-private locations, were deemed legitimate because of her status as a public figure.<sup>44</sup> After further rounds of proceedings in the German courts, the earlier results were reaffirmed.<sup>45</sup> Dissatisfied with the German courts' resolution, Princess Caroline took her case to the European Court of Human Rights. That court ruled in her favor.<sup>46</sup>

Much like the Federal Constitutional Court of Germany, the ECHR considered the matter to require balancing the right to privacy, found in Article 8 of the Convention, and the right to free expression, found in Article 10.<sup>47</sup> Notably, although the ECHR quoted extensively from the opinions of the German courts (the lower courts as well as the Federal Constitutional Court), it gave little if any deference to the balance between privacy and free expression drawn by the German courts, using rights under German law analogous to those provided by the Convention.<sup>48</sup> The German courts emphasized Caroline's status as a public figure. Moreover, the German courts held that free press rights encompass entertainment as well as "hard" news. In their view, this afforded the press more leeway in its reporting. By contrast, the ECHR accorded little credence to the public figure status of the Princess, noting that she had few public duties as a princess, and that the pictures were not reflective of those duties.<sup>49</sup> Instead, the court found that the pictures simply satisfied the public's curiosity about the lifestyle of a princess, which the court believed was an insufficient basis to override her right to privacy.<sup>50</sup> Thus, the court found in favor of Princess Caroline and against the state of Germany (the ECHR issues judgments against

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43. *Id.* at ¶ 25.

44. *Id.* at ¶ 25 (Constitutional Court's opinion).

45. *Id.* at ¶¶ 19-38.

46. *Id.* at ¶¶ 78-80.

47. *Id.* at ¶ 58.

48. The issue of the proper level of deference—called a "margin of appreciation" by the ECHR—is discussed *infra* Part IV.

49. *Id.* at ¶¶ 62, 64 ("The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.").

50. *Id.* at ¶¶ 65-66 ("The Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public. In these conditions freedom of expression calls for a narrower interpretation."); *id.* at ¶¶ 72-74, 77 ("The Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.").

Convention member states).<sup>51</sup>

*B. Von Hannover as a Basis for Creating Privately Enforceable Rights: the Affirmative Obligations of Member Countries to Enforce the Convention*

The right to privacy and its supremacy (at least in some contexts) over free expression may lead directly to an IP right, namely the right of publicity. In the United States, the right of publicity, which is now widely recognized as a property right, had its origins in the tort concept of the right to privacy.<sup>52</sup> And it may be, as discussed below, that the ECHR's privacy decisions will ripen into a property right protectable under Article 1, as well as Article 8. However, the importance of the *Von Hannover* decision transcends its basic result. The opinion provides a framework that bridges the gap between human rights as a protection against unwarranted governmental intrusion and human rights as a vehicle to remedy harms perpetrated by private actors. The intrusion of which Princess Caroline complained was not in any way the product of state action directed against her. It was an entirely private intrusion. Although her suit in the ECHR was against the German government, the gravamen of her lawsuit was a dispute between private parties—her lawsuit in the German courts was against various publications. Essentially, her claim in the ECHR was that German law did not afford her sufficient protection against *private* intrusions, and therefore the German government was not protecting her privacy as required by Article 8 of the Convention. By ruling in favor of Princess Caroline, the ECHR effectively created an affirmative right from Article 8, rather than simply a negative right. In other words, Article 8 did not just protect Princess Caroline from governmental intrusions (a negative right); it required the government to shield her from the intrusions of others, even to the extent of providing an appropriate civil action in its courts (an affirmative right).<sup>53</sup> The imposition of an affirmative obligation on the

51. *Id.* at ¶ 80. The ECHR was asked to issue a judgment for approximately €142,800, but reserved the question of damages for later decision. *Id.* at ¶ 85. A settlement of the judgment in the amount of €15,000 was later recorded. *Von Hannover v. Germany*, App. No. 59320/00 (Eur. Ct. H.R. July 28, 2005) (Just Satisfaction—Friendly Settlement).

52. *See e.g.*, *Lugosi v. Universal Pictures*, 603 P.3d 425 (Cal. 1979) (rights of publicity arose from privacy tort); CAL. CIV. CODE § 3344.1(b) (West 2013) (recognizing a property right); ARIZ. REV. STAT. ANN. § 12-761(G) (2007) (soldier's right of publicity); 765 ILL. COMP. STAT. ANN. 1075/15 (West 2013); IND. CODE ANN. § 32-36-1-7 (West 2002); OKLA. STAT. ANN. tit. 12, § 1448(B) (West 2013).

53. *Von Hannover*, App. No. 59320/00 at ¶ 57 (“The boundary between the State’s positive and negative obligations under this provision does not lend itself to precise definition. The

country to effectuate the right is a marked contrast to the Bill of Rights jurisprudence in the United States, which requires some form of state action in order for its provisions to be invoked.<sup>54</sup> It is also a critical bridge between a system focusing on state actions and a system that contemplates the creation of new obligations without the necessity of state action. Thus, if the effectuation of the rights granted by the Convention requires a country to enact legislation (or create common law) that grants a cause of action to one private party injured by another private party, then the ECHR becomes a vehicle to effectuate those obligations. To put the matter into IP rights language, if the effectuation of any of the provisions of the Convention requires the creation or expansion of IP rights, then the ECHR will issue judgments that effectively require such creation or expansion.<sup>55</sup>

Moreover, there does not appear to be any textual reason why such an affirmative obligation would not be imposed with regard to the effectuation of any of the rights granted under Article 10 or Article 1, First Protocol. The first sentence of Article 8, which grants the right to privacy, does not invoke any notion of state action. It simply says that everyone is entitled to privacy.<sup>56</sup> Similarly, Article 10 states that “[e]veryone has the right to freedom of expression,”<sup>57</sup> and Article 1 states that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”<sup>58</sup> There is no textual invocation of any state action or any indication that the right only insures against instances of state interference.<sup>59</sup>

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applicable principles are, nonetheless, similar.”).

54. The affirmative obligation of states under Article 8 and other Convention provisions has been reaffirmed by the ECHR. See *Von Hannover v. Germany* (no. 2), App. No. 40660/08, ¶98 (Eur. Ct. H.R. Feb. 7, 2012) (Grand Chamber); *Evans v. United Kingdom*, App. No. 6339/05, ¶75 (Eur. Ct. H.R. Apr. 10, 2007) (Grand Chamber).

55. *Von Hannover*, App. No. 59320/00 at ¶57. The ECHR cannot directly order states to enact legislation. However, as noted earlier, an arm of the Council of Europe oversees compliance with the court’s judgments and will inquire about legislation needed to effectuate the court’s ruling. See *A unique and effective mechanism*, COUNCIL OF EUROPE, [www.coe.int/t/dghl/monitoring/execution/Presentation/About\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp) (last visited Feb. 16, 2012).

56. Convention, *supra* note 9, at art. 8.

57. *Id.* at art. 10.

58. *Id.* at protocol 1, art. 1.

59. The second paragraph of each of these provisions, like that of Article 8, allows the state certain leeway to protect other rights and interests by imposing some limitations on privacy, free expression, and property rights. But that does not eliminate the affirmative obligation created by the first paragraph. See, e.g., *Lobanov v. Russia*, App. No. 15578/03, ¶ 46 (Eur. Ct. H.R. Dec. 2, 2010) (alluding to affirmative obligations under Article 1).

### C. Von Hannover and the Balance of Free Expression and Privacy

The right to free expression is often a significant limitation on IP rights, including rights of celebrities. The ECHR's treatment of the free expression argument in *Von Hannover* demonstrates that under the Convention, speech in a commercial context may not be given particularly strong protection.<sup>60</sup> Since many IP cases implicate free speech concerns, this development would favor the rights of IP owners over the rights of unauthorized users. On the other hand, an affirmative obligation to promote freedom of expression could be invoked to create IP rights that further such expression.

The *Von Hannover* decision may not appear to be an IP case at all; it could be viewed as an ordinary tort case. Even without the right of publicity overtones, however, the case would be of interest to IP lawyers for several reasons. The decision made clear that the right of free expression does not trump other rights under the Convention. When two rights are potentially at odds, as in *Von Hannover*, the court must balance them, giving due regard for the ECHR's view of the general societal values at stake. Although, as discussed further below, the ECHR often gives member state decisions a certain degree of deference—called a “margin of appreciation”<sup>61</sup>—in the case of *Von Hannover*, the court showed very little inclination to defer to the German courts' own balancing of the rights, even though the balance struck by the German courts was not patently unreasonable.<sup>62</sup> Moreover, the right to know about (and perhaps make use of) facts of a celebrity's life was expressly deemed to have relatively little weight in the free expression balance.<sup>63</sup>

Subsequently, the ECHR expounded on the role of free expression in several cases involving celebrity photographs, including a second case

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60. *Id.* at ¶¶ 59, 63-64. In addition to its statements in *Von Hannover*, the ECHR's attitude toward commercial speech can be found in some of its unfair competition cases. See generally Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUMAN RIGHTS L. REV. 53 (2006).

61. See *infra* Part IV. Cf. *A v. Norway*, App. No. 28070/06, ¶ 66 (Eur. Ct. H.R. Apr. 9, 2009); *Evans v. United Kingdom*, App. No. 6339/05, ¶ 77 (Eur. Ct. H.R. Apr. 10, 2007) (Grand Chamber).

62. The margin of appreciation can also reflect the ECHR's view of the existence of a European consensus on the issue. See *Mosley v. United Kingdom*, App. No. 48009/08, ¶ 124 (Eur. Ct. H.R. May 10, 2011) (granting a greater margin of appreciation to the state's refusal to act where there was no European consensus on whether the press must give advance notice of intent to publish a story about a prominent figure).

63. *Von Hannover v. Germany*, App. No. 59320/00, ¶ 65 (Eur. Ct. H.R. June 24, 2004). *Accord Mosley*, App. No. 48009/08 at ¶ 114.

brought by Princess Caroline (and her husband).<sup>64</sup> In one case, the ECHR found a violation of Article 10, where a newspaper was prevented from publishing a picture of an actor together with articles concerning his arrest and guilty plea on charges of drug possession.<sup>65</sup> But this case involved the press's oversight function vis a vis the criminal process and can be distinguished from *Von Hannover* (no. 1). In another case, the ECHR upheld a decision of the British House of Lords<sup>66</sup> that prevented publication of photographs of model Naomi Campbell arriving at a drug rehabilitation facility.<sup>67</sup> In a second *Von Hannover* case, the ECHR upheld the German courts' decision to allow publication of a picture of Princess Caroline and her husband at St. Moritz *together with* an article about her then-ailing father and the contrast with her sister's decision to stay with the father.<sup>68</sup> The ECHR propounded five factors relevant to the balancing process: (1) the contribution to a debate of general interest; (2) how well known the person is and what is the subject of the report; (3) prior conduct of the person concerned; (4) content, form and consequences of the publication; and (5) circumstances in which the photos were taken.<sup>69</sup> Although these factors clarify the proper methodology, they do not materially alter the boundaries of protection from the first *Von Hannover* decision. In the second *Von Hannover* case, the ECHR stressed the informative value of the article and noted that the German courts had prevented publication of photographs that were less informative.<sup>70</sup> Thus, the impact of the first *Von Hannover* decision apparently was to narrow Germany's previously broader tolerance of press intrusion into the lives of public figures.

Although the later cases stressed the importance of the press in a democratic society, they do not appear to have markedly altered the

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64. *Von Hannover v. Germany* (no. 2), App. No. 40660/08 (Eur. Ct. H.R. Feb. 7, 2012) (Grand Chamber); *Axel Springer A.G. v. Germany*, App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012) (Grand Chamber); *MGN Ltd. v. United Kingdom*, App. No. 39401/04 (Eur. Ct. H.R. Apr. 18, 2011).

65. *Axel Springer*, at ¶¶ 10-15, 110-111. The actor's name was not revealed by the court; he was referred to as person X.

66. In 2009, the House of Lords was replaced by the Supreme Court of the United Kingdom as the supreme judicial body of the country. See *History*, THE SUPREME COURT (UK), [www.supremecourt.gov.uk/about/history.html](http://www.supremecourt.gov.uk/about/history.html) (last visited Mar. 1, 2012).

67. *MGN Ltd.*, App. No. 39401/04 at ¶10, 156. The ECHR did find a violation of Article 10 in another aspect of the case—the amount of “success fees” (legal fees) of Naomi Campbell imposed on MGN. *Id.* at ¶¶218-220. Cf. *Mosley v. United Kingdom*, App. No. 48009/08 (Eur. Ct. H.R. May 10, 2011) (declining to mandate that celebrities be informed in advance of any potentially damaging publications).

68. *Von Hannover* (no. 2), App. No. 40660/08 at ¶¶ 15-20.

69. *Id.* at ¶¶ 108-113.

70. *Id.* at ¶¶ 118-126.



perception that entertainment news is considered of lesser value than other news.<sup>71</sup>

#### IV. THE DEFERENCE AFFORDED MEMBER STATES: MARGIN OF APPRECIATION

The doctrine of margin of appreciation is the ECHR's mechanism for affording deference to the state in the manner of its implementation of the Convention. The doctrine is fraught with potential difficulties.<sup>72</sup> If too much deference is given, it undercuts the universality of human rights guarantees and could allow countries to carry out seriously unfair policies that flout the spirit of the Convention. On the other hand, refusing to give deference in some circumstances cannot undermine important social and cultural values embedded in the legal norms of member countries. In practice, the doctrine appears to be unevenly applied. As discussed above, in the first *Von Hannover* case, the ECHR did not afford Germany any meaningful margin of appreciation for the German courts' balancing of privacy and free expression. Yet, in other privacy cases, the court has afforded countries a significant margin of appreciation.<sup>73</sup> The ECHR has identified one factor as being particularly

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71. *MGN, Ltd.*, App. No. 39401/04 at ¶¶ 139, 143 (“The Court considers the publication of the photographs and articles, the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure’s private life, cannot be deemed to contribute to any debate of general interest to society.”); *Axel Springer A.G.*, App. No. 39954/08 at ¶ 78 (“Freedom of expression constitutes one of the essential foundations of a democratic society.”), *Id.* at ¶¶ 82-84 (discussing limits on Article 10, particularly those of Article 8). The ECHR continued this trend in *Ashby v. France*, Case No. 36769/08 (Eur. Ct. H.R. Jan. 10, 2013), where it rejected a claim that France violated Article 10 by prosecuting the petitioners for posting photographs of a fashion show online. The Court specifically noted that France’s actions were consistent with protecting the intellectual property of the fashion creators (fashions are protected by French copyright law), and that the state has greater leeway where the expression is for a commercial purpose. *Id.* at ¶¶ 39-42. See *Hertel v. Switzerland*, Case No. 59/1997/843/1049, ¶ 47 (Eur. Ct. H.R. Aug. 25, 1998) (while finding a violation of Article 10, Court said “a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition.”).

72. For further discussions of the issue, see, e.g., Paul Gallagher, *The European Convention on Human Rights and the Margin of Appreciation* (University College Dublin Law, Criminology & Socio-legal Studies, Working Research Paper No. 52/2011, 2011), available at <http://ssrn.com/abstract=1982661>; Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT’L L. REV. 391 (2001).

73. See, e.g., *Evans v. United Kingdom*, App. No. 6339/08, ¶¶ 79, 81, 90 (Eur. Ct. H.R. Apr. 10, 2007) (state’s decision concerning destruction of stored embryos conceived via in vitro fertilization given “wide” margin of appreciation); *Schalk v. Austria*, App. No. 30141/04, ¶¶ 105-108 (Eur. Ct. H.R. Nov. 22, 2010) (state afforded margin of appreciation regarding same-sex marriage); *A, B and C v. Ireland*, App. No. 25579, ¶ 185 (Eur. Ct. H.R. Dec. 16, 2010) (state

important in the margin of appreciation—the existence or lack of a European consensus on the matter.<sup>74</sup> Also identified as factors are the importance of the right to “an individual’s existence or identity,” which narrows the margin, and the need “to strike a balance between competing private and public interests or Convention rights,” which broadens the margin.<sup>75</sup> But *Von Hannover* (no. 1) involved just such a competing rights circumstances with little evidence of a margin of appreciation.<sup>76</sup> And in *A, B, C v. Ireland*,<sup>77</sup> the ECHR deferred to Ireland’s law on abortion rights despite an apparent European consensus to the contrary.<sup>78</sup>

In property rights cases, there is a greater mention of the margin of appreciation, and some cases indicate a wider margin exists in such situations.<sup>79</sup> However, the implementation of the margin of appreciation has not been particularly consistent in property rights cases, either. In two cases where a retroactive application of law deprived applicants of certain legal claims, the ECHR found violations of Article 1, despite acknowledging the margin of appreciation given to the state.<sup>80</sup> In another case, a Chamber of the court found a violation where the applicant was deprived of its property by Britain’s adverse possession law, noting that the “wide” margin of appreciation may be overcome by a lack of “fair balance” and proportionality.<sup>81</sup> The Grand Chamber,

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afforded margin of appreciation regarding right to abortion).

74. See, e.g., *Schalk*, App. No. 30141/04 at ¶ 98; *Mosley v. United Kingdom*, App. No. 48009/08 ¶ 124 (Eur. Ct. H.R. May 10, 2011).

75. *Evans*, App. No. 6339/08 at ¶ 77.

76. In the second *Von Hannover* case, there was a more extensive discussion of the margin of appreciation, particularly in a competing rights situation. *Von Hannover v. Germany* (no. 2), App. No. 40660/08, ¶¶104-07 (Eur. Ct. H.R. Feb. 7, 2012). Ultimately, the German courts’ balancing was upheld in the second instance. *Id.* at ¶¶ 124-26.

77. App. No. 25579 (Eur. Ct. H.R. Dec. 16, 2010).

78. *Id.* at ¶ 235 (noting the existence of a consensus), *Id.* at ¶ 241 (finding Irish restrictions on abortion within its margin of appreciation).

79. See, e.g., *Paeffgen GMBH v. Germany*, App. No. 25379/04, 21688/05, 21722/05, and 21770/05, at 10 (Eur. Ct. H.R. 2007) (rejecting admissibility of complaints regarding laws relating to the improper use of domain names); *Spadea v. Italy*, App. No. 12868/87, ¶ 29 (Eur. Ct. H.R. Sept. 28, 1995) (rejecting challenge to Italy’s rent control law that deprived applicants of possession of their apartments for long periods of time; court noted the “wide margin of appreciation” given the state). See also *Barrow v. United Kingdom*, App. No. 42735/02, ¶ 35 (Eur. Ct. H.R. Aug. 22, 2006) (“The margin of appreciation available to the legislature in implementing social and economic policies should be a wide one.”).

80. *Pressos Compania Navieca, S.A. v. Belgium*, App. No. 17849/91, ¶¶ 37-39, 43 (Eur. Ct. H.R. Nov. 20, 1995); *Maurice v. France*, App. No. 11810/03, ¶¶ 83, 90-91 (Eur. Ct. H.R. Oct. 6, 2005) (noting a lack of proportionality).

81. *J. A. Pye (Oxford) Ltd. v. United Kingdom*, App. No. 44302/02, ¶¶ 44, 46, 70-75 (Eur. Ct. H.R. Nov. 15, 2005). See also *Hutten-Czapeska v. Poland*, App. No. 35014/97, ¶¶ 223-225 (Eur. Ct. H.R. May 17, 2006) (Polish rent control law violates Article 1) (Grand Chamber).

however, reversed, finding that the interference in this case was not disproportionate and that the system of land ownership was one in which the government was entitled to an especially wide margin of appreciation.<sup>82</sup> Other cases also evidenced a greater willingness to defer to the member state's law.<sup>83</sup> The application of the doctrine is, therefore, somewhat unpredictable. Its operation may be contrasted with United States equal protection doctrine where the level of deference or scrutiny is more predictable and the outcomes, while not entirely predictable, are at least somewhat predictable based on the level of scrutiny.<sup>84</sup> However, it is worth noting that the ECHR follows a somewhat analogous system when assessing the margin of appreciation afforded under Article 14, the Convention's antidiscrimination provision.<sup>85</sup>

Given the relative unpredictability of the outcome even when a state has a wide margin of appreciation, it is difficult to assess whether the ECHR would defer to the state's legislative process (or lack thereof) when deciding many of the issues discussed here.

## V. CREATING CELEBRITY RIGHTS UNDER ARTICLE 8

Despite the fact that Article 8 appears to rest more on dignity

82. *J.A. Pye (Oxford) Ltd.*, App. No. 44302/02 at ¶ 83 (“Such arrangements fall within the State’s margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable.”). One dissent, on behalf of five judges, found the application in a case of a registered owner to be disproportionate. *Id.* at ¶ 21 (Joint Dissenting Opinion of Judges Rozakis, Bratza, Tsatsa-Nikolovska, Gyulumyan and Šikuta). A second dissent, on behalf of two judges, found both a lack of proportionality *and* a failure of the adverse possession law to be in the general interest. *Id.* (Dissenting Opinion of Judge Loucaides Joined By Judge Kovler).

83. *E.g., Spadea*, App. No. 12868/87 at ¶¶ 28, 40 (rent control); *Benet Czech, spol. S.R.O. v. The Czech Republic*, App. No. 31555/05, ¶¶ 35-40 (Eur. Ct. H.R. Oct. 21, 2010) (in seizure of company bank accounts pursuant to a criminal investigation of a company officer; “the Courts will respect the State authorities’ judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.”); *Air Canada v. United Kingdom*, App. No. 18465/91, ¶¶ 38, 48 (Eur. Ct. H.R. May 5, 1995) (temporary seizure of airplane plus payment before any hearing).

84. Race-based distinctions receive the highest scrutiny; economically based conditions require only a “rational basis.” One exception may be discrimination based on sexual orientation, where the Supreme Court uses a rational basis test, but has recently struck down governmental actions. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating Colorado initiative that removed specific protections against discrimination based on sexual orientation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating laws against homosexual sodomy). *But cf. Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2008) (upholding Nebraska’s constitutional initiative precluding recognition of same sex marriage, civil union, or other similar same sex relationships).

85. *See B v. United Kingdom*, App. No. 36571/06, ¶ 56 (Eur. Ct. H.R. Feb. 14, 2012) (wide margin of appreciation in areas of social and economic policy).

interests than commercial interests, one can postulate something akin to a true right of publicity arising from this provision. As interpreted in *Von Hannover*, Article 8 provides a suitable foundation, by imposing an affirmative obligation on countries to protect privacy rights and by limiting the legitimate sphere of press freedom regarding celebrities. The ECHR may expand the right to privacy to protect a celebrity against unwanted merchandising on the grounds that it dishonors the celebrity's name. In many countries in Europe the right to privacy is imbued with both dignity interests and rights of commercial exploitation.<sup>86</sup> The ECHR could hold that these personality rights inform the interpretation of Article 8 and require a broader right to privacy, one that allows the individual wide ranging control over various forms of commercialization of his or her image.<sup>87</sup>

The simplest extension would be to a use that falsely implies that the celebrity endorses a particular product or service.<sup>88</sup> Many celebrities certainly would view such a false endorsement as an indignity.<sup>89</sup> Other unauthorized uses, such as merchandising, might also be deemed undignified and therefore invasive of a broad notion of privacy.<sup>90</sup> *Von*

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86. In *Von Hannover*, Princess Caroline brought a claim in the German courts under a provision of German copyright law, as well as privacy laws. Georgios Zagouras, *Commercial Exploitation of the Personality and License Requirements for Satiric Advertisements Under German Law*, 42 I.I.C. 74, 76-82 (2011) (discussing German cases on use of celebrities in advertising). See generally Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673, 681-86 (2002); Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: an Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L.REV. 511, 516-17 (1998); Stephen R. Barnett, "The Right to One's Own Image": *Publicity and Privacy Rights in the United States and Spain*, 47 AM. J. COMP. L. 555 (1999); Susanne Bergmann, *Publicity Rights in the United States and in Germany: a Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479, 479-80, 500-503 (1999).

87. In *Burghartz v. Switzerland*, App. No. 16213/90 (Eur. Ct. H.R. Feb. 22, 1994), the court held that Article 8 gives a person an interest in his name, such that the state cannot arbitrarily deny him the right to choose how his surname will be designated (married man wanted to use his wife's family name, but precede it with his own). "As a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life." *Id.* at ¶ 24. Although this case does not establish that a pecuniary interest in one's name is a privacy right, it is not a large leap to say that a deceptive use of one's name (e.g., a false endorsement) would implicate a privacy right.

88. The U.K. already has some precedent in this area. See *Irvine v. Talksport Ltd.*, [2002] EWHC (Ch) [367].

89. See *Waits v. Frito-Lay, Inc.*, 976 F.2d 1093, 1103 (9th Cir. 1992) (noting jury award of "\$200,000 for injury to [Waits'] peace, happiness and feelings.>").

90. See Zagouras, *Commercial Exploitation*, *supra* note 86, at 82-85 (discussing merchandising cases). In *Mosley v. United Kingdom*, App. No. 48009/08 (Eur. Ct. H.R. May 10, 2011), the ECHR refused to mandate that member countries require a newspaper to give advance notice of any publications relating to the private life of a celebrity. *Id.* at ¶¶ 125-129. However, the ECHR was highly critical of the publications in question (which had been successfully sued in

*Hannover*'s requirement that the country give a private civil right of action to protect the claim creates the basis for a private civil action.

The argument in favor of a strong publicity right, particularly one grounded in Article 8, is not without some contrary precedent. For example, in *Vorsina v. Russia*,<sup>91</sup> decided just months before *Von Hannover*, the ECHR refused the application of the granddaughters of a man whose portrait was used on bottles of beer. The court found that by giving the portrait in question to a local museum, the family "had agreed, in principle, that the portrait may be seen by others."<sup>92</sup> The court also found that the brewery's use did not dishonor the family.<sup>93</sup> This case involved a man who had been dead for several decades. That fact may have been important in the court's decision (though it was not expressly mentioned in the court's analysis). The court may have been uncertain about how to handle such inherited claims, and how to allocate "ownership" of the right after more than one generation. Moreover, the court's finding that the use was not undignified indicates that a less dignified use (and the court did not define what that would be) might have led to a different result. On the other hand, its statement that the family had allowed the portrait to be seen publicly points to privacy, as opposed to simple dignity, as a basis for Article 8 claims.

Moreover, as discussed above, there is at least the potential for Article 10, the free expression provision, to enter the picture. In addition to the *Axel Springer* case, in *Karhuvaara v. Finland*,<sup>94</sup> the ECHR recognized that Article 10 has some force in right to privacy matters. The court held that Finland violated Article 10 by criminally punishing a newspaper for publishing a story about a criminal trial, and identifying the defendant by name and by the fact that he was the husband of a member of Parliament.<sup>95</sup> But the applicability of this judgment to

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British courts) and was not completely unsympathetic to the plaintiff's plea. *Id.* at ¶¶ 130-131. Granting a right of publicity against a commercial use of a celebrity's identity seems less drastic than granting a prepublication right of notice, even if the latter is tempered by a "public interest" exemption. *See id.* at ¶ 131. In *Mosley*, the ECHR was concerned about inhibiting free and open debate. *Id.* at ¶ 132. However, the court's view of the photographs in *Von Hannover* and *MGN, Ltd.* suggests that it would not view commercial uses of celebrity identities as contributing to a useful debate.

91. App. No. 66801/01 (Eur. Ct. H.R. Feb. 5, 2004).

92. *Id.* at \*5. The Court did not consider the merits in a normal fashion; it ruled the application inadmissible, meaning it appeared to be "manifestly ill-founded."

93. *Id.* It was not clear that the court was denying a claim under Article 8; it began this section by saying "assuming that Article 8" applies. The court did not consider Article 1 of the First Protocol.

94. App. No. 53678/00 (Eur. Ct. H.R. Nov. 16, 2004).

95. *Id.* at ¶¶ 54-55.

private civil actions must be tempered by the court's references to the requirement of proportionality of the punishment<sup>96</sup> and the heavy fines imposed by the government.<sup>97</sup> Moreover, the case involved a political figure, not a mere celebrity.<sup>98</sup> Thus, like *Axel Springer*, it can easily be distinguished from *Von Hannover*.

Another attempt to expand the right to privacy was turned aside by the ECHR when it refused to impose an obligation on the media to notify the subject in advance of a news report.<sup>99</sup> Such advance notice would permit the subject to seek a preliminary injunction against publication; the ECHR recognized that this posed potential problems with Article 10's free press guarantee and that there was no consensus among European countries on the need for such advance notice.<sup>100</sup>

On the other hand, these two cases did not involve endorsement or merchandising uses of the celebrity's identity. Thus, the balance more easily tipped in the direction of Article 10 freedoms. In a commercial context, that balance may shift.<sup>101</sup>

In the United States, the right to privacy has morphed into a right of publicity, which is more like a property right and less like a dignity interest—it is assignable and, in most states, inheritable. The right described here under Article 8 is more like the U.S. right to privacy, in that the attention is unwanted. It is not a question of who obtains the commercial value of the celebrity's identity, but a matter of precluding the use entirely. In a later section of this paper, I postulate a more property-like right of publicity under the Convention, but one that is attached primarily to Article 1, First Protocol.

#### VI. THE EXTENSION OF IP RIGHTS THROUGH ARTICLE 10 OF THE CONVENTION

It can be—and has been—argued that the application of human rights standards is a positive development for intellectual property, in that it “humanizes” intellectual property rights, and forces courts to consider limitations based on the rights of those other than intellectual

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96. *Id.* at ¶ 51.

97. *Id.* at ¶ 53.

98. *Id.* at ¶ 52. See *Axel Springer A.G. v. Germany*, App. No. 39954/08, ¶ 111 (Eur. Ct. H.R. Feb. 7, 2012) (Grand Chamber) (prohibition on publishing an article and photo of an actor who was arrested on cocaine related charges in a public place violated Article 10).

99. *Mosley v. United Kingdom*, App. No. 48009/08, ¶ 132 (Eur. Ct. H.R. May 10, 2011).

100. *Id.* at ¶¶ 124, 129.

101. *Ashby v. France*, Case No. 36769/08, ¶¶ 39-42 (Eur. Ct. H.R. Jan. 10, 2013); *Hertel v. Switzerland*, Case No. 59/19977/843/104, ¶ 47 (Eur. Ct. H.R. Aug. 25, 1998).

property rights holders.<sup>102</sup> However, in view of the ECHR's approach to free press, the degree to which the application of the Convention would humanize European intellectual property law is likely to vary widely, depending on the country in question.

But Article 10 could be used as more than a limitation. In theory, it might be the basis for extending IP rights as well. As a reminder, the pertinent language of Article 10 is as follows (with some emphasis supplied):

Everyone has the right to freedom of expression. *This right shall include freedom to hold opinions and to receive and impart information and ideas* without interference by public authority and regardless of frontiers.<sup>103</sup>

Building on the idea that the Convention creates affirmative as well as negative obligations, Article 10 could support an expansion of copyright.<sup>104</sup> If, as is sometimes postulated in the U.S., copyright is an engine of free expression, one could argue for a robust copyright regime as a means of allowing one to “impart information and ideas.”<sup>105</sup> No doubt this right would have to reflect a balance of the rights of others to free expression, and perhaps even some notion of proportionality, which is a common feature of ECHR jurisprudence.<sup>106</sup>

## VII. EXTENDING IP RIGHTS THROUGH ARTICLE 1—FOUNDATIONAL PRINCIPLES

Having laid an appropriate base for the application of the Convention to private disputes, we can now return to Article 1, First Protocol, as a more formidable foundation for the creation and/or extension of IP rights. Through a series of cases, the ECHR has established a methodology for analyzing problems under Article 1. The first task is to lay out that methodology. Once the framework has been

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102. See generally Christophe Gieger, “Constitutionalising” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 I.I.C. 371 (2006); A. Kampelman Sanders, *Unfair Competition Law and the European Court of Human Rights: The Case of Hertel v. Switzerland and Beyond*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 305 (1999).

103. Convention, *supra* note 9, at art. 10 (emphasis added).

104. See *Appleby v. United Kingdom*, App. No. 44306/98, ¶¶ 39-40 (Eur. Ct. H.R. May 6, 2003) (indicating the possibility of affirmative rights under Article 10). See also *infra* Section VIII.D., discussing the creation and expansion of copyright through Article 1.

105. Cf. Lea Shaver and Caterina Spanga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT'L L.J. 637 (2010) (discussing use of the International Covenant on Economic, Social and Cultural Rights as a basis for copyright-like protection).

106. The concept of proportionality is discussed in more detail *infra* in Section VII. A.

established, we shall discuss a variety of possible IP rights that could flow from Article 1.

A. *The General Principles of the ECHR's Article 1 Methodology*

As the ECHR has noted on more than one occasion,<sup>107</sup> Article 1 has two paragraphs that express three separate, but related principles. The first sentence of the first paragraph states a general principle, that one has a right to enjoy one's possessions without interference.<sup>108</sup> The second principle is stated in the second sentence, that one may not be *deprived* of one's possessions, except under specified conditions.<sup>109</sup> The third principle is contained in the second paragraph: the state can control the *use* of one's property, provided it complies with the conditions of the paragraph, namely, that the control be consistent with the public interest.<sup>110</sup> The second and third principles are regarded as specific instances of the first principle.<sup>111</sup> Consequently, the first principle stands by itself; a violation of Article 1 can occur even if there is no total deprivation,<sup>112</sup> and, apparently, even in the absence of an attempt by the state to control the use of the property.<sup>113</sup> On the other hand, not all "interferences" with property under the first principle will constitute violations of Article 1. That principle also requires the state to strike a balance between protecting the individual and protecting "the general interest of the community."<sup>114</sup>

107. See, e.g., *Perdigão v. Portugal*, App. No. 24768/06, ¶ 57 (Eur. Ct. H.R. Nov. 16, 2010) (Grand Chamber); *Benet Czech, spol. S.R.O. v. The Czech Republic*, App. No. 31555/05, ¶ 30 (Eur. Ct. H.R. Oct. 21, 2010); *Maurice v. France*, App. No. 11810/03, ¶ 78 (Eur. Ct. H.R. Oct. 6, 2005) (Grand Chamber); *Sporrong v. Sweden*, App. No. 7151/75; 7152/75, ¶ 61 (Eur. Ct. H.R. Sept. 23, 1982). See *Hermann v. Germany*, App. No. 9300/07, ¶ 74 (Eur. Ct. H.R. June 26, 2012) (Grand Chamber) (the second paragraph of Article 1 is to be interpreted "in the light of the principle laid down in the first sentence of the Article.").

108. Convention, *supra* note 9, at protocol 1, art. 1.

109. *Id.*

110. *Id.* This requirement appears to preclude controls that are intended to favor one person or a small group of people. Support for this argument also comes from a principle added by the court, that is, one of balance between the rights of the individual and the rights of the society. See, e.g., *Perdigão v. Portugal*, App. No. 24768/06, ¶ 78 (Eur. Ct. H.R. Nov. 16, 2010) (Grand Chamber).

111. See, e.g., *Maurice*, App. No. 11810/03 at ¶ 78.

112. See *Sporrong*, App. No. 7151/75; 7152/75 at ¶¶ 67-74.

113. *Id.* at ¶ 65 (finding the second paragraph inapplicable). This would support the idea that affirmative state action is not a prerequisite to the application of this Article.

114. *Id.* at ¶ 69. In *Sporrong*, the city of Stockholm had been issued permits to take applicants' land, permits that were extended for many years but never executed. *Id.* at ¶¶ 9-30. This was found to violate the first principle because the delays reduced the land's value (constituting an interference with its enjoyment) and the inflexibility of the process provided no means to ameliorate the injury as the process dragged on. *Id.* at ¶¶ 70-74. This was a close decision; the vote on this issue was 10-9. Eight dissenters felt that the second paragraph of Article 1



Furthermore, the state's ability to control the use of property under the second paragraph of Article 1, even if the regulation is in the general interest, is limited by a principle of proportionality. The ECHR has stated that there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be reali[z]ed,"<sup>115</sup> which amounts to striking a balance between the interest of the state and that of the individual.<sup>116</sup> That is, the state may not place an undue burden on an individual, even to further a goal that is in the general interest.<sup>117</sup> Compensation by the state for the interference with the individual's property interest is a factor in that proportionality.<sup>118</sup> When reviewing whether the state's action is in the general interest, the ECHR normally grants the state "a wide margin of appreciation."<sup>119</sup> However, the principle of proportionality still limits the state's authority to control property, and, by extension, its ability to permit others to interfere with the owner's enjoyment of the property.<sup>120</sup>

The cases enunciating these principles involved direct state action against an individual's property interest. Other cases indicate that an affirmative right that requires the state to afford protection against private interference with property also exists under Article 1.<sup>121</sup> A

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was applicable, i.e. the permits constituted control of the use of the property by the state. But they believed that the control was within the bounds of the "general interest" and therefore not in violation of Article 1. *Id.* (Joint Dissenting Opinion of Judges Zekia, Cremona, Thór Vilkyálmsson, Lagergren, Sir Vincent Evans, MacDonald, Bernhardt and Gersing with regard to Article 1 (of Protocol No. 1 (P1-1)). *Id.* at 28. The ninth dissenter indicated that the majority was recognizing too absolute a right in property and was insufficiently crediting the public interest. *Id.* at 40 (Partly Dissenting Opinion of Judge Walsh).

115. *Agosi v. United Kingdom*, App. No. 9118/80, ¶ 52. (Eur. Ct. H.R. Oct. 24, 1986). *Cf.* *Iatridis v. Greece*, App. No. 31107/96, ¶ 62 (Eur. Ct. H.R. Mar. 25, 1999) (because the interference violated Greek law, no need to determine whether "a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."); *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, ¶ 149 (Eur. Ct. H.R. June 30, 2005) (Grand Chamber).

116. *Agosi*, App. No. 9118/80 at ¶ 54.

117. *Maurice v. France*, App. No. 11810/03, ¶ 86 (Eur. Ct. H.R. Oct. 6, 2005).

118. *Id.* at ¶ 87.

119. *See supra* Part IV for a discussion of the margin of appreciation.

120. The principle of proportionality is not limited to Article 1. The ECHR has invoked the principle in relation to several other Articles, including Articles 8 and 10. *See generally* Alastair Mobray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, 10 HUM. RTS. L. REV. 289 (2010). The notion of "fair balance" also is not unique to the Convention. *See* Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1 (2010).

121. *Lobanov v. Russia*, App. No. 15578/03, ¶ 46 (Eur. Ct. H.R. Dec. 2, 2010) ("The boundaries between the state's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition."). *See supra* Part III.B. *See also* J. A. Pye (Oxford) Ltd. v. United Kingdom, App. No. 44302/02 (Eur. Ct. H.R. Aug. 30, 2007) (Grand Chamber)

country's property law (or tort law as it relates to harm to property) reflects, albeit perhaps indirectly, the country's level of control over the use of property. A prohibition on theft, for example, reflects the country's goal that certain types of interference with property ownership by private parties will not be countenanced. A tort action for conversion reflects a similar goal. A country's tolerance for unauthorized uses of other forms of property by individuals also reflects the country's decisions concerning legitimate uses of property.<sup>122</sup> These decisions could be weighed using the same principle of proportionality as in cases of direct governmental interference with property. The affirmative/negative distinction need not change the basic framework used by the ECHR in property rights cases. Thus, the questions in each example posited below will include whether there is a possession at all, what conduct would constitute an interference with the possession, and whether the state may allow that interference in accordance with the general interest, in the absence of any compensation for the interference. This last question must include consideration of the proportionality between the general interest and the burden placed on the individual.

#### B. "Possessions," "Interference," and Private Rights

The application of Article 1 begins with a simple question—does the claimant have a "possession"? The ECHR has stated that

[T]he concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.<sup>123</sup>

Intangible property, including intellectual property, qualifies as a possession.<sup>124</sup> Even interests that do not rise to the level of true intangible property can be possessions.<sup>125</sup>

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(allowing a party to invoke adverse possession law against registered owner of property raises an issue under Article 1 notwithstanding lack of direct state action).

122. See *J. A. Pye*, App. No. 44302/02.

123. *Iatridis v. Greece*, App. No. 31107/96, ¶ 54 (Eur. Ct. H.R. 1999). *Accord Paeffgen GMBH v. Germany*, App. No. 25379/04, at 8 (Eur. Ct. H.R. 2007).

124. *Balan v. Moldova*, App. No. 19247/03 (Eur. Ct. H.R. Jan. 29, 2008).

125. *Anheuser-Busch Corp. v. Portugal*, App. No. 73049/01, ¶¶ 76-78 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber) (application to register trademark deemed a possession within Article 1); *Paeffgen GMBH v. Germany*, App. No. 25379/04, at 8 (Eur. Ct. H.R. 2007) (right to use domain name as a possession); *B. v. United Kingdom*, App. No. 36571/06, ¶¶ 38-42 (Eur. Ct. H.R. Feb. 14, 2012) (where government reduced future benefits to recoup past overpayment, right to future

It is not sufficient to postulate property rights, or “possessions.” The Convention protects against an “interference” with the enjoyment of one’s possessions, and one must ask how one can fit a case against a *country* (a prerequisite to a suit in the ECHR) within the usual private framework of intellectual property rights. As discussed above, this obstacle may be overcome by *Von Hannover*’s insistence that a country take affirmative steps to protect the right in question, even providing a private cause of action as necessary. Although Article 1 and Article 8 protect different interests, it is logical for the ECHR to extend the affirmative obligation of the state to the rights granted under Article 1. A close examination of these Articles reveals several similarities in structure. Both Articles begin with a general statement of rights that do not mention interference by the state. Those rights are of a nature that are often protected by tort law—invasion of privacy or conversion of property. The Articles each follow with a subsection permitting a certain level of state interference with the general right in order to further important state interests.

Although it does not direct the member state to create a private right of action, the case of *J A Pye (Oxford) Ltd. v. United Kingdom*<sup>126</sup> illustrates how a private dispute can implicate Article 1. In *Pye*, the applicant company was the registered owner of a piece of land in Great Britain, which it leased for a specified period to its neighbors<sup>127</sup> for grazing. At the end of the lease period, the company refused to extend the grazing rights period, but the neighbors continued to use the land.<sup>128</sup> After using the land without authorization for twelve years the neighbors applied to register a claim to the land under the British statutes governing adverse possession.<sup>129</sup> This was granted, and it divested *Pye* of its claim to the land.<sup>130</sup> The British courts (with some apparent reluctance)<sup>131</sup> upheld the neighbors’ claim under the relevant British

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benefits were a possession, though overpayment made because of applicant’s misrepresentation is not a possession); see *Öneryildiz v. Turkey*, App. No. 48939/99, ¶¶ 126-127 (Eur. Ct. H.R. Nov. 30, 2004) (applicant built house on land belonging to the government without permission; land was not a possession even if applicant could have obtained it, but dwelling was a possession).

126. App. No. 44302/02 (Eur. Ct. H.R. Nov. 15, 2005).

127. *Id.* at ¶ 9. The neighbors were an individual family.

128. *Id.* at ¶ 11. For a time, the parties exchanged correspondence concerning the neighbors’ desire to continue using the land. However, this contact ceased after a few years. *Id.*

129. *Id.* at ¶ 12.

130. *Id.* at ¶ 3.

131. The reluctance stemmed from the fact that *Pye*’s ownership was registered and thus public record. The courts believed that the primary interest served by adverse possession—certainty of title—was only marginally advanced by allowing adverse possession against a *registered* owner. *Id.* at ¶¶ 20-21.

statutes. However, Pye appealed to the ECHR, which initially ruled in its favor under Article 1. The Chamber specifically rejected the British government's argument that, because this was a private dispute not involving governmental action, Article 1 was not applicable.<sup>132</sup> It then ruled that a violation of Article 1 had occurred.<sup>133</sup> The case was transferred to the Grand Chamber, which, by a vote of 10-7, reversed the finding of a violation of Article 1.<sup>134</sup> However, the Grand Chamber accepted that Article 1 applies to cases between private individuals, at least where the government is responsible for the application of its law to the case.<sup>135</sup> Subsequently, the ECHR indicated that Article 1 does, in fact, contain affirmative obligations.<sup>136</sup> Extending affirmative obligations to property rights makes Article 1, First Protocol, the foundation of many possible IP rights. The combination of treating various intangibles of value as possessions, and the obligation of member countries to provide a private right of action to prevent interference with a possession, is a potentially powerful one.

C. *The Potential of Article 1 Further Revealed: Anheuser-Busch v. Portugal*

Perhaps ironically, the potential power of Article 1 for IP rights was revealed in a decision that rejected an attempt to invoke Article 1 in support of an IP right. The case was part of a long-running dispute between brewer Anheuser-Busch and a Czech company over the rights to the name Budweiser. The Czech company claimed to have a geographic indication ("GI") in the name (as translated from Czech to German). Anheuser-Busch filed an application for trademark registration in Portugal, which the Czech company opposed. Although Anheuser-Busch eventually received a registration, it was later cancelled by the Portuguese courts on the grounds that a treaty between Portugal and Czechoslovakia (as it was then called) required Portugal to

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132. *Id.* at ¶¶ 50-52, 56.

133. It found that the application of the adverse possession statute to a registered owner imposed a disproportionate burden relative to the governmental interest involved. *Id.* at ¶¶ 75-76. *See also* Kanala v. Slovakia, App. No. 57239/00, ¶¶ 64-65 (Eur. Ct. H.R. 2007) (allowing applicant's property interest to be sold at foreclosure for far less than appraised value imposed disproportionate burden).

134. J.A. Pye (Oxford) Ltd. v. United Kingdom, App. No. 44302/02, ¶ 85 (Eur. Ct. H.R. Aug. 30, 2007) (Grand Chamber).

135. *Id.* at ¶ 57.

136. Lobanov v. Russia, App. No. 15578/03, ¶ 46 (Eur. Ct. H.R. Dec. 2, 2010) ("The boundaries between *the state's positive and negative obligations under Article 1 of Protocol No. 1* do not lend themselves to precise definition.") (emphasis added).

recognize the Czech company's GI.<sup>137</sup> Anheuser-Busch applied for relief to the ECHR, claiming a violation of Article 1. In an initial chamber judgment, the ECHR rejected the application, asserting that an application to register that did not ripen into a final, non-appealable registration could not be considered a "possession."<sup>138</sup> Anheuser-Busch then appealed to the Grand Chamber of the court. The Grand Chamber also held that there was no violation of Article 1, but on somewhat different grounds. Contrary to the decision of the Chamber, the Grand Chamber decided that an application for a trademark registration *is* a "possession" within the meaning of Article 1.<sup>139</sup> However, the judges then decided that there had not been an "interference" with Anheuser-Busch's right to peaceful enjoyment of its possession.<sup>140</sup> The court viewed Anheuser-Busch's complaint as an attack on the correctness, as a matter of domestic law, of the Portuguese Supreme Court's decision concerning the relative priority of rights between Anheuser-Busch and its Czech adversary.<sup>141</sup> Thus, the court ruled that it could only review the decision to the extent of determining that the Portuguese court's decision was not arbitrary "or otherwise manifestly unreasonable."<sup>142</sup> Pointing out that Anheuser-Busch had had ample opportunity to present its claim to the Portuguese courts, and noting that the questions of law involved—the effect of any preexisting rights of the Czech company and the effect of the 1986 bilateral agreement relating to the GI—were not clear on the face of the laws themselves, the ECHR stated that it was for the Portuguese courts to decide these issues and that the ECHR would not disturb the decision.<sup>143</sup> Two judges dissented from this decision, arguing that, once it was decided that an application was a possession, the retroactive application of the 1986 agreement would constitute an

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137. This is a somewhat simplified recitation of the events, which were rather complicated.

138. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, ¶ 52 (Eur. Ct. H.R. Oct. 11, 2005) (the "Chamber opinion").

139. *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, ¶ 78 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber) (the "Grand Chamber opinion"). Two judges concurred in the result, but disagreed with the Grand Chamber's rationale. They argued that, although intellectual property (including a trademark registration) is generally within the protection of Article 1, an application is not. *Id.* (Joint Concurring Opinion of Judges Steiner and Hajiyev). Two other judges dissented. *Id.* (Joint Dissenting Opinion of Judges Caflich and Cabral Barreto).

140. *Id.* at ¶ 87.

141. *Id.* at ¶ 83.

142. *Id.*

143. *Id.* at ¶¶ 84-86. The Portuguese government made an analogous argument to the Chamber below, to the effect that action by the *ECHR* would amount to an appeal on an issue of domestic law.

interference.<sup>144</sup>

From the standpoint of intellectual property rights, the ruling that a trademark application, which is even more ephemeral than a registration, constitutes a “possession” is very important. The Grand Chamber noted that “a ‘legitimate expectation’ of obtaining an ‘asset’ may also enjoy the protection of Article 1.”<sup>145</sup> It further noted several cases in which IP rights were regarded as possessions, and held that IP rights “as such” are protected by Article 1.<sup>146</sup> With regard to the case of Anheuser-Busch, the Grand Chamber noted in particular the pecuniary value of a trademark registration application.<sup>147</sup> As discussed below, the near equation of pecuniary value with a possession is potentially very expansive in the area of intellectual property.<sup>148</sup>

### VIII. USING ARTICLE 1 TO CREATE OR EXPAND IP RIGHTS: EXAMPLES

#### A. *Possible Trademark and Related Rights Developments from Human Rights*

A good starting point for the discussion of expanding IP rights is an IP right already recognized to implicate Article 1, namely trademark law. *Anheuser-Busch* made clear that trademarks, and even applications to register trademarks, are “possessions” under Article 1 of the First Protocol.<sup>149</sup> *Anheuser-Busch* involved an outright revocation of the

144. *Id.* at ¶ 5 (Joint Dissenting Opinion of Judges Cafilisch and Cabral Barreto).

145. *Id.* at ¶ 65 (Grand Chamber opinion).

146. *Id.* at ¶¶ 67-72.

147. *Id.* at ¶ 76 (“Such applications may give rise to a variety of legal transactions, such as a sale or license agreement for consideration, and possess—or are capable of possessing—a substantial financial value.”). The Chamber had also noted the financial value of the application, but did not deem that sufficient to make it a possession. *Id.* at ¶¶ 47-48 (Chamber opinion).

148. The Grand Chamber’s disposition of the remainder of the case made an analysis of whether there was an actionable “interference” unnecessary.

149. That trademark rights are considered important rights under the Convention also is illustrated by the decision of the European Commission of Human Rights in the case of *Nijs v. Netherlands*, App. No. 15497/89 (Eur. Comm’n. Hum. Rts. 1992). The applicants, a pharmacist, a doctor, and a manufacturer of generic pharmaceuticals, claimed that a limitation on the manner in which doctors could prescribe drugs violated their rights under Articles 8 and 10, and Article 1 of the First Protocol. *Id.* The doctor wanted to prescribe in the form “‘BRAND NAME’ or equivalent other product according to agreed list.” *Id.* However, this was found by the local courts to violate the trademark rights of the brand name manufacturer under Benelux law. *Id.* The Commission rejected the Article 10 claim, stating that, although the regulation was an interference with free expression, it was within the government’s right of control as “necessary in a democratic society,” in order to protect another’s trademark rights. *Id.* The Commission noted that the prescription could be written just in the generic name of the drug. *Id.* The claims under Article 8 and Article 1 were rejected because of a failure to exhaust domestic remedies. *Id.*

trademark registration, but found no violation of Article 1. That result, however, had more to do with the procedural posture of the case than any substantive decision that revoking a registration is not an actionable interference with property rights.<sup>150</sup> Although the second sentence of Article 1 refers to people being “deprived” of possessions—implying a complete taking—the case law clearly shows that less than complete takings will constitute violations if they disproportionately burden the individual.

With this in mind, consider the example of trademark dilution. Trademark dilution is a form of infringement that does not require a showing of likelihood of confusion. Thus, it gives a trademark owner rights in a trademark that often resemble copyright more than traditional trademark rights, which are grounded more in issues of consumer deception. Dilution protects the distinctiveness, or uniqueness, of a trademark. Thus, an unauthorized use of a mark, even on a non-competing good, makes the mark less unique as a source identifier. The owner of a registered mark could argue that under Article 1, another’s use of its mark that dilutes the distinctiveness of the owner’s registered mark constitutes an interference with the enjoyment or use of its property by lessening the trademark’s marketing power. If a mark is diluted, the trademark owner’s property interest (i.e., the “possession”) is diminished in value, perhaps even destroyed. The possibility of complete destruction of the trademark’s value could be most acute if the second use was one that tended to genericize the mark—for example, using “Kleenex” as a generic word for tissue.<sup>151</sup>

Dilution raises multiple issues under Article 1. The first problem may be defining at what point a *potentially* diluting use becomes an

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150. As noted, earlier, the ECHR seemed to view the case as though Anheuser-Busch claimed that Portugal unfairly applied its law retroactively to Anheuser-Busch. *Anheuser-Busch v. Portugal*, App. No. 73049/01, ¶ 82 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber). It is noteworthy that prior ECHR cases *did* find violations of Article 1 where member countries’ laws were applied retroactively to deprive people of claims against the government (or even against private actors). *See, e.g., Lecarpentier v. France*, App. No. 67847/01, ¶¶ 50-52 (Eur. Ct. H.R. Feb. 14, 2006) (retroactive change in law relating to loan disclosures deprived applicants of their expected statutory recovery relating to failure to disclose) (opinion available in French only); *Maurice v. France*, App. No. 11810/03, ¶¶ 3, 94 (Eur. Ct. H.R. Oct. 6, 2005) (Grand Chamber) (retroactive rescission of tort claim violates Article 1).

151. If this sort of use is deemed to be an interference with the enjoyment of property rights, then in some cases there may have to be a balancing between the rights of the trademark owner under Article 1, and the rights of free expression of the second user under Article 10. If the second user publishes a dictionary or a novel that uses the mark in a generic fashion, it would at least implicate Article 10 rights. Whether the Article 10 rights would outweigh the Article 1 rights is not clear. In many cases, the contribution of the use to a debate of public interest, as that is defined by the ECHR, may be very small.

actual interference or deprivation. Clearly, a trademark owner would want to stop diluting uses before they cause measurable harm to the trademark.<sup>152</sup> If the country's trademark scheme is viewed as a means of controlling uses of property, then the argument is directed at the appropriate level of control.<sup>153</sup>

The second problem is determining whether the interference violates the principle of proportionality. The state may have valid reasons to allow at least a certain amount of dilution to occur. A desire to permit free expression would allow various potentially tarnishing uses. Tarnishing uses are ones that damage the reputation of the mark, such as those that connect the mark to sex or drugs. Certain descriptive or nominative uses of marks may be essential, or at least useful, in every day discourse.<sup>154</sup> These reasons probably would be given significant deference, or margin of appreciation,<sup>155</sup> in the analysis. But that still leaves the question of proportionality. That the state's actions potentially affect large numbers of people does not appear to preclude a violation.<sup>156</sup> Because of the potential for significant diminishment of the trademark's marketing power, the ECHR may find that allowing more than *de minimis* dilution imposes too great a burden on an individual trademark owner. Moreover, the interests of those who may be diluting a mark will most often be commercial interests. This may "dilute" the

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152. *Cf. Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003) (U.S. dilution statute, as then worded, held to require actual dilution); *id.* at 435-436 (Kennedy, J., concurring) (expressing concern about the trademark owner's ability to stop incipient dilution under actual dilution standard).

153. The mark owner then could argue that the state's willingness to allow unauthorized diluting uses of the mark deprives mark owners of a possessory right.

154. *See, e.g.*, 15 U.S.C. § 1125(c)(3)(A) (West 2013) (excluding certain descriptive and nominative uses from liability for dilution under U.S. law). Descriptive uses would be uses not as a trademark, but as a means of describing the product—like "soft and dry" towels (assuming that "Soft & Dry" is a trademark for someone's goods). Nominative uses are uses that point to the trademark owner's goods or services—such as a news report about "NIKE" shoes being made in third world countries—but they are not used by the second user as a trademark for his or her own goods.

155. *See supra* Part IV for a discussion of the margin of appreciation. However, comparative advertising, which is accepted in the United States as not being trademark infringement, is not as accepted in Europe. *See L'Oreal S.V. v. Bellure N.V.*, Case C-487/07, ¶¶ 41, 47 (ECJ 2009) (knockoff perfumes that were not confusingly similar violated EU dilution law). Thus, the margin of appreciation granted if a country allows such uses may not be as large.

156. *Lecarpentier v. France*, App. No. 67847/01, ¶¶ 50-52 (Eur. Ct. H.R. Feb. 14, 2006) (case would apply to all applicants for loans prior to legislation) (opinion available in French only); *Maurice v. France*, App. No. 11810/03 (Eur. Ct. H.R. Oct. 6, 2005) (Grand Chamber). *Cf. Hutten-Csapska v. Poland*, App. No. 35014/97 (Eur. Ct. H.R. June 19, 2006) (Grand Chamber) (rent control as violation notwithstanding widespread effect).



value of protecting those interests to the ECHR.<sup>157</sup>

Finally, although the crux of the dispute is one between private parties, as discussed earlier, constructing an argument in favor of an affirmative right against a private party is not difficult. A state tort or property regime that permits others to destroy one's possessions<sup>158</sup> could constitute a deprivation of the right to the enjoyment of one's possessions. Presumably, Convention member states have an affirmative obligation to protect possessions from interferences that are not in the general interest, even if that means providing private civil causes of action to do so.<sup>159</sup>

In practical terms, requiring member states to protect trademarks against dilution would not be a seismic event. As a result of the European Union's Trademark Harmonization Directive, almost all of its twenty-seven members protect trademarks against dilution.<sup>160</sup> Other non-EU European countries protect trademarks against dilution as well.<sup>161</sup> However, once such a right is recognized as a "possession" under the Convention, it leads to further issues. For example, suppose that the European Commission decided to narrow the scope of its non-confusion based trademark protections so that only marks deemed "famous among the general consuming public of the European Union" were protected.<sup>162</sup> Such an amendment would deny protection to marks

157. To some degree, consumers may have an interest in allowing certain forms of dilution—it may promote competition, or it may add some terms to the lexicon. *Ty v. Perryman*, 306 F.3d 509, 513-14 (7th Cir. 2003).

158. An extreme example would be a legal regime that turned a blind eye to physical appropriations of one group's tangible possessions by a competing group. *Cf. infra* section VIII.C., discussing trade secret law.

159. *See Lobanov v. Russia*, App. No. 15578/03, ¶ 46 (Eur. Ct. H.R. Dec. 2, 2010). It may be noted that, in the absence of a protective regime, such interferences would be pursuant to law, or the lack thereof, but they could violate the concept of proportionality that is part of the ECHR's property rights jurisprudence.

160. Many of these laws were enacted pursuant to the European Union's Trademark Harmonization Directive. *See* DAVID S. WELKOWITZ, TRADEMARK DILUTION: FEDERAL, STATE, AND INTERNATIONAL LAW 650-58 (2d. ed. 2012). The EU's Community Trade Mark Regulation also provides for such protection. *Id.* at 658-59.

161. WELKOWITZ, TRADEMARK DILUTION, *supra* note 160, at 662.

162. At present, the Trademark Harmonization Directive protects marks "with a reputation" from certain non-confusing uses. TRADEMARK HARMONIZATION DIRECTIVE, art. 4(4)(a) and 5(2); COMMUNITY TRADE MARK REG. art. 8(5) and 9(1)(c). The European Court of Justice has not equated this limitation with a requirement of "fame," let alone fame measured by the general consuming public of the EU. My hypothetical is based on the Trademark Dilution Revision Act of 2006 ("TDRA"). Prior to this amendment, U.S. law protected "famous" trademarks from dilution. However, "famous" was defined in a way that arguably allowed marks famous only in a specific product market (what the ECJ might call the "relevant public") to be eligible for protection. The TDRA restricted dilution protection to marks whose fame extended to the "general consuming public of the United States." 15 U.S.C. § 1125(c)(2) (West 2013).

previously eligible. If a trademark registration<sup>163</sup> is a “possession” and a country removes an important protection from that possession, would that constitute an interference, subject to Article 1? Much would depend on the margin of appreciation given to countries to regulate possessions in the public interest. However, in other contexts, the ECHR has found the retroactive removal of choices in action to be violations of Article 1.<sup>164</sup>

### B. *A Property-Based Right of Publicity?*

The *Von Hannover* case demonstrated that celebrities could expect protection by Convention member countries for their personal interests (at least those interests covered by the Convention), by the allowance of a private civil action against other private actors who would invade the celebrity’s realm. *Von Hannover* was what a United States observer would categorize as a right to privacy suit. United States law, particularly state law, often provides additional protection to celebrities through the category known as right of publicity.<sup>165</sup> Rather than protecting celebrities from invasions of their private space, the right of publicity allows celebrities to control many commercial uses of their names, likenesses, or “personas.” Not all of these uses are invasive or undignified. Based on the *Von Hannover* and *Anheuser-Busch* decisions, might the ECHR extend the right to privacy from *Von Hannover* (under Article 8) to cover the type of commercial uses associated with the American right of publicity (under Article 1)?

The ECHR could hold that the rights to privacy and control of merchandising provided in various European countries rise to the level of a “possession,” and are protected by Article 1. Clearly, the ability to use a celebrity’s name or likeness in the promotion of products is a valuable commodity. The celebrity can license uses of his or her image to others, analogous to the licensing of the use of a trademark.<sup>166</sup> In

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163. The Directive only applies to registered marks.

164. *E.g.* Lecarpentier v. France, App. No. 67847/01 (Eur. Ct. H.R. Feb. 14, 2006); Maurice v. France, App. No. 11810/03 (Eur. Ct. H.R. 2005) (Grand Chamber).

165. In this regard, it is interesting that the California statute protecting rights of publicity post-mortem describes the right as a property right. CAL. CIV. CODE §3344.1(b) (West 2013). The statute protecting rights of publicity for living persons does not contain this provision. *Id.* at § 3344. See also FLORIDA STAT. ANN. § 540.08 (West 2013); IND. CODE ANN. §§ 32-36-1-1 - 32-36-1-20 (West 2013).

166. See Zagouras, *Commercial Exploitation*, *supra* note 86, at 82-85. Here it is worth noting that in both *Von Hannover* cases, Princess Caroline’s suit in the German courts included a claim under a provision of German law which is part of the Act on Artistic Creations—a relative of copyright. Copyrights, like trademarks, would be considered possessions under Article 1.

*Anheuser-Busch*, the court stressed the pecuniary value of a trademark *application* when finding it to be a possession. Merchandising is generally viewed as a valuable aspect of one's personality. As long as licensing of an image is permitted, one has a "legitimate expectation," to use the ECHR's terms, in being able to reap that value. That being the case, the state's unwillingness to allow a celebrity to police the right (which could either dilute its licensing value or destroy it altogether) could constitute an "interference" with the celebrity's enjoyment of that possession. Moreover, the ECHR is somewhat unlikely to view allowing such an interference as within the general interest under Article 1, nor is it likely to view the deprivation of control of the celebrity's image as proportional to the protected interest. In *Von Hannover* (no. 1), the court gave little deference to the German courts' assertion that Princess Caroline, as a public figure, was newsworthy and therefore invasions of her privacy were allowed.<sup>167</sup> In the case of endorsements and merchandising, the purely commercial aspects of the activity probably would be deemed even less worthy of protection by the ECHR.<sup>168</sup>

If such a right of publicity is recognized, it is likely to be more extensive than the analogous right recognized domestically. U.S. courts are somewhat solicitous of free speech arguments when something other than simple "merchandising" is at issue.<sup>169</sup> However, in *Von Hannover*, the ECHR obviously believed that there was little free speech interest in satisfying the public's desire for information about a celebrity. Consequently, the ECHR may find little free speech interest in profiting from the use of another's image, even where the use, for example, constitutes an artistic interpretation of the celebrity's image.<sup>170</sup>

167. *Von Hannover v. Germany*, App. No. 59320/00, ¶ 72 (Eur. Ct. H.R. June 24, 2004).

168. *Ashby v. France*, Case No. 36769/08, ¶¶39-42 (Eur. Ct. H.R. Jan. 10, 2013); *Hertel v. Switzerland*, Case No. 59/1997/843/1049, ¶47 (Eur. Ct. H.R. Aug. 25, 1998).

169. *E.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, at 924-25, 931-36 (6th Cir. 2003) (lithograph of Tiger Woods at the Masters tournament protected by First Amendment); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-89 (9th Cir. 2001) (magazine story with altered picture of Dustin Hoffman as "Tootsie" subject to First Amendment protection); *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003) (comic book portraying Johnny and Edgar Winter as grotesque characters protected by First Amendment). *But cf.* *Comedy III Prods., Inc. v. Saderup*, 21 P.3d 797, 805 (Cal. 2001) (non-transformative lithograph of Three Stooges not protected by First Amendment); *Doe v. TCI Cablevision*, 100 S.W.3d 363 (Mo. 2003) (comic book character named after former hockey player violated player's right of publicity and not protected by First Amendment).

170. *Cf. ETW Corp.* 332 F.3d 915 (lithograph of Tiger Woods at the Masters protected by First Amendment). This would be consistent with the more expansive notion of moral rights in copyright recognized by European countries.

Furthermore, the broad notion of “newsworthiness” applied in some U.S. cases<sup>171</sup> probably would not be an effective defense in the ECHR.<sup>172</sup>

### C. *Article 1 and Trade Secret Law*

Cementing dilution protection would not fundamentally change existing IP rights. But the Convention may be used to *create* rights as well as extend them. One possibly fertile ground for creating IP rights from Article 1 is trade secrets. To fully appreciate how Article 1 might protect trade secrets, consider whether a country with no trade secret protection would be obliged to protect them. Without any domestic trade secret protection, one might argue that the trade secret owner has no “possessions” to be protected by Article 1. However, the *Anheuser-Busch* opinion contains several statements that suggest that Article 1 would still apply. Although the ECHR did refer to the existence of rights under Portuguese law relating to intellectual property (in this case, specifically to trademark registration applications), it also stated that a “possession” under Article 1 is to be considered independent of domestic law.<sup>173</sup> That suggests that an Article 1 possession may not depend on the preexistence of actual property rights under domestic law. Moreover, the ECHR’s discussion of whether *Anheuser-Busch*’s application was a possession emphasized that the application had significant financial value—it could be sold or licensed, for example.<sup>174</sup> The same is true of a trade secret; it can be licensed or sold to another business and may have considerable financial value.<sup>175</sup> This value would not depend on the willingness of any country to protect the trade secret from theft—its value stems from its secrecy, and, presumably, the expected ease of keeping it a secret. Thus, one would expect that a trade secret would meet the criteria of a “possession.”

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171. See, e.g., *Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549 (N.Y. 2000) (photograph not completely unrelated to article although not of the person named in column); *CBC Distrib. & Mktg, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) (fantasy baseball league can use public statistics and names of players).

172. See, e.g., *Campbell v. MGN Ltd.*, [2004] E.M.L.R. 15 (H.L.) (granting relief under the U.K. Human Rights Act to model for pictures taken of her outside a drug rehabilitation facility, and citing ECHR precedent). The ECHR, noting the balancing and citation of ECHR precedent by the U.K. courts, rejected an application by MGN claiming that the judgment was a violation of Article 10. *MGN Ltd. v. United Kingdom*, App. No. 39401/04, ¶¶ 149-156 (Eur. Ct. H.R. Jan. 18, 2011).

173. *Anheuser-Busch v. Portugal*, App. No. 73049/01, ¶ 63 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber).

174. *Id.* at ¶ 76.

175. Indeed, under US law, the definition of a trade secret is something that has value because of its secrecy. UNIF. TRADE SECRETS ACT §1(4) (1985).

The next step would be to determine whether the theft of a trade secret is a “deprivation” or a “control” of property. In one important sense, loss of a trade secret is a deprivation in that the loss of secrecy deprives the owner of the key component of value. On the other hand, the owner retains the know-how behind the trade secret and is still able to use the process (or whatever the secret is). Moreover, the misappropriator has an incentive not to reveal the secret any further in order to maintain its value.<sup>176</sup>

For a state to justify *its own* interference with a possession, it would have to show that the interference was in accordance with domestic law. Presumably, in the case of a private interference, the state would have to at a minimum show that the private person’s actions were in some sense lawful. In the trade secret context, that should mean that if the secret was taken by means that are independently unlawful—for example, by burglarizing the company’s premises—then a failure of the state to allow the owner to enjoin the use of the secret and/or recover for its use should be a violation of Article 1.<sup>177</sup> However, the acquisition may have been by means that are not independently unlawful, say, by flying an airplane over a plant while it is being built.<sup>178</sup> Finally, under Article 1, one must consider the issue of proportionality. Presumably, a state would argue that weak or nonexistent trade secret protection serves the public interest by allowing competition and thereby lowering the price of goods or services. It could also argue that weak protection serves to deter inappropriate uses of a trade secret (e.g., charging exorbitant prices) in light of the potentially perpetual nature of a trade secret, unlike a patent or copyright. On the other hand, the ECHR has appeared wary of otherwise legitimate state policies that force an individual (as opposed to society at large) to bear the brunt of the policy’s downside. Here, the holder of the trade secret is being made to bear the weight of the state’s

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176. This assumes that the secret was taken to exploit its economic value and not simply to harm the owner by revealing it in the manner of Wikileaks. Moreover, if the secret is a customer list, then its loss would likely destroy its value.

177. Note that even if the state allows some sort of tort action for the act of taking, if it does not protect the owner from the consequences of the taking, i.e., the loss of secrecy and the ability of another to compete, then the principle of fair balance may still be violated.

178. See *E.I. du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1017 (5th Cir. 1970) (taking pictures of unfinished plant by flying over it as trade secret violation). Article 39 of TRIPS requires members of the World Trade Organization (“WTO”) to protect trade secrets, so the likelihood of a country not having any trade secret protection is small. But Article 39 appears not to require protection from *all* trade secret misappropriation; only appropriations by means that in the United States would be independently wrongful; breach of contract, inducement to breach a contract, and breach of confidence are clearly within the required protection of Article 39. TRIPS Art. 39 fn. 10.

pro-competitive policies. This compares to other situations in which the ECHR found a disproportionate burden and, thus, a violation of Article 1.<sup>179</sup> Clearly, the requirement of a trade secret regime would also depend on imposing affirmative obligations under Article 1, a topic discussed earlier.

Trade secret protection is bolstered by Article 8, the right to privacy. The essence of a trade secret is its secrecy. One who reveals the secret either in violation of an understanding that it would be kept secret (somewhat like the British common-law claim for breach of confidence) or who misappropriates it, would be said to be violating privacy.

#### *D. A Mandate for Copyright?*

All European countries have some form of copyright protection. But what if we imagine a Europe without copyright protection? Would the Convention require its existence? Begin with Article 1. Is there any “possession” that an infringer could interfere with?<sup>180</sup> Assume you have created a “work” such as a manuscript for a book. Arguably, the work is a possession by virtue of its potential value—one could, for instance, sell it to a book publisher. Although the work itself (as opposed to a copy) is an intangible, the ECHR seems comfortable affording intangibles protection as possessions. But would the act of unauthorized copying constitute an unwarranted interference? That may depend on when the copying takes place. If the manuscript is taken and published before the author has an opportunity to publish it, then that constitutes the strongest situation for interference. A prepublication appropriation deprives the author of any opportunity either to extract value by sale or license or to control the context of the use.

However, that opportunity can be respected by a limited tort regime that outlaws such prepublication appropriations, subject to limitations based on free speech principles,<sup>181</sup> and possibly limits based on time—the author’s life, for instance. To bolster the argument under Article 1,

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179. See *Pressos v. Belgium*, App. No. 17849/91, ¶ 43 (Eur. Ct. H.R. Nov. 30, 1995); *Hutten-Czapeka v. Poland*, App. No. 35014/97, ¶ 225 (Eur. Ct. H.R. June 19, 2006) (Grand Chamber); *Maurice v. France*, App. No. 11810/03, ¶ 93 (Eur. Ct. H.R. Oct. 6, 2005) (Grand Chamber).

180. Keep in mind that a possession cannot be based on the hope that the courts will create a right. See *Malhous v. Czech Republic*, App. No. 3307/96 (Eur. Ct. H.R. Dec. 13, 2000) (Grand Chamber); *Kopeccky v. Slovakia*, App. No. 44912/98, ¶ 35(c) (Eur. Ct. H.R. Sept. 28, 2004) (Grand Chamber).

181. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 569 (1985) (rejecting First Amendment defense to copyright infringement where prepublication dissemination took the “core” of the work).

we may invoke Article 8 of the Convention, the privacy provision, and assert that disseminating an unpublished work violates the author's right to keep it private. But none of this requires us to create a full-blown copyright in the work.

A variety of roadblocks exist to the mandating of a copyright regime. Even assuming that the expression of an idea (i.e., a "work") is a possession of its creator, when imposing affirmative obligations under the Convention, the ECHR normally weighs the impact on the individual against the impact on the state and society, and looks to whether the individual is being forced to bear a disproportionate burden.<sup>182</sup> Although the lack of a copyright regime would reduce the value of the author's work, it need not be extinguished altogether. It may be that the lead-time monopoly would be sufficient to extract value from the work.<sup>183</sup> It would not be as much value as a copyright monopoly, but there is no inherent right to make monopoly profits under Article 1, unless the state's legal regime grants such rights. Moreover, one might add that Article 10 of the Convention, protecting free expression, gives additional support for the dissemination of information without copyright. Finally, the ECHR may give the state a considerable margin of appreciation because the imposition of a copyright regime would require the state to enact a potentially complex legislative scheme to properly balance the rights of authors and society, and this is a task ill-suited for a court.

On the other hand, it should be pointed out that the ECHR has shown a fair degree of indulgence of property rights when asked to weigh them against free expression, at least where there were alternative means of expression available.<sup>184</sup> An infringer can express him or herself without appropriating the author's work. Combined with the argument that free expression is actually enhanced by copyright,<sup>185</sup> and the fact that the U.N. Declaration of Human Rights contains explicit support for intellectual property,<sup>186</sup> the ECHR might be persuaded to

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182. See, e.g., *Appleby v. United Kingdom*, App. No. 44306/98, ¶ 40 (Eur. Ct. H.R. May 6, 2003); *Pressos v. Belgium*, App. No. 17849/91, ¶ 43 (Eur. Ct. H.R. Nov. 30, 1995); *Hutten-Czapeka v. Poland*, App. No. 35014/97, ¶ 225 (Eur. Ct. H.R. June 19, 2006) (Grand Chamber); *Maurice v. France*, App. No. 11810/03, ¶ 93 (Eur. Ct. H.R. Oct. 6, 2005) (Grand Chamber).

183. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 293 (1970). Justice (then Professor) Breyer wrote at a time when ebooks and widespread Internet access were not issues. The ease with which books, and other materials, can be copied, distributed, and read on an e-reader such as a Kindle or an iPad may make his analysis outdated.

184. See *Appleby*, App. No. 44306/98 at ¶ 48.

185. See *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

186. Universal Declaration of Human Rights, *supra* note 2.

require at least a limited copyright regime protecting the author's reproduction right. However, it would be surprising if the court went beyond that, at least in countries without any pre-existing copyright regime, to impose the kind of copyright scheme contemplated by TRIPS or European copyright statutes. Clearly, performance rights, display rights, and adaptation rights would be a rather large leap for the court, even if imposing a mandate of protection against reproduction would not.<sup>187</sup>

This, of course, assumes no pre-existing copyright regime. Because all countries joining the WTO must adhere to TRIPS, which requires at least some level of copyright protection, European countries would have *some* sort of copyright protection.<sup>188</sup> Below we shall discuss possible extensions to an existing copyright regime that could be mandated under the ECHR's Article 1, Article 8, and Article 10 jurisprudence.

### E. Moral Rights

The Berne Convention on copyrights requires protection of what are conventionally called "moral rights" of authors.<sup>189</sup> Protection of moral rights permits authors—even those who no longer own the economic rights to their works—to prevent certain uses of those works.<sup>190</sup> European countries already protect the moral rights of authors.<sup>191</sup> However, the scope of these rights is not uniform. If the

187. One would expect that the wide margin of appreciation afforded countries in a commercial context would allow countries to choose the details of the economic rights afforded authors and copyright owners.

188. Russia, which already has a copyright regime, was the last major country outside of TRIPS. The Russian Federation joined the World Trade Organization—thus subjecting itself to TRIPS—in 2012. Seven other members of the Council of Europe—Andorra, Azerbaijan, Bosnia and Herzegovina, Monaco, San Marino, and Serbia—still are not members of the WTO. See [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Feb. 10, 2013). Of those, all except San Marino are members of the Berne Convention. See [www.wipo.int/treaties](http://www.wipo.int/treaties) (last visited Mar. 15, 2012). San Marino is a member of the World Intellectual Property Organization ("WIPO") and the Paris Convention, and it has a copyright statute (one that also includes moral rights). See [www.wipo.int/wipolex/en/profile.jsp?code=SM](http://www.wipo.int/wipolex/en/profile.jsp?code=SM) (last visited Mar. 15, 2012).

189. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis. [hereinafter Berne Convention]. United States copyright laws protect moral rights, but only to a limited degree. See 17 U.S.C. § 106A (West 2013).

190. The principal moral rights are the right of attribution, right of integrity, right of first publication, and right of withdrawal. See, e.g., Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap,"* 2007 UTAH L. REV. 569, 660 & n.4; Cyril R. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359 (2006). See generally ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (Stanford Law Books 2010).

191. Virtually all Convention countries are members of the Berne Convention. That does not guarantee implementation of a moral rights provision; Berne has no formal enforcement mechanism



ECHR interprets the Convention to apply to moral rights, it might impose some measure of uniformity. The three provisions of the Convention we have been discussing could apply to moral rights.

Conceivably, Article 10 of the Convention could be used to *limit* moral rights. However, this seems unlikely, especially if the moral rights of authors are analogized to a kind of dignity interest similar to the interest protected by Article 8.<sup>192</sup>

On the other side of the coin, Article 1, First Protocol, could provide the means to expand moral rights. There are, however, several potential obstacles to using Article 1 as a source of moral rights. First, Article 1 requires the existence of a “possession.” Given the fairly broad view of possessions taken by the ECHR in *Anheuser-Busch*,<sup>2</sup> one might not expect this to be a serious obstacle. But, in fact, this may be a serious issue. An author’s moral rights are independent of her ownership of the copyright in the work. Thus, the economic rights to the copyright may be owned by someone other than the author. Moral rights give the author the right to require attribution, to prevent alteration of the work, and to prevent uses that would bring dishonor to the author.<sup>193</sup> These are not inherently pecuniary rights. They appear not to be intended to give the author extra money for the work by imposing an obligation to pay for its use. Rather, they appear to exist to allow the author to *prevent* certain uses of the copyrighted work. Thus, they would not have a monetary value. Conceivably, if the moral rights are waivable, the copyright owner (or a licensee) might pay an extra sum to the author for a waiver. The availability of that extra value might be sufficient to make moral rights into a “possession.” But not all countries permit waivers, and those that do differ on the exact parameters of the

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and neither the TRIPS Agreement nor the European Union require moral rights implementation. Rigamonti, *Deconstructing*, *supra* note 190, at 357-58. See Hughes, *American Moral Rights*, *supra* note 190, at 706-09 (discussing moral rights implementation in various countries); TRIPS Agreement, art. 9(1) (specifically excluding Berne’s moral rights provision from TRIPS). However, at least formally, European copyright statutes appear to include some form of moral rights, as indicated by the statutes listed in the WIPO database WIPOLEX.

192. This does not mean that Article 8 would be a direct source of moral rights. Though not inconceivable, it is unlikely that an alteration of an author’s work would rise to the level of an invasion of the author’s privacy. *But cf.* Hughes, *American Moral Rights*, *supra* note 190, at 707 (noting that the United Kingdom used privacy-like protection to implement moral rights). Nevertheless, when considering the proper scope of free expression, one would expect the ECHR to consider the countervailing dignity interest of the author.

193. See, e.g., Berne Convention, *supra* note 189, at art. 6bis (giving authors, *inter alia*, the right to prevent actions “in relation to the said work, which would be prejudicial to [the author’s] honor or reputation.”).

rights and the ability to waive.<sup>194</sup> This is a difficult question, not easily answered by the ECHR's case law.

However, if the ECHR finds that moral rights are possessions, an unauthorized alteration of the work could be considered an interference with that right, and therefore a violation of the right to enjoy one's possessions. There are several areas in which a failure to enforce or allow moral rights could lead to an Article 1 claim. The Berne Convention gives rights against uses that harm an author's reputation, but an author might want to challenge other alterations of (or perhaps the imminent destruction of) the work. Presumably, the government would defend on the basis of the general interest in making various uses—especially “transformative” or communicative uses—of an existing work without interference by the author. This defense would be strengthened if the copyright owner gave consent to, and was paid for, the use. In that case, the moral rights of the author interfere with the economic rights of the copyright owner. This invokes Article 1 in favor of the copyright owner and Article 10 in favor of communication to the public. Given the normal margin of appreciation, that should make the government's inaction consistent with the general interest. The remaining question would be one of proportionality. If the author's interest is purely pecuniary, it is unlikely to trump the general interest. Whether an author who simply feels personally insulted by the use despite its lack of effect on reputation or honor would claim an undue imposition (in the manner perhaps of Article 8) is a more difficult question to answer. If the ECHR views the use as having little communicative value, then the author's prospect of winning is significant.<sup>195</sup> On the other hand, if imposing a right to preclude alterations, which may interfere with the normal right to allow derivative works, significantly interferes with the economic value of the work, then the author's imposition may be deemed disproportionate.<sup>196</sup>

The ECHR could also include Article 8 in the analysis of moral

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194. See WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS, FINAL REPORT OF THE REGISTER OF COPYRIGHTS 26-52 (Mar. 1, 1996) (discussing waiver policies of fourteen countries and the European Union). Cf. 17 U.S.C. § 106A(e) (2013) (allowing waiver of rights under the Visual Artists Rights Act).

195. The imminent destruction of a work raises different questions. If it is a publicly displayed work, then the public loses out by its destruction. But there is a countervailing interest in the owner of the embodiment of the work (a sculpture, painting, etc.), which might be protected under Article 1, especially if destruction is economically necessary. But if the author is willing to pay compensation, the balance tips in another direction.

196. This also raises the question whether a broad moral right to preclude any alteration overly interferes with the copyright owner's interest, which is protected under Article 1.

rights.<sup>197</sup> To the extent that moral rights represent the author's personality imbued in the work, a right of personality would be a possible way to protect that interest.<sup>198</sup> There would be a need to balance any Article 8 right against an Article 10 right of free expression—especially if an alteration of a work promotes a debate on a matter of general interest.<sup>199</sup> The proportionality inquiry would be more complicated. The author of a work that has been made public may have to accept a certain level of public use of the work.<sup>200</sup> However, alterations that impugn the reputation of the author may be deemed excessive in light of the point being made. If the author's claim is that *any* alteration is impermissible, then, as noted above, Article 10 and Article 1 may enter the picture—Article 10 favors dissemination of differing points of view and Article 1 protects the economic value of the work, which in this case is owned by the copyright owner, not necessarily the author.

Because moral rights are part of an international treaty, inferring such rights from the Convention, like trademark dilution, may not represent a significant inroad in the world of intellectual property. However, given the variation in moral rights among different countries, even those that adhere to the Berne Convention, it is possible that the ECHR would decide to protect those rights to an extent not provided by all countries (as in *Von Hannover*). Moreover, the ECHR could review the legitimacy of certain limitations on moral rights. This independent analysis could cause problems in connection with a waiver of moral rights, an area where countries do have different rules. On the one hand, the ECHR may find that upholding a waiver given under somewhat coercive circumstances is a violation of the right. On the other hand, the ECHR could rule that a failure to allow an author to recoup the pecuniary value of waiving the right is also a violation. Finally, the application of the doctrine of margin of appreciation could allow some variation in the precise scope of the rights.

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197. See Rigamonti, *Deconstructing*, *supra* note 190, at 393-94 (discussing use of rights of personality in some countries to protect moral rights).

198. *Burghartz v. Switzerland*, App. No. 16213/90, ¶ 24 (Eur. Ct. H.R. Feb. 22, 1994) (noting the importance of one's name to personal autonomy).

199. Article 10 would seem to *favor* a right of attribution insofar as it disseminates accurate information about the work to the public.

200. *Cf. Von Hannover v. Germany* (no. 2), App. No. 40660/08, ¶120 (Eur. Ct. H.R. Feb. 7, 2012) (Grand Chamber) (noting that public status is not irrelevant to analysis under Article 8).

### F. *Rights to Traditional Knowledge*

One other area in which the Convention could be used to expand intellectual property rights is traditional knowledge.<sup>201</sup> As chronicled by other scholars, various forms of traditional knowledge and folklore, including songs, dances, and knowledge of the medicinal properties of various plants, have value in the modern world.<sup>202</sup> This knowledge often is not considered to be the individual property of any one person, but, rather, is “owned” by the group for the benefit of the group. In some instances, outsiders have sought to exploit this knowledge and tradition and to acquire IP rights in that knowledge and tradition. Article 1, First Protocol provides a possible means of preventing such acquisitions by granting rights to the group (or, if identifiable, the individuals) from which the knowledge and tradition originates. Such knowledge and tradition, having value, should be considered a possession. However, the issue of who owns the possession is particularly significant. Unlike Articles 8 and 10, Article 1 specifically gives rights to “[e]very natural or legal person.”<sup>203</sup> But depending on the structure of the group claiming rights in the traditional knowledge, it may not be deemed a “legal person.” And the individuals within the group may not have a sufficient right of ownership to be able to bring suit individually under Article 1.<sup>204</sup>

Article 34 of the Convention may be of some assistance in dealing with this problem. Article 34 allows individual suits in the ECHR against member countries. But Article 34 does not limit standing to “individuals,” or “legal persons,” be they natural persons or

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201. A number of articles have discussed the possibility of using various human rights conventions to protect traditional knowledge. For a recent example, see Rebecca Gross, *The “I” in Indigenous: Enforcing Individual Rights Guarantees in an Indigenous Group Rights Context*, 27 N.Y. INT’L L. REV. 65 (2010).

202. See, e.g., Gary K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai’i: A Soft Law Proposal*, 29 U. HAW. L. REV. 581 (2007); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997). The rather simple argument I am presenting here deliberately sidesteps many complications and nuances of the debate about protecting traditional knowledge. It is not my purpose in this paper to take sides in this debate. The arguments here are based only on what *could* occur, and are not normative judgments about such results.

203. Convention, *supra* note 9, at protocol 1, article 1.

204. See, e.g., *Agrotexim v. Greece*, App. No. 14807/89, ¶¶ 64–65, 71 (Eur. Ct. H.R. Oct. 24, 1995) (shareholders not considered proper applicants on behalf of corporation—one dissenter thought shareholders should be proper applicants); *Holy Synod Of The Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, App. No. 412/03, ¶ 168 (Eur. Ct. H.R. Jan. 22, 2009) (ousted former members of church leadership, who did not claim ownership interests in the property of the church, not proper applicants for Article 1 action).

corporations. Instead, it permits suit by any “non-governmental organisation or group of individuals claiming to be a victim of a violation” of the Convention.<sup>205</sup> Thus, in order to invoke the protection of the Convention, a group need not have any particular structure. While this does not necessarily override the limits of Article 1, it does suggest a possible solution. Article 13 of the Convention requires countries to provide “an effective remedy” for violations of Convention rights.<sup>206</sup> If a country refuses to grant legal status to a group, effectively making it impossible for anyone to challenge the country’s decision to allow others to use, or even acquire rights in, the traditional knowledge, it may be failing to provide an effective remedy for a Convention violation. Of course, such a remedy could take many forms, but if the barriers to a challenge are severe, Article 13 could provide the means to allow the group some sort of effective enforcement. That would require either the country or the group to come up with some appropriate representative or representatives to bring the action.<sup>207</sup> This analysis would permit a group claiming rights to traditional knowledge to have standing in the ECHR to sue for interference with their possessory interests in the traditional knowledge.<sup>208</sup> The ECHR may also look to the recent WIPO

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205. Convention, *supra* note 9, at art. 34.

206. *Id.* at art. 13. Article 1 of the Convention—the actual one, not the one in the First Protocol—commits member states to “secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” *Id.* at art. 1. Although Article 1, First Protocol, is not in Section 1, Article 5, First Protocol effectively merges the provisions of the First Protocol with the existing Convention.

207. *Cf.* 25 U.S.C. § 305e (West 2013) (the Indian Arts and Crafts Act, which references other statutes defining “Indian” and “Indian tribe”).

208. But whether such a group could claim to be a “victim” under Article 34 could raise problems analogous to the natural or legal person problem of Article 1. On the other hand, case law under Article 13 only requires that there be an “arguable” violation of the Convention in order to trigger the effective remedy requirement. *See* G.R. v. Netherlands, App. No. 22251/07, ¶ 44 (Eur. Ct. H.R. Jan. 10, 2012). Although that seems grounded in the substance of the Convention—i.e., one must have an arguable claim that the substance of a Convention right to which you would be entitled has been violated—it would seem reasonable to include procedure within the ambit of Article 13 as well. The ECHR has said that the concept of a “possession” in Article 1 has an “autonomous” meaning that is not dependent on the law of a particular country. It is logical to extend that reasoning to the meaning of “legal person” as well. Exactly who “owns,” or at least has the right to represent the interest of groups claiming interests in traditional knowledge is the subject of some debate. I will assume that there is some principled way to identify the “group” and some equally principled way to identify a proper representative for the group. I am also assuming that, even if the group does not recognize “ownership” in the same manner contemplated by Article 1, the ECHR would recognize that having a legitimate interest in excluding others from using the knowledge is the equivalent of “possessing” it, making the knowledge a possession within the meaning of Article 1. In addition to Article 13, Article 14, which prohibits discrimination, might be applicable if the country effectively favors outsiders over indigenous groups that have traditional knowledge. Convention, *supra* note 9, at art. 14.

draft of a protective scheme for traditional knowledge<sup>209</sup> as evidence of an emerging consensus that such knowledge should be protected in some manner and that the Convention should not erect artificial barriers to the realization of such protection.

A state that gave IP rights in this knowledge to the outsiders could be required to recognize the rights of the indigenous owners under Article 1, or at least give compensation for the interference. This, of course, assumes that the exploitation of such knowledge by others constitutes an interference, or that the state could not allow such exploitation as being in the general interest (as permitted by Article 1).<sup>210</sup>

Interestingly, the Article 1 approach could allow the problem of traditional knowledge to be analyzed outside of the strict confines of traditional intellectual property law.<sup>211</sup> This could permit a more flexible approach to the problem. Moreover, certain limits of traditional IP rights, such as durational limits, ownership issues (subject to the “natural or legal person” issue discussed above), and fixation issues (whether the knowledge is “fixed” in some tangible way), are not necessarily obstacles under Article 1. In particular, the ECHR’s proportionality requirement under Article 1 could permit a certain degree of flexibility in balancing the competing claims of various groups to this knowledge under certain circumstances. For example, the state’s interest with respect to the use of certain biologically significant plants that confer a public benefit by being made available might outweigh the interest of an individual or even a group in keeping the knowledge within the group. However, the public interest in making dances, songs, or artwork available—and assigning ownership to other than the originating group—may be deemed disproportionately small compared to the group or individual interest at stake. And, if one factors in possible Article 8 rights to privacy that could be asserted by the group to

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209. *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WORLD INTELLECTUAL PROPERTY ORG., available at <http://www.wipo.int/tk/en/igc/index.html> (last visited May 2, 2013) [hereinafter *Traditional Knowledge*]. Article 2 of this document lists the intended beneficiaries of protection. Article 3, among other things, requires countries to provide “adequate and effective legal measures” to protect the interests of the beneficiaries.

210. For example, if the traditional knowledge had medicinal value and the group refused to license it, this might trigger the general interest provision. See Shuba Ghosh, *Reflections on the Traditional Knowledge Debate*, 11 CARDOZO J. INT’L AND COMP. L. 497, 509-510 (2003) (comparing this problem to the problem of moral rights). However, it is also possible that, under the proportionality concept, the ECHR would require the state to give some compensation to the group.

211. Farley, *Protecting Folklore*, *supra* note 202, at 40-50 (discussing alternatives to traditional copyright protection).

its knowledge,<sup>212</sup> the balancing would not necessarily favor the usual IP rights regime.<sup>213</sup>

#### IX. SOME CAUTIONARY OBSERVATIONS REGARDING THE USE OF THE CONVENTION IN INTELLECTUAL PROPERTY CASES

##### A. *Who Are the Primary Beneficiaries of Expanded Rights Under the Convention? Follow the Money*

To the extent that Article 1 is used to expand IP rights, those cases will revolve around assets with a pecuniary value. Although applicants in the ECHR generally request monetary damages, the value of creating or extending IP rights often extends beyond the particular incident giving rise to the claim. The value of IP rights makes it likely that IP owners will go to great lengths to assert their rights. Though not the exclusive province of corporations, corporate ownership of IP rights appears to predominate over individual ownership. Thus, IP rights may favor corporate rights holders over other individuals.<sup>214</sup> Though this is not inherently bad, a corporate actor may have more resources to take cases to the ECHR than an individual, and the availability of legal advice to promote such action. The ECHR increasingly may find itself asked to decide commercial issues in the form of human rights cases, potentially crowding its calendar at the expense of other cases. The ECHR is already behind in its adjudication of claims.<sup>215</sup> Adding IP rights claims in large numbers would increase the delay for all claims.

Of course, some of the expansion discussed above might not

212. The WIPO draft on traditional knowledge protection acknowledges the privacy aspect of traditional knowledge. *Traditional Knowledge*, *supra* note 209, art. 1, § 1.2 (Option 1).

213. Compare *Von Hannover v. Germany* (no.1), App. No. 59320/00, ¶¶ 74-80 (Eur. Ct. H.R. June 24, 2004) (finding Germany's balance of free expression and privacy to be inconsistent with Article 8) with *Von Hannover v. Germany* (no. 2), App. No. 40660/08, ¶¶ 124-126 (Eur. Ct. H.R. Feb. 7, 2012) (finding Germany's balance consistent with Article 8).

214. Of course, corporations own other forms of property as well. But in cases involving that type of property—real property being a prime example—protecting corporate rights can be a useful proxy for protecting individual owners since a large number of individuals own the same type of property.

215. According to the Court's statistics, it disposed of nearly twice as many applications in the first month of 2012 compared with the same period in 2011. All of that increase is from decisions ruling applications inadmissible or striking them out; the number of full judgments issued by the Court actually declined from year to year. This indicates an effort to ease the Court's backlog. On the other hand, there are still over 152,000 pending cases. Although the number of dispositions increased year to year, the Court's backlog increased by about 1,000 cases per month. See *Analysis of Statistics 2011*, EUROPEAN COURT OF HUMAN RIGHTS 6 (Apr. 25, 2013) and *Statistics 1/1-31/8/2012*, EUROPEAN COURT OF HUMAN RIGHTS (Apr. 25, 2013). Both available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/>.

redound to the benefit of traditional IP rights holders. A mandate to protect traditional knowledge could benefit groups that presently do not own IP rights. Similarly, an expansion of moral rights would favor authors over copyright owners, but this would still leave the problem of clogging an already backlogged court.

*B. Expanding Rights by Affirmative Obligation*

The *Von Hannover* case signals a potential expansion of rights in another way, by imposing obligations beyond the negative requirement that a government may not interfere with fundamental freedoms. No one connected with the German government intruded upon Princess Caroline's privacy. Her complaint was about private parties' intrusions; it was a private tort action. Yet the ECHR ruled that the German government had an affirmative obligation to protect her privacy by preventing private parties from intruding and affording her a civil remedy for those intrusions.<sup>216</sup> In the wake of *Von Hannover*, it has been argued that the British trademark office's refusal to register celebrity names as trademarks for celebrity merchandise—on the grounds that the public does not view them as trademarks—violates the Convention's equal protection guarantee found in Article 14.<sup>217</sup> Rather than limiting the scope of IP rights, such arguments expand them. This means that the ECHR could mandate a tort scheme if it deems it necessary to fulfill the requirements of the Convention. This raises difficult problems of the extent to which such mandates could, perhaps unintentionally, upset legal regimes that go beyond the immediate right at issue. Such mandates can have consequences far beyond the immediate confines of the case before the ECHR.<sup>218</sup> One may question

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216. The affirmative nature of this obligation was reaffirmed by the ECHR in subsequent cases. See, e.g., *Mosley v. United Kingdom*, App. No. 48009/08, ¶ 106 (Eur. Ct. H.R. May 10, 2011); *Karhuvaara v. Finland*, App. No. 53678/00, ¶ 42 (Eur. Ct. H.R. Nov. 16, 2004).

217. The argument is that Britain is discriminating against celebrities based on status.

218. For a U.S. perspective on this issue, see *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863-64 (1986) (Brennan, J., dissenting). Although he wrote in dissent, and in a different context, Justice Brennan's words resonate in this context as well:

The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence. . . . The danger of the Court's balancing approach is, of course, that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial



whether such an effort is more appropriately subject to resolution by legislation, or, in multinational circumstances, by treaty.

### C. *Complications for Other Multilateral Agreements*

Having a multinational tribunal governed by the Convention creating IP rights could create a variety of complications for other multinational agreements and organizations. Consider first the European Union, all of whose members are adherents to the Convention. As discussed above, some of the rights that could be inferred from the Convention already exist in the European Union. However, it was also noted that basing rights in the Convention could prevent the EU from altering the scope of those rights (at least where the alteration narrows those rights) in response to changing conditions. If the Strasbourg court becomes a pan-European constitutional arbiter of IP law, it may complicate the position of the EU's member states. Presently, the courts of member states can seek guidance from the European Court of Justice ("ECJ") as the ultimate source of guidance on EU law. Although the ECJ will use the Convention in its decisions, its interpretations may not correspond to those of the Strasbourg Court.<sup>219</sup> That creates a quandary for European courts. They are bound by treaty to accept the ECJ's interpretation of EU law.<sup>220</sup> But they also are bound by the terms of the Convention to accept the Strasbourg Court's judgments. That would make it difficult for EU members to have certainty about their laws, even after ECJ review.

A separate, but related problem involves the EU's attempts to harmonize and unify its IP laws. Consider, for example, the Community Trade Mark ("CTM") system. That system is a centralized system for the granting of rights good throughout the EU. It is not controlled by individual member states; the registration system is operated by the Office for the Harmonization of the Internal Market, or OHIM, and OHIM's decisions are reviewed by the EU's Court of First Instance and the ECJ, although infringement suits are brought in courts of the member

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independence, the protections of Article III will be eviscerated.

If one substitutes "the member state's perception of the general interest" for "judicial independence," the basis for the comparison is clear.

219. Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. INT'L L. ANN. 301 (2001).

220. See also *Murray v. Express Newspapers plc*, [2007] EWHC 1908 (Ch) [¶ 60-62] (British courts are bound to follow House of Lords decisions in cases of conflict with European Court of Human Rights decisions).

states designated for that purpose. Conceivably, the Strasbourg court might review member state decisions implementing the CTM system, even though the EU itself is not part of the Council of Europe.<sup>221</sup>

A further problem is the effect of ECHR pronouncements on treaty negotiations, both bilateral and multilateral. The as-yet largely unused ability to require IP rights to conform to the Convention could create uncertainty about the ability of Convention signatories to abide by their commitments. This is ameliorated somewhat by the fact that such inter-country agreements are likely to expand, rather than contract, IP rights. The ECHR's entry into this area thus may be consistent with the negotiation of IP rights treaties. Also, the margin of appreciation could allow leeway to countries, at least up to a point.

But when IP rights are outside of the realm of traditional IP rights, such as rights to traditional knowledge, the effect of the ECHR may be more pronounced. From the perspective of countries that do not favor expanded rights, it may lessen their leverage in negotiations with Convention countries. Alternatively, Convention countries will have less leeway to compromise in negotiations relating to such rights, even if they might be inclined to do so, because of the need to give effect to ECHR cases (whether this is a good or bad result may depend on one's perspective about the protection of traditional knowledge). Moreover, the uncertainty inherent in the ECHR's jurisprudence—margin of appreciation and fair balance come to mind here—makes it difficult to predict how future cases might come out. This may make it more difficult to negotiate even taking cognizance of possible ECHR action. Moreover, if non-Convention countries are less interested in expanding certain IP rights (say, moral rights in the United States), then negotiating a universally accepted regime would be difficult.<sup>222</sup>

The effect of the ECHR on regimes like TRIPS is more difficult to evaluate. TRIPS acts as a minimum standard; it is not a global uniform IP rights regime. An expansion of IP rights, as long as it does not conflict with other TRIPS concerns such as national treatment or most favored nation, would not harm the TRIPS regime. In theory, the ECHR could make it difficult for a country to exercise some of the discretion granted by TRIPS. For example, Article 31 of TRIPS permits countries

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221. Similar questions also could be raised concerning EU law relating to patents, industrial designs, and copyrights.

222. The usual rule of territoriality would allow countries to have different levels of protection if they so desired. The problem is limited to situations where countries wish to negotiate a uniform level of treatment, supplanting territoriality.

to issue compulsory patent licenses under certain circumstances.<sup>223</sup> The ECHR might rule that the safeguards of TRIPS are insufficiently protective of patent rights under Article 1 and that compulsory licenses constitute an unwarranted interference with possessions—patent rights. Although such a ruling would not put the Convention countries in violation of TRIPS (TRIPS only permits, but does not compel, the issuance of licenses), it would undermine an important compromise built into the international IP rights regime.<sup>224</sup>

#### D. The “Cheapening” of Human Rights?

The intellectual property applications of the Convention, particularly the balancing approach of the ECHR in *Von Hannover*, may temper expansive notions of IP rights with the need to consider other societal concerns as boundaries. However, there is a countervailing possibility. IP rights have long been strongly influenced by “natural law” elements. That is, IP rights are often seen as the natural entitlement resulting from one’s intellectual labors.<sup>225</sup> Although in the United States a utilitarian approach to IP may be more prevalent,<sup>226</sup> there is evidence of a strong “natural entitlement” strain in our law as well. The landmark case of *International News Service v. Associated Press*<sup>227</sup> states this most forcefully as restricting a defendant that “reap[s] where it has not sown.”<sup>228</sup> It is also found in the federal trademark dilution statute, which grants rights to owners of famous trademarks against uses that do not cause confusion.<sup>229</sup> The scope of moral rights of authors in copyright law—where Europe has embraced strong protection far more avidly than

223. Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), art. 31. The more general set of patent exceptions is in Article 30. In addition, the Doha Declaration allows countries additional leeway when deciding to issue such licenses. See *Declaration on the TRIPS agreement and public health*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (2001) (last visited Mar. 22, 2012).

224. See Helfer, *New Innovation*, *supra* note 6, at 36-51 (discussing different possible paradigms for the ECHR to follow and possible consequences).

225. John Locke, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT ch. 5 (Peter Laslett, ed., Cambridge Univ. Press 1988).

226. By “utilitarian” I am referring to the Patent and Copyright Clause’s first sentence: that these rights are granted “To promote Science and the useful arts.” U.S. Const. art. I, § 8, cl. 8.

227. 248 U.S. 215 (1918).

228. *Id.* at 239.

229. Courts have stated that this protects only mark owners, not consumers. *TCPIP Holding Co., Inc. v. Haar Commc’ns, Inc.*, 244 F.3d 88, 95 (2d Cir. 2001). Other courts have posited that dilution can aid consumers by lowering search costs. See *e.g.*, *Ty, Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002).

the United States—is also evidence of a natural rights approach.<sup>230</sup> The point is that IP rights holders often seek to restrain what they might describe as “unfair” uses of their property, not just those that threaten the utilitarian system supporting the rights—i.e., even when other parts of society may have an interest in restricting those rights, and when the incentive to produce new works is not seriously threatened.

Putting this in the context of the *Von Hannover* and *Anheuser-Busch* cases, a celebrity might argue the “unfairness” of permitting someone to profit from the image of, or a perceived connection to, the celebrity.<sup>231</sup> The user may respond by claiming a free speech interest under Article 10, or the government may claim a right under Article 1, First Protocol, to regulate property in the general interest. At this point, the *Von Hannover* case requires a balancing between the interests at issue. The danger is that the balancing may be influenced by the seeming “unfairness” of the offender’s actions (which implicitly assumes the correctness of the complainant’s case), leading the court to undervalue the rights of the offender (such as rights of free expression), especially if they are not in a “traditional” form for those rights.<sup>232</sup> The result would be a precedent that would “cheapen” the value of the right opposing the IP right, even outside the context of intellectual property.

On a larger scale, the question is whether the ECHR will be sensitive to the differences between creating or expanding IP rights and affirmative obligations in other human rights contexts. Without such sensitivity, precedents set in the IP rights context could have unpredictable and possibly unwanted effects in other human rights contexts.<sup>233</sup> Certainly the almost holistic nature of the ECHR’s case law in this area allows for a fair degree of contextual balancing. How the

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230. “Moral rights” give *authors* of copyrighted works rights of attribution and rights against uses that would harm their reputations even against the *owners* of the copyright.

231. See, e.g., *Town & Country Properties, Inc. v. Riggins*, 457 S.E.2d 356 (Va. 1995) (sale of house identified as formerly owned by football player John Riggins).

232. Cf. *Comedy III Prods., Inc. v. Saderup*, 21 P.3d 797 (2001), where First Amendment rights were considered in the context of artwork; *Keller v. Electronic Arts, Inc.*, 94 U.S.P.Q.2d 1130 (N.D. Cal. 2010) (rights of publicity and First Amendment relating to use in a video game).

233. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Fortas, J., concurring) (incorporating right to jury trial in criminal cases should not require incorporating “all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts.”); *Johnson v. Louisiana*, 406 U.S. 356, 369-375 (1972) (Powell, J., concurring) (arguing that different standards should apply to the requirement of a unanimous jury in federal and state courts); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (ruling that the Sixth Amendment does not require a unanimous verdict); *id.* at 414 (Stewart, J., dissenting) (arguing that “[u]ntil today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial.”). The point is that a lack of sensitivity to context may lead the ECHR to lessen some traditionally understood rights in order to maintain consistency with cases involving IP rights.

Court uses that discretion may determine how human rights will evolve in the future.

#### X. CONCLUSION

Although IP rights are not the type of rights typically imagined as human rights, the case law of the ECHR allows one to imagine using the Convention to expand IP rights. The *Von Hannover* cases give us two important pieces of the IP rights puzzle: the notion of an affirmative responsibility on the part of member countries to protect against *private* incursions on Convention-protected rights, and a limited view of free expression where privacy and commercial interests are at stake. The *Anheuser-Busch* case indicates the possible use of the Convention's property rights protection—Article 1 of the First Protocol—as a means of protecting IP rights. Combine an affirmative obligation to protect Convention rights from private intrusion with a broad view of “property” (or “possessions”) and you have the possibility of significant protection for IP rights emanating from the Convention. As yet, the ECHR's case law has not put all of the pieces together to create broad IP protection. But, as shown by the discussion above, there is case law in addition to *Von Hannover* and *Anheuser-Busch* that suggests the possibility.

The possibility that the Convention could be used to expand IP rights raises several concerns, not the least of which is the appropriateness of the ECHR as arbiter of IP rights among the forty-seven members of the Council of Europe. I do not claim that the possibility is likely or that it is normatively a good thing. The possibilities raised in this article may never come to pass. But, given the effect that a leap into the IP rights sphere could have on the enforcement of human rights, it seems sensible to contemplate the leap and consider whether to embrace the possibility or prepare to resist it.