

# The New Innovation Frontier? Intellectual Property and the European Court of Human Rights

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*This article provides the first comprehensive analysis of the intellectual property case law of the European Court of Human Rights ("ECHR"). Within the last three years, the ECHR has issued a trio of intellectual property rulings interpreting the right of property protected by the European Convention on Human Rights. These decisions, which view intellectual property through the lens of fundamental rights, have important consequences for the region's innovation and creativity policies. The cases are also emblematic of a growing number of controversies in domestic and international law over the intersection of human rights, property rights, and intellectual property. The article analyzes this trend and uses it to develop three distinct paradigms to identify the proper place of intellectual property issues in the European human rights system. It concludes that the ECHR should find a violation of the right of property in intellectual property disputes only in cases of arbitrary government conduct.*

## I. INTRODUCTION

In Europe, human rights law is intellectual property's new frontier. This statement will no doubt surprise many observers of the region's intellectual property system, which has steadily expanded over the last few decades. The mechanisms of that expansion have included a litany of now familiar legal and regulatory tools: the negotiation and ratification of multilateral agreements, the promulgation of European Community ("EC") directives, the rulings of the powerful European Court of Justice, and the revision of national laws and administrative regulations. The result of these cumulative and interrelated initiatives is a highly developed intellectual property system that is strongly protective of creators, innovators, and businesses.

This regional intellectual property regime has developed in relative isolation from Europe's other judicial powerhouse, the European Court of Human Rights ("ECHR" or "Court").<sup>1</sup> The ECHR began its existence

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1. For a detailed discussion of the ECHR's success and its influence on other international tribunals, see Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 917-22 (2005); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 399-410 (1998) [hereinafter Helfer, *Adjudicating Copyright Claims*]; Laurence R. Helfer & Anne-

modestly as an optional judicial review mechanism for European states that had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> (“European Convention” or “Convention”) and its Protocols. But in the half century since its creation, the ECHR has evolved into something far more momentous—the judicial guardian of a “constitutional instrument of European public order.”<sup>3</sup> The Court now reviews tens of thousands of complaints each year, and its jurisdiction extends the length and breadth of the continent, encompassing 800 million people in forty-seven nations from Azerbaijan to Iceland and from Portugal to Russia.<sup>4</sup>

One might reasonably ask what an international human rights court and the human rights treaty it interprets has to do with intellectual property. The answer is the right of property, which appears in the European Convention together with more widely recognized civil and political liberties such as the prohibitions of slavery and torture, due process rights, and freedom of expression. Yet the protection of “the peaceful enjoyment of . . . possessions” in Article 1 of Protocol 1 (“Article 1”)<sup>5</sup> has long been considered among the weakest rights in the Convention system, affording governments broad discretion to regulate private property in the public interest.<sup>6</sup>

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Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 297–98 (1997).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention*].

3. *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 27 (1995) (preliminary objections).

4. See ECHR, *SURVEY OF ACTIVITIES 2006*, [http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey\\_2006.pdf](http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf).

5. Article 1 of Protocol 1 states in its entirety:

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.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262, [hereinafter *Protocol 1*]. Although the drafters of Article 1 “spoke of ‘right of property’ or ‘right to property’ to describe the subject-matter” protected by this clause, *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A), ¶ 63 (1979), the ECHR has consistently described this provision as guaranteeing the right of property. See, e.g., *Hutten-Czapska v. Poland*, App. No. 35014/97, 45 Eur. H.R. Rep. 4 [52], 129 (Grand Chamber 2007) (judgment of June 19, 2006) (holding that government had “failed to strike the requisite fair balance between the general interests of the community and the protection of the *right of property*”) (emphasis added) [Due to a change in 2000, recent volumes of the European Human Rights Report do not use standard citation formats for cases. For the reader’s convenience, the Report’s citation is given, along with the more traditional starting page number in brackets afterward. Eds.].

6. See Arjen van Rijn, *Right to the Peaceful Enjoyment of One’s Possessions*, in *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 863, 864 (Pieter van Dijk et al. eds., 4th ed. 2006) (“[T]he right of property has lost a good deal of its inviolability, also in the Member States of the Council of Europe, under the influence of modern social policy (*Sozialstaat*). This fact is reflected in the very far-reaching limitations which Article 1 allows.”).

Partly for this reason, the ECHR and the European Commission of Human Rights ("European Commission" or "Commission") for decades gave intellectual property issues a wide berth. Intellectual property claimants did not file any complaints alleging violations of property rights until the early 1990s. And when these claimants did allege such violations, the ECHR and the European Commission summarily dismissed their challenges. Applying a restrictive interpretation of Article 1, the two tribunals eschewed searching scrutiny of national courts and administrative agencies and allowed Europe's intellectual property system to evolve largely unfettered by human rights concerns.<sup>7</sup>

This judicial reticence has now decisively ended. Within the last three years, the ECHR has issued a trio of decisions holding that patents, trademarks, copyrights, and other economic interests in intangible knowledge goods are protected by the European Convention's right of property.<sup>8</sup> The most recent of these rulings—a 2007 judgment of the Grand Chamber in *Anheuser-Busch Inc. v. Portugal*—is especially striking.<sup>9</sup> The case involved a dispute between two corporations, the well-known American brewer and its longstanding Czech rival, Budějovický Budvar, over the exclusive right to market "Budweiser" beer in Portugal. The ECHR concluded that both registered trademarks and applications to register such marks fall within the ambit of the treaty's property rights clause. On the particular facts presented, however, the Court found that the Portuguese government had not violated Article 1.<sup>10</sup> Nevertheless, the analysis in *Anheuser-Busch* suggests that the ECHR recognizes the broader human rights implications of the region's innovation and creativity policies and that its future rulings may influence intellectual property protection standards in Europe.<sup>11</sup>

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7. See *infra* Part III (reviewing intellectual property rulings of the ECHR and the European Commission).

8. See *Dima v. Romania*, App. No. 58472/00, para. 87 (2005) (admissibility decision) (in French only; unofficial English translation on file with author) (copyrighted works protected by Article 1); *Melnichuk v. Ukraine*, App. No. 28743/03, para. 8 (2005) (admissibility decision) (intellectual property protected by Article 1); *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [846], 855–56 (Chamber 2007) (judgment of Oct. 11, 2005) (registered trademarks protected by Article 1).

9. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830] (Grand Chamber 2007).

10. The facts of the *Anheuser-Busch* case are complex. In essence, the ECHR concluded that Portugal had not interfered with the American brewer's application to register the trademark "Budweiser" because the application had been contested by Budějovický Budvar, the owner of a previously registered geographical indication for "Budweiser Bier." For a more detailed analysis of the case, see *infra* Part III.A.

11. Intellectual property owners have heralded *Anheuser-Busch* as a watershed ruling, suggesting that the case may trigger the filing of new complaints alleging violations of Article 1. See, e.g., Burkhardt Goebel, *Geographical Indications and Trademarks in Europe*, 95 TRADEMARK REP. 1165, 1179 (2005) (describing the 2005 Chamber judgment as "remarkable and most important" in recognizing trademarks "as protected fundamental rights"); Arthur Rogers, *Anheuser-Busch Hails European Court Ruling that Trademark Applications Get Protections*, 24 INT'L TRADE REP. 72, 72 (2007) (characterizing the 2007 Grand Chamber judgment as a "landmark" decision).

From just this brief description, the Grand Chamber judgment in *Anheuser-Busch Inc. v. Portugal* may strike many observers as misguided in several respects. First, the decision protects the fundamental rights of multinational corporations rather than those of natural persons. For reasons I explain below, the ECHR's adjudication of property rights claims by business entities is indisputably authorized by Article 1's text and the intent of its drafters.<sup>12</sup> Such cases nevertheless sit uneasily with a treaty whose principal objective is to protect the civil and political liberties of individuals. This is particularly true given that serious or systemic violations of those liberties are occurring in many countries.<sup>13</sup> In addition, with the accession to the Convention of Eastern European states in the 1990s, the ECHR's caseload has exploded. The result is a mountainous backlog of pending complaints.<sup>14</sup> Adding intellectual property disputes to the Court's already vastly overburdened docket will only make it more difficult for the judges to adjudicate other complaints that allege violations of fundamental rights.

A second concern relates to the broader legal and political context in which the ECHR's recent intellectual property rulings are situated. The last several years have seen an explosion of competing human rights claims relating to intellectual property—in Europe, in the United States, and in numerous international venues. There are two separate catalysts for these developments.

On the one hand, the expansion of intellectual property protection standards raises numerous human rights concerns relating to the right to life, health, food, privacy, freedom of expression, and enjoying the benefits of scientific progress. International experts, government officials, judges, and scholars are responding to these concerns by analyzing the interface between the two legal regimes<sup>15</sup> and, in particular, whether human rights should

12. See Protocol 1, *supra* note 5, art. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions.") (emphasis added). See also *infra* notes 23 & 178 and accompanying text (discussing the rationales for protecting the property rights of corporations and other business entities in the European human rights system).

13. See, e.g., EUR. PARL. ASSEMB., *Implementation of Judgments of the European Court of Human Rights: Supplementary Introductory Memorandum (revised)*, AS/Jur (2005) 55 rev., 11–13 (2005), available at [http://assembly.coe.int/CommitteeDocs/2005/20051220\\_Ejdoc55.pdf](http://assembly.coe.int/CommitteeDocs/2005/20051220_Ejdoc55.pdf) (assessing compliance with ECHR judgments involving widespread human rights abuses by the Russian military in Chechnya and massive structural failures of the Russian courts and the criminal justice system); Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 12 NETH. Q. HUM. RTS. 153, 153–54 (1994) (analyzing past cases and suggesting that there will be an increasing number of systemic human rights abuses challenged before the ECHR); Paul Mahoney, *Speculating on the Future of the Reformed European Court of Human Rights*, 20 HUM. RTS. L.J. 1, 4 (1999) (predicting that the ECHR will increasingly be confronted with "serious human rights violations" such as "minorities in conflict with [a] central government" and cases relating to "terrorism, violence, and civil strife").

14. Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RTS. L. REV. 403, 404 (2006) ("[T]he Court is presently confronted with an accumulated case-load of 82,600 applications, out of which 45,550 were made in 2005, the yearly capacity of absorption of the Court now being at around 28,000 cases.").

15. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural*

serve as “corrective[s] when [intellectual property] rights are used excessively and contrary to their functions.”<sup>16</sup> On the other hand, litigants, lawmakers, and courts are increasingly invoking fundamental rights—including the right of property—as a justification for *protecting* intellectual property and the corporations and individuals that own it.<sup>17</sup> This countervailing trend is reflected in treaties,<sup>18</sup> reports of international expert bodies,<sup>19</sup> and judicial rulings in Europe<sup>20</sup> and the United States.<sup>21</sup>

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*Rights: Human Rights and Intellectual Property*, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001) (analyzing conflicts between intellectual property and the International Covenant on Economic, Social, and Cultural Rights); The High Commissioner, *Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, delivered to the Sub-Comm'n on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001); ECOSOC, Sub-Comm'n on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights*, at 3, U.N. Doc. E/CN.4/Sub.2/2000/L.20 (Aug. 11, 2000) (identifying conflicts between intellectual property and “the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination”). For more detailed analyses of these developments, see, for example, Christophe Geiger, “Constitutionalising” *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 371, 382, 390–97 (2006) [hereinafter Geiger, *Constitutionalising Intellectual Property Law*] (analyzing recent intellectual property cases from Belgium, France, Germany, the Netherlands, Switzerland, and countries outside of Europe that raise non-trivial freedom of expression issues); Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 268, 277 (2004) [hereinafter Geiger, *Fundamental Rights Safeguard*] (analyzing “decisions in the field of copyright in which the freedom of expression has been invoked to justify a use that is not covered by an exception provided for in [intellectual property] law”); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1001–14 (2007) [hereinafter Helfer, *Human Rights Framework*] (analyzing recent treaty-making initiatives in the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, and the World Intellectual Property Organization concerning the relationship between human rights and intellectual property); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 26–53 (2004) (analyzing intellectual property standard setting in the biodiversity, plant genetic resources, public health, and human rights regimes).

16. Geiger, *Fundamental Rights Safeguard*, *supra* note 15, at 278; see also Helfer, *Human Rights Framework*, *supra* note 15, at 1017–18 (analyzing how international human rights law can be interpreted to impose “external limits on intellectual property”).

17. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 1 (2004) (stating that “[o]ne of the most revolutionary legal changes in the past generation has been the ‘propertization’ of intellectual property”); Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1032 (2007) (stating that “the embrace of [intellectual property] by human rights advocates and entities . . . is likely to further entrench some dangerous ideas about property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community”).

18. See Charter of Fundamental Rights of the European Union art. 17, Dec. 7, 2000 O.J. (C 364) 1 (“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. . . . Intellectual property shall be protected.”), available at [http://www.europarl.europa.eu/chartre/pdf/text\\_en.pdf](http://www.europarl.europa.eu/chartre/pdf/text_en.pdf).

19. See ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c) of the Covenant)*, U.N. Doc. E/C.12/GC/17 (Nov. 21, 2005) [hereinafter General Comment], available at <http://www.ohchr.org/english/bodies/cescr/docs/gc17.doc>.

20. See, e.g., Joseph Straus, *Design Protection for Spare Parts Gone in Europe? Proposed Changes to the EC Directive: The Commission's Mandate and its Doubtful Execution*, 27 EUR. INTELL. PROP. REV. 391, 398 (2005) (discussing 2000 decision of the Federal Constitutional Court holding that patents constitute

The ECHR's entry into this maelstrom of competing human rights-based claims to restrict or expand intellectual property raises important and difficult questions. For example, does intellectual property deserve to be treated as a fundamental right? And if it does, how does a human rights-inspired conception of intellectual property differ from existing rules that promote innovation and creativity? More concretely, what role, if any, should the ECHR play in shaping innovation and creativity policy in Europe? Should the Court favor the rights of corporate intellectual property owners over the rights of individual users and consumers, or should it strike a distinctive human rights balance among these actors with competing interests?

In this article, I consider one important dimension of these questions in light of the ECHR's recent intellectual property rulings. I provide the first detailed assessment of the European human rights tribunals' Article 1 intellectual property case law.<sup>22</sup> And I develop a comprehensive proposal for the ECHR to adjudicate intellectual property disputes under the European Convention's property rights clause.

The article begins in Part II with an overview of the right of property in Article 1 and the decisions interpreting it. Part III develops a tripartite framework to analyze the ECHR's intellectual property case law, including decisions that commentators have not previously identified. I use this framework to link together a series of seemingly disconnected rulings and to expose the many points of intersection between Europe's human rights and intellectual property systems. Part IV analyzes three distinct paradigms that the ECHR may apply in future intellectual property disputes. I label these approaches the rule of law paradigm, the enforcement paradigm, and the intellectual property balancing paradigm. Each paradigm finds support in the Court's case law and its interpretive methodologies. However, the three paradigms have radically different consequences for innovation and creativity policy in Europe. I analyze these consequences and emphasize the systemic effects of overlaying two previously unrelated legal regimes. I argue

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property under the German Constitution); Thomas Crampton, *Apple Gets French Support in Music Compatibility Case*, N.Y. TIMES, July 29, 2006, at C9 (discussing a ruling of the French Constitutional Council, the country's highest judicial body, which "declared major aspects of the so-called iPod law unconstitutional" and "made frequent reference to the 1789 Declaration on Human Rights and concluded that the law violated the constitutional protections of property").

21. See, e.g., *Zoltek Corp. v. United States*, 442 F.3d 1345 (Fed. Cir. 2006) (rejecting a claim that the federal government's uncompensated use of a patent amounts to a taking of private property in violation of the U.S. Constitution), *reh'g denied*, 464 F.3d 1335 (Fed. Cir. 2006).

22. The few existing analyses of intellectual property in the European human rights system focus on treaty provisions that restrict intellectual property—such as the right to freedom of expression—or emphasize the European Convention's influence on the intellectual property laws of a specific country. See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343 (Rochelle Cooper Dreyfuss et al. eds., 2001); Timothy Pinto, *The Influence of the European Convention on Intellectual Property Rights*, 24 EUR. INTELL. PROP. REV. 209 (2002). No comprehensive study of the European human rights tribunals' intellectual property jurisprudence under the Convention's property rights clause has ever been attempted.

that the ECHR should follow the rule of law paradigm and restrict its review of Article 1 intellectual property claims to cases of arbitrary government conduct. Part V briefly concludes.

## II. EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHT OF PROPERTY

This Part surveys the property rights jurisprudence of the European human rights tribunals, highlighting issues that are relevant to the more detailed analysis of the intellectual property case law that appears in the next Part of the article. Before turning to this survey, however, a brief introduction to the structure of the European human rights system and the ECHR's interpretive methodologies is in order.

The European Convention enshrines a broad catalogue of civil and political liberties. The primary beneficiaries of these liberties are natural persons, although certain rights of corporations also receive protection, including the right of property.<sup>23</sup> In addition, the Convention is principally a charter of negative liberties that constrain the behavior of state actors. But it also imposes a limited set of positive obligations on European governments.<sup>24</sup>

When reviewing the actions of national governments, the ECHR gives pride of place to the Convention's text, from which it has distilled a diverse array of bright-line rules and multi-part balancing tests. But other interpretive methodologies have been equally vital forces in shaping European human rights jurisprudence. For example, the Court assesses the functional importance of particular rights in democratic societies, the rationales governments advance for restricting those rights, the arguments for and against deference to domestic decisionmakers, and the need for the Convention to evolve in response to legal, political, and social trends in Europe.<sup>25</sup> As explained below, the Court has applied each of these doctrines and interpretive tools when analyzing the right of property.

### A. *Article 1 of Protocol 1: Protecting Peaceful Enjoyment of Possessions*

The protection of "the peaceful enjoyment of possessions" for "every natural or legal person" is one of the more controversial and obscure provisions in the European human rights system.<sup>26</sup> The right appears not in the Con-

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23. See generally MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (2006).

24. See generally ALASTAIR R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* (2004). For a discussion of "positive obligations" relating to the right of property, see *infra* Part IV.B.

25. See Helfer, *Adjudicating Copyright Claims*, *supra* note 1, at 407.

26. For more detailed analyses of the right of property in the European human rights system, see ALI RIZA ÇOBAN, *PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 124–25 (2004); CAMILO B. SHUTTE, *THE EUROPEAN FUNDAMENTAL RIGHT OF PROPERTY* (2004); Rijn, *supra* note 6.

vention's primary text, but in Article 1 of its first Protocol.<sup>27</sup> This placement, as well as the absence of any mention of the word "rights" in Article 1, reflects a disagreement among European governments over the inclusion of a property rights clause in the treaty as well as the scope and extent of protection it provides.<sup>28</sup>

The Convention's drafters recognized that democratic governments need leeway to adopt or modify economic and social policies implicating private property without, in every instance, compensating adversely affected owners. On the other hand, the drafters also understood that the rule of law in general and the stability and predictability of property rights in particular would be undermined if governments could arbitrarily deprive owners of their possessions.<sup>29</sup> In attempting to reconcile these competing perspectives, the European Court and Commission have created a complex and intricate jurisprudence interpreting the right of property.

### B. *The Subject Matter and Temporal Scope of the Right of Property*

A preliminary issue the tribunals faced was defining Article 1's subject matter scope. The Court and Commission adopted a capacious interpretation of the word "possessions," extending it to a broad array of "concrete proprietary interest[s]" having economic value.<sup>30</sup> Whether such interests qualify as possessions does not depend on their status in domestic law.<sup>31</sup> Rather, Article 1 has an "autonomous meaning" that authorizes the ECHR to decide "whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by" Article 1.<sup>32</sup> Applying this expansive if amorphous standard, the Court has adjudicated restrictions on most economically important types of tangible and intangible property, including land, chattels, licenses, leases, contractual rights, corporate securities, business goodwill and, as described in detail below, intellectual property.<sup>33</sup>

Article 1's temporal scope extends to current and future proprietary interests. As the ECHR recently stated, "'Possessions' can be either (1) 'existing possessions' or (2) assets, including claims, in respect of which the applicant . . . has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right."<sup>34</sup> The Court has extended the latter line of cases to enforceable debts, lease renewal options, final court judgments, and vested

27. See Protocol 1, *supra* note 5, art. 1.

28. See ÇOBAN, *supra* note 26, at 124–25 (reviewing Article 1's drafting history).

29. See *id.* at 127–37; Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL. L.J. 136, 146–47 (2002).

30. See *Kopecký v. Slovakia*, App. No. 44912/98, 2004-IX Eur. Ct. H.R. 125, 144 (Grand Chamber).

31. *Kechko v. Ukraine*, App. No. 63134/00, ¶ 22 (2005).

32. *Öneryıldız v. Turkey*, App. No. 48939/99, 2004-XII Eur. Ct. H.R. 79, 127 (Grand Chamber).

33. See ÇOBAN, *supra* note 26, at 152–55 (collecting recent decisions); David Anderson, *Compensation for Interference with Property*, 6 EUR. HUM. RTS. L. REV. 543, 546 (1999) (same).

34. *Kopecký*, 2004-IX Eur. Ct. H.R. at 139–40 (enumeration added).



rights to social security and pension benefits.<sup>35</sup> By contrast, the mere “hope of recognition of a property right which it has been impossible to exercise effectively” is not protected, nor is “a conditional claim which lapses as a result of the non-fulfillment of the condition.”<sup>36</sup> Future interests must also have a solid basis in domestic law, such as a statute or a judicial ruling that recognizes their existence.<sup>37</sup>

### C. *Interferences with Property*

If the ECHR determines that a possession falls within Article 1’s subject matter and temporal scope, it must then consider whether the government has interfered with the possession. The second and third sentences of Article 1 recognize two distinct categories of government interferences—deprivations of property and controls on its use.<sup>38</sup>

Deprivations are the more invasive of these two categories. They include expropriations, nationalizations, confiscations, and other comprehensive dispossessions. The ECHR has avoided finding a deprivation unless the government has effectively extinguished the owner’s property right. In contrast, controls on use encompass any lesser restriction on an owner’s possessory interests. The ECHR has adopted “a very broad concept of ‘control of use,’” thereby bringing “a wide range of regulatory measures within its jurisdiction . . . .”<sup>39</sup>

### D. *Assessing the Legality of Interferences*

Where a state interferes with a possession, the Court must assess the validity of its actions. For an interference to be compatible with the Convention, it must be “provided by law” and pursue “a legitimate aim” in the

35. See ÇOBAN, *supra* note 26, at 152–55 (collecting recent decisions).

36. Kopecký, 2004-IX Eur. Ct. H.R. at 140; *see also* Gratzinger v. Czech Republic, App. No. 39794/98, 2002-VII Eur. Ct. H.R. 399, 419–20 (Grand Chamber). The ECHR has often applied these principles to complaints seeking restitution of real or personal property seized by socialist governments in Eastern Europe. The Court has held that former property owners have no “legitimate expectation” of receiving restitution if they do not have “a currently enforceable claim that was sufficiently established,” for example because they do not meet “one of the essential statutory conditions” for recovery of previously owned property or because there is “a dispute as to the correct interpretation and application of domestic law by the national courts.” Rosival v. Slovakia, App. No. 17684/02, para. 75 (2007) (admissibility decision) (internal citations omitted).

37. See Zhigalev v. Russia, App. No. 54891/00, ¶ 131 (2006); Kopecký, 2004-IX Eur. Ct. H.R. at 144–45.

38. Hellborg v. Sweden, App. No. 47473/99, 45 Eur. H.R. Rep. 3 [29], 43 (2007) (judgment of Feb. 28, 2006) (explaining this distinction); *see also* ÇOBAN, *supra* note 26, at 174–86. The ECHR has also recognized a third category—interference with the substance of property. This category is reserved for government intrusions that, as a formal matter, “do[ ] not transfer the property to public authorities, nor . . . limit or control the use of the property . . . .” *Id.* at 187. In practice, however, the Court has not applied this concept consistently or coherently. Commentators have also noted that the cases decided under this rubric could easily fit under the first two categories. *See id.* at 189; Anderson, *supra* note 33, at 551–52. For these reasons, I do not give separate treatment to “substance of property” claims.

39. Mountfield, *supra* note 29, at 146; *see also* ÇOBAN, *supra* note 26, at 175–85 (analyzing deprivations and comparing them to controls on use).

public interest.<sup>40</sup> Interferences must also achieve “a fair balance . . . between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>41</sup> Striking this balance requires “a reasonable relationship of proportionality between the means employed” by the state and the objectives it seeks to achieve.<sup>42</sup>

Although this proportionality test is highly fact-specific, the ECHR has identified several considerations relevant to assessing whether the government has maintained the fair balance required by Article 1. These factors include the owner’s reasonable expectations;<sup>43</sup> whether the restriction imposes an inequitable or excessive burden (especially on non-nationals);<sup>44</sup> the amount of compensation (if any) paid by the government;<sup>45</sup> the uncertainty created by the regulation;<sup>46</sup> and the speed and consistency with which the state acts.<sup>47</sup>

In assessing these factors, the ECHR affords governments considerable leeway to regulate private property in the public interest. Because states frequently impose property controls when implementing broader social and economic policies, “the national authorities”—which have direct knowledge of their society and its needs—are in principle better placed than the international judge” to decide whether a regulation is necessary to achieve those policies.<sup>48</sup> As a result, the ECHR gives significant deference to “the legislature’s judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation.”<sup>49</sup> It also stresses the “wide margin of appreciation” that states enjoy “with regard both to choosing the means of enforcement and to ascertaining whether the consequences of en-

40. Jahn v. Germany, App. No. 46720/99, 42 Eur. H.R. Rep. 49 [1085], 1103–04 (Grand Chamber 2006) (judgment of June 30, 2005).

41. Kirilova v. Bulgaria, App. No. 42908/98, ¶ 106 (2005).

42. L.B. v. Italy, App. No. 32542/96, ¶ 23 (2002).

43. Pine Valley Dev. Ltd. v. Ireland, App. No. 12742/87, 222 Eur. Ct. H.R. (ser. A) at 23 (1991).

44. The Court has justified this differential treatment on public choice grounds, reasoning that non-nationals lack representation in domestic political processes and thus risk bearing a disproportionate share of the costs of property deprivations. See *Lithgow v. United Kingdom*, App. No. 9006/80, 102 Eur. Ct. H.R. (ser. A) at 49 (1986).

45. See Tom Allen, *Compensation for Property Under the European Convention of Human Rights*, 28 MICH. J. INT’L L. 287, 298–300 (2007). When the state deprives non-nationals of their property, Article 1’s reference to “the general principles of international law” mandates the payment of prompt, adequate, and effective compensation. Protocol 1, *supra* note 5, art. 1; Anderson, *supra* note 33, at 548. By contrast, Article 1 does not require compensation to be paid to nationals. *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 47–49. In practice, however, the Court has applied an equivalent standard of compensation to both types of takings. As a result, where a state deprives its own citizens of their property, it must normally pay “an amount reasonably related to its value,” and its failure to provide any compensation “can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.” *Scordino v. Italy*, App. No. 36813/97, 45 Eur. H.R. Rep. 7 [207], 239 (Grand Chamber 2006) (judgment of Mar. 30, 2005).

46. *Hurten-Czapska v. Poland*, App. No. 35014/97, 45 Eur. H.R. Rep. 4 [52], 108 (Grand Chamber 2007) (judgment of June 19, 2006).

47. *Kirilova v. Bulgaria*, App. No. 42908/98, ¶ 106 (2005); *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. 1 (Grand Chamber).

48. *Draon v. France*, App. No. 1513/03, 42 Eur. H.R. Rep. 40 [807], 832–33 (2006) (judgment of Oct. 6, 2005) (internal quotations omitted).

49. *Id.*

forcement are justified in the general interest for the purpose of achieving the object of the law in question.”<sup>50</sup>

This deference does not, however, amount to a blank check for European governments. To the contrary, as the docket of property rights cases has expanded exponentially over the last decade,<sup>51</sup> the ECHR has pointedly refused to “abdicate its power of review” and has reserved the final authority to “determine whether the requisite balance was maintained in a manner consonant with” the right of property.<sup>52</sup> As a result of this European judicial supervision, the ECHR has found an increasing number of violations of Article 1 in the last few years.<sup>53</sup>

### III. INTELLECTUAL PROPERTY AND THE EUROPEAN CONVENTION’S RIGHT OF PROPERTY: A TRIPARTITE FRAMEWORK FOR ANALYSIS

In this Part, I apply the general principles reviewed above to cases in which intellectual property owners alleged a violation of Article 1 of Protocol 1. The analysis consists of three questions: First, does Article 1 apply to the intellectual property at issue, either because it is an existing possession or because the owner has a legitimate expectation of obtaining a future proprietary interest? If neither type of property exists, the government’s conduct, however egregious, cannot violate Article 1. In contrast, if the ECHR answers this question affirmatively, it must consider a second question: Has the government “interfered” with the possession? The absence of such an interference also requires a ruling for the respondent state. Conversely, the existence of an interference leads to a third and final question: Whether the interference is justified, i.e., has the state upset the fair and proportional balance that Article 1 requires between the interests of the public and the property owner’s rights?

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50. *Scordino*, 45 Eur. H.R. Rep. 7 at 239.

51. ÇOBAN, *supra* note 26, at 258 (stating that over the last decade “both the magnitude and variety of the applications regarding [Article 1] have escalated significantly and the number of the judgments rose consequently”). Not surprisingly, this expansion followed the accession of Eastern European countries to the Convention in the 1990s. These states have faced significant challenges to reallocating property rights during their transition from socialist to democratic systems of government. See Tom Allen, *Restitution and Transitional Justice in the European Court of Human Rights*, 13 COLUM. J. EUR. L. 1, 13–29 (2006/2007).

52. *Jahn v. Germany*, App. No. 46720/99, 42 Eur. H.R. Rep. 49 [1085], 1105 (Grand Chamber 2006) (judgment of June 30, 2005); see also *Fedorenko v. Ukraine*, App. No. 25921/02, ¶ 29 (2006) (asserting that the state’s “margin of appreciation . . . goes hand in hand with European supervision” which authorizes the ECHR to “ascertain whether the discretion afforded to the Government was overstepped”).

53. *Kopecný v. Slovakia*, App. No. 44912/98, 2004-IX Eur. Ct. H.R. 125, 155 (Grand Chamber 2004) (Strážnická, J., dissenting) (“In the Court’s case-law from 2000 onwards, a tendency may be discerned to subject the application of national law to supervisory review by the Court.”); ÇOBAN, *supra* note 26, at 258 (stating that the ECHR has found “more and more violations of [Article 1] in the last couple of years” and that it “is not as reluctant as it was before to find [a] violation”).

Analyzing the intellectual property jurisprudence of the ECHR and the European Commission using this tripartite framework helps to expose the numerous points of intersection—and of potential conflict—between the European human rights system and the region's intellectual property laws.

### A. *Is Intellectual Property Protected by Article 1?*

In three decisions dating back to 1990, the European Commission has consistently held that patents and copyrights fall within Article 1's subject matter scope.<sup>54</sup> The Court did not directly address this issue until 2005,<sup>55</sup> when it issued a trilogy of decisions applying Article 1 to intellectual property disputes.<sup>56</sup> *Anheuser-Busch Inc. v. Portugal* is the most well-known of these three rulings. In that judgment, analyzed in detail below, a seven-member Chamber of the ECHR concluded that "intellectual property as such incontestably enjoys the protection of Article 1 of Protocol No. 1."<sup>57</sup>

The case was reargued before a Grand Chamber of the ECHR in 2006. Review by this panel of seventeen judges is reserved for disputes that involve "a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance."<sup>58</sup> In a judgment issued in early 2007, the Grand Chamber unanimously agreed with the Chamber's conclusion, holding that Article 1 "is applicable to intellectual property as such."<sup>59</sup> The Grand Chamber's statement is more measured than the language used by the Chamber. Nevertheless, its holding is an unequivocal endorsement of the view that the right of property protects the financial interests of intellectual property owners in their inventions, creations, and signs.

The ECHR's only justification for this conclusion is found in a brief quotation from the European Commission's first intellectual property decision, in which the Commission stated that

under Dutch law the holder of a patent is referred to as the proprietor of a patent and that patents are deemed, subject to the provisions of the

54. See *Lenzing AG v. United Kingdom*, App. No. 38817/97, 94-A Eur. Comm'n H.R. Dec. & Rep. 136 (1998) (patent); *Aral v. Turkey*, App. No. 24563/94 (1998) (admissibility decision) (copyright); *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. 70, 79 (1990) (admissibility decision) (patent).

55. In a 1995 ruling, *British Am. Tobacco Co. Ltd. v. Netherlands*, App. No. 19589/92, 331 Eur. Ct. H.R. (ser. A) (1995), the Court avoided deciding whether patent applications are possessions—an issue I discuss in greater detail below. See *infra* Part III.A.2.

56. See *supra* note 8.

57. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [836], 856 (Chamber 2007) (judgment of Oct. 11, 2005). I discuss the complex facts and procedural history of the case below. See *infra* Part III.A.2.a.

58. European Convention, *supra* note 2, art. 43.

59. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 849 (Grand Chamber 2007). Both the concurring and dissenting judges agreed that Article 1 applies "to intellectual property in general and to a duly registered trade mark." *Id.* at 853 (Steiner & Hajiyev, JJ., concurring), 855 (Cafisch & Cabral Barreto, JJ., dissenting).

Patent Act, to be personal property which is transferable and assignable. The Commission finds that a patent accordingly falls within the scope of the term “possessions” in Article 1 of Protocol No. 1.<sup>60</sup>

The Commission’s reasoning in this passage is sparse. But it suggests that the European tribunals place significant weight on the exclusivity of the exploitation and transfer rights that national laws confer on intellectual property owners.<sup>61</sup> Inasmuch as these exclusive rights are standard features of national and international intellectual property systems, it is safe to predict that the ECHR will treat other forms of industrial and artistic property—such as new plant varieties, integrated circuits, performers’ rights, trade secrets, and the like—as “possessions” protected by Article 1. In addition, because Article 1 applies to fixed claims to future revenue and compensation,<sup>62</sup> the Court will likely extend Article 1 to intellectual property rights that are subject to a statutory or compulsory license (i.e., a license that authorizes users to exploit protected works provided that they remunerate rights holders).<sup>63</sup> These logical extensions of prior Article 1 case law suggest that there are no obvious jurisdictional limits on the ECHR’s power to review a wide array of intellectual property disputes under the rubric of the right of property.

Outside of these broad jurisdictional parameters, however, the scope of Article 1 is much less certain. This is particularly true where Article 1 intersects with intellectual property subject matter and ownership rules; for example, where ownership is contested or where it is unclear whether an inventor, creator, or business has satisfied the requirements for protection under domestic law. I analyze these unresolved issues below. I begin with literary and artistic works that are protected from the moment of their creation or fixation. I then discuss industrial property whose eligibility for protection is determined by a registration procedure.

### 1. *Literary and Artistic Works*

Consider first an easy case: literary and artistic works whose ownership and eligibility for protection in domestic law are undisputed. The creators of such works possess exclusive exploitation and assignment rights that fit

60. *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm’n H.R. Dec. & Rep. 70, 79 (1990) (admissibility decision).

61. See LAURENT SERMET, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PROPERTY RIGHTS* 13 (1998) (“patents have two characteristics—exclusiveness and transferability—which are also hallmarks of property”).

62. See *supra* Part II.B.

63. Compulsory licenses fit easily within the concept of Article 1 “assets,” even where the amount of compensation is determined ex post by a government agency or royalty tribunal. See *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. 1, 54 (Grand Chamber) (applying Article 1 to a right “to obtain . . . compensatory property” notwithstanding the fact that the “right was created in a somewhat inchoate form, as its materialisation was to be effected by an administrative decision allocating State property to” the applicant).

comfortably within European jurisprudence protecting various forms of intellectual property under Article 1. In these cases of undisputed ownership and eligibility, the ECHR will simply defer to the national copyright or neighboring rights laws and conclude that Article 1 is applicable. Yet such deference may not always yield easy answers, particularly when domestic law provides limited guidance concerning a creator's proprietary interests.

*a. Dima v. Romania*

*Dima v. Romania*,<sup>64</sup> a 2005 admissibility decision previously unmentioned by commentators, highlights these complexities. The case concerned a graphic artist, Victor Dîma, who created the design for a new national emblem and seal shortly after the fall of Romania's communist regime in 1989. Dîma developed a preliminary drawing of the state symbols in response to a public competition. A government commission selected his prototype over several other submissions and directed him to work with two history and heraldry experts to revise the design.<sup>65</sup>

The Romanian Parliament later adopted the revised design as the state emblem and seal, listing Dîma as the "graphic designer" in a statute published in the country's Official Journal.<sup>66</sup> Inexplicably, however, the Parliament never paid Dîma for his work. In addition to seeking to recover the compensation owed to him, Dîma responded by asserting his rights as the graphic designer of the state emblem and seal.

He turned first to Romania's administrative agencies. The Patent and Trademark Office refused to register the design, relying on a provision of Romania's industrial design statute that excludes from protection designs "whose purpose and appearance are contrary to morality or public policy."<sup>67</sup> Dîma had better luck with the Copyright Agency, whose director informed him in a series of letters that he was the author of the graphic design and enjoyed all of the rights in domestic copyright law. On the strength of these assertions, Dîma filed three copyright infringement actions in the Romanian courts against two private businesses and a state-owned enterprise responsi-

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64. *Dima v. Romania*, App. No. 58472/00 (2005) (admissibility decision).

65. The ECHR does not indicate whether Dîma prepared his initial design for the competition, although that is the most plausible interpretation of the facts. *See id.* at paras. 3–4.

66. *Id.* at para. 6 ("*auteur des maquettes graphiques*" in French).

67. The Patent and Trademark Office also based its refusal on an unpublished internal rule which provided that industrial drawings and models representing the emblem of a state were excluded from copyright protection ("*droit d'auteur*"). *Id.* at para. 9. The ECHR did not explain why an industrial property office believed itself competent to interpret an issue of copyright law. However, settled grounds for rejecting the registration of state symbols as trademarks appear in Article 6 *ter* of the Paris Convention, which prohibits the registration and use of "armorial bearings, flags, and other State emblems" as such marks or as elements thereof "without authorization by the competent authorities . . ." *Id.* at para. 27 (citing Paris Convention for the Protection of Industrial Property, art. 6 *ter*, Mar. 20, 1883, 828 U.N.T.S. 305). Although the Patent and Trademark Office did not rely upon this provision in denying Dîma's registration, Romania cited it in opposing his complaint to the ECHR. *See id.* at paras. 7, 18.

ble for minting Romanian coins—all of which had reproduced and distributed the design for profit.<sup>68</sup>

The courts dismissed all three suits, holding that Dima did not own a copyright in the design of the state symbols. The decisive rulings were issued by the Romanian Supreme Court of Justice. The court acknowledged that Dima had personally created the design. But it held that the Parliament, which had commissioned the revision of the design, was the “author” of the works.<sup>69</sup> Alternatively, the Supreme Court concluded that “symbols of the State could not be the subject of copyright,” neither under the 1956 copyright statute in effect at the time Dima created the design (which did not mention state symbols) nor under a revised 1996 statute (which expressly excluded such symbols from copyright protection).<sup>70</sup> Finally, the Supreme Court rejected Dima’s argument that the lower courts had retroactively applied the 1996 statute to his design, since even under the earlier law Dima was not the author of “works of intellectual creation.”<sup>71</sup>

Dima challenged these rulings before the ECHR, alleging that the Romanian courts had deprived him of a possession in violation of Article 1.<sup>72</sup> He invoked the subject matter and authorship rules of the 1956 copyright statute, which protected “all works of intellectual creation in the literary, artistic and scientific domain, whatever the contents and form of expression,” including “works of graphic art.”<sup>73</sup> The statute further provided that the “author” of such works “shall be the person who has created” them and that the copyright “arise[s] the moment the work takes . . . concrete form.”<sup>74</sup> Dima asserted that, as a result of these statutory provisions, his copyright in the graphic design arose at the moment he created it or, at the latest, when he was listed as the graphic designer in the Official Journal.<sup>75</sup>

68. See *Dima*, App. No. 58472/00, at paras. 11–26.

69. The Supreme Court emphasized the collective process of the models’ creation and the decisive role played by the Parliament in selecting the final models. See *id.* at para. 14.

70. According to the ECHR, the 1996 statute was adopted to “modernize the field of copyright” after the fall of the socialist regime in 1989. See *id.* at paras. 61–62.

71. *Id.* at para. 13.

72. Dima’s complaint to the ECHR also raised two other claims: (1) the government’s failure to compensate him for his work, and (2) various procedural objections to the domestic infringement proceedings. As to the first claim, the ECHR ruled that Dima had failed to exhaust domestic remedies, thus precluding the Court from reviewing his allegations on the merits. *Id.* at paras. 78–81. As to the second claim, the ECHR rejected all of Dima’s objections save one—a challenge to a report produced by an expert witness for one of the defendants. As to that issue, it declared Dima’s complaint admissible. *Id.* at paras. 66–67. In November 2006, the ECHR concluded that Romania had violated the European Convention’s right to a fair hearing when the Romanian Supreme Court dismissed his appeal without addressing Dima’s challenge to the expert’s report. The Court awarded Dima €2,000 in damages. See *Affaire Dima c. Roumanie*, App. No. 58472/00 (2006); see also Press Release, Registrar, European Court of Human Rights, Chamber Judgments Concerning Azerbaijan, Bulgaria, Croatia, Italy, Lithuania, Romania and Russia (Nov. 16, 2006) (summarizing the ECHR’s judgment in English).

73. Decree No. 321 Relating to Copyright, June 18, 1956, art. 9 (Rom.) (copy on file with author).

74. *Id.* art. 2.

75. See *Dima v. Romania*, App. No. 58472/00, para. 38 (2005) (admissibility decision).

The ECHR began its analysis by stating that Article 1 protects copyrighted works. But this conclusion did not resolve whether Dima had “a ‘possession’ or at least a ‘legitimate expectation’ to acquire a ‘possession’” as the author of the graphic models he created.<sup>76</sup> To assess that issue, the Court first turned to the subject matter rules of European copyright laws. It observed that “the majority of national legal systems, including that of Romania, provide that copyright arises upon the creation of an artistic work. Some jurisdictions require, in addition . . . that the work have a concrete form of expression.”<sup>77</sup> These general principles, viewed in the abstract, appeared to support a ruling in Dima’s favor.

Yet the Court also recognized that these principles did not answer all unsettled questions concerning the scope of national copyright law. In cases where the “existence or extent” of copyright is uncertain, the ECHR stated, it is the task of domestic courts to resolve any ambiguities.<sup>78</sup> Only once those ambiguities have been resolved can the Court determine the extent of the applicant’s property right and whether the state had violated that right.

The key question, therefore, was whether Romanian courts had decided that a graphic design of a state emblem could be protected by copyright prior to the adoption of the 1996 statute that expressly denied such protection. On this issue, the facts did not favor Dima. Although he was listed as the graphic designer in the official gazette and the subject matter provisions of the 1956 copyright law were ambiguous, he could not point to “a judgment in his favor, nor could he rely on any favorable case law concerning the ability to copyright models of the State emblem and seal.”<sup>79</sup> In addition, the Supreme Court of Justice ultimately rejected Dima’s proposed interpretation of the 1956 statute (and, implicitly, that of the Copyright Agency, although the ECHR failed to mention this fact). In light of this rejection, Dima could not claim to have any “legitimate expectation” of acquiring a possession, since such an expectation cannot arise where there is “a dispute as to the interpretation and application of national law, and . . . the applicant’s submissions [are] subsequently rejected by the national courts.”<sup>80</sup>

The ECHR concluded by reaffirming its “limited power” to review allegations of legal or factual errors committed by national courts when interpreting domestic law. Applying this deferential standard, it found “no appearance of arbitrariness” in the Supreme Court’s ruling. There was thus “no basis on which the [ECHR] could reach a different conclusion on the question of whether [Dima] . . . did or did not have a copyright” in the design he created.<sup>81</sup>

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76. *Id.* at para. 87.

77. *Id.* at para. 88.

78. *Id.* at para. 89.

79. *Id.* at para. 91.

80. *Id.* at para. 92.

81. *Id.* at para. 93.



*b. Implications of Dima for the Protection of Literary and Artistic Works*

*Dima v. Romania* raises several important issues regarding the application of Article 1 to literary and artistic works. Perhaps most significantly, the ECHR refused to second-guess the Romanian courts' interpretation of domestic copyright law in a case whose facts were sympathetic to the creator. Instead, it deferred to the authority of national courts of last resort to resolve contested legal issues that divide lower courts and administrative agencies. Yet the Court also signaled that its deference to these domestic decisionmakers would not be unlimited. A close parsing of the judgment suggests several issues which may engender more searching scrutiny by the ECHR in future cases.

First, the ECHR in *Dima* did not address moral rights, a branch of copyright law that enables creators to control the attribution and integrity of their works. Inasmuch as moral rights protect the personal link between the creator and his or her intellectual creations, some commentators have argued that they have a stronger claim to protection as human rights than do copyright's economic exploitation privileges.<sup>82</sup> Scholars are divided, however, over whether Article 1 extends to moral rights.<sup>83</sup> The Court did not resolve this debate, inasmuch as *Dima's* challenge focused solely on his economic rights in the graphic designs. In future cases, however, creators may raise moral rights claims, such as where the state misattributes authorship or distorts or damages a protected work.<sup>84</sup> In such cases, the Court will need to consider whether national decisionmakers deserve less deference if they restrict moral rights.

Second, the ECHR refused to conflate subject matter standards from different branches of intellectual property law. In contesting *Dima's* allegations before the ECHR, the government argued against the *copyrightability* of state symbols by citing to a *trademark* provision of the Paris Convention and Romania's *industrial design* statute,<sup>85</sup> both of which exclude such symbols as

82. See Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 524 (2004) (stating that "the center of copyright as a human right lies in the moral rights arena"). *But see* General Comment, *supra* note 19, ¶¶ 30–34, 44–46 (emphasizing importance of economic exploitation rights for creators and innovators and their interdependence with moral rights).

83. Compare ÇOBAN, *supra* note 26, at 149–50 (suggesting that Article 1 covers only the economic value of a possession), with Geiger, *Constitutionalising Intellectual Property Law*, *supra* note 15, at 383 & n.54 (suggesting that Article 1 also protects moral rights).

84. Plausible illustrations of such claims include disputes over the government's removal or destruction of sculptures, murals, or other works of visual art from public buildings or parks. *Cf.* Rebecca Stuart, Comment, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 659–76 (2007) (reviewing cases decided under U.S. moral rights statute in which creators challenged the government's removal, destruction, or mutilation of works of visual art, and comparing U.S. law to the protection of moral rights in international agreements and in other countries).

85. See *Dima v. Romania*, App. No. 58472/00, para. 80 (2005) (admissibility decision). *Dima* challenged the government's reliance on these authorities.

protectable subject matter.<sup>86</sup> The ECHR studiously avoided any mention of industrial property, however, restricting its analysis to copyright law. Had the Romanian courts relied solely on industrial property principles to reject Dima's copyright infringements claims, the case's outcome before the ECHR might have been quite different. A broader implication of this approach is that the ECHR will interpret Article 1 in a manner that is appropriately sensitive to the distinct subject matter and protection standards of different fields of intellectual property law.

Third, the ECHR signaled in *Dima* a concern with the retroactive application of domestic intellectual property laws. The ECHR recognized that copyright protection exists from the moment an author creates a work. Had the Romanian Supreme Court rejected Dima's authorship claim based solely on the subsequently enacted 1996 statute, the ECHR's recognition of this rule would have supported a finding that the retroactive application of the new law interfered with an existing possession. On the facts presented, however, Dima did not have a reasonable basis for claiming copyright protection even before the new statute took effect. There was no final judgment, nor any favorable precedent that recognized the copyrightability of design models for state symbols. This raises the possibility that the ECHR may find in favor of authors and rights holders who rely on these legal authorities before a change in the applicable law.

Fourth, the ECHR did not dismiss Dima's complaint solely on the ground that he did not own a possession protected by Article 1. Although the Court emphasized that issue, it also considered whether the Romanian courts had acted arbitrarily, indicating that the Court was also implicitly addressing the second issue identified above—whether the government had "interfered" with a possession.<sup>87</sup> Had Dima not been the owner of such a possession, no amount of arbitrariness by the Romanian courts could have justified the ECHR in finding a violation of Article 1. The Court's willingness to consider the issue of arbitrariness suggests that in close cases it may assume *arguendo* that the complainant has an existing possession or a legitimate expectation in order to correct egregious errors of national courts in domestic intellectual property disputes.

## 2. Industrial Property

A different set of ambiguities arises with respect to the ECHR's treatment of industrial property. As mentioned above, the Grand Chamber's judgment in *Anheuser-Busch Inc. v. Portugal* definitively resolved the question of whether registered industrial property rights are existing possessions protected by Article 1. The Court also concluded that applications to register trademarks are similarly protected, overruling the Chamber's conclusion

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86. See *supra* note 67 and accompanying text (discussing these two provisions).

87. See *supra* Part II.C.

that such applications are neither existing possessions nor legitimate expectations. This extension of Article 1 to trademark applications raises several important issues. I discuss those issues below, but first provide an overview of the case and the reasoning of the Chamber and the Grand Chamber.

*a. Anheuser-Busch Inc. v. Portugal*

The ECHR's judgment in *Anheuser-Busch* is one small skirmish in a long-standing litigation war between the American brewer of "Budweiser" beer and a rival Czech company, Budějovický Budvar ("Budějovický"), which also distributes beer under the "Budweiser Bier," "Budweiser Budvar," and similar brand names. Over the last quarter century, nearly fifty disputes between the two competitors have raged across Europe in industrial property offices, domestic courts, and regional tribunals.<sup>88</sup> These disputes raise difficult questions concerning the relationship between trademarks and geographical indications ("GIs")<sup>89</sup> and between national and international intellectual property laws.

The Portuguese legal system confronted these issues in 1981 when Anheuser-Busch applied to the National Institute for Industrial Property to register "Budweiser" as a trademark. Budějovický opposed the registration, citing its 1968 Portuguese registration of an appellation of origin<sup>90</sup> for "Budweiser Bier."<sup>91</sup> The industrial property office refrained from acting on Anheuser-Busch's application while the parties attempted to negotiate a licensing agreement. Eight years later, in 1989, after protracted negotiations proved unsuccessful, Anheuser-Busch asked the Portuguese courts to cancel

88. See *European Rights Court Rejects Budweiser Bid for Protection Against Rival Czech Brand*, 70 PAT. TRADEMARK & COPYRIGHT J. 668, 668 (2005); Jeremy Reed, *ECJ Protects Simple Geographical Indications for their Bud-dy*, 27 EUR. INTEL. PROP. REV. 25 (2005); Budweiser Budvar, *Disputes Concerning Registered Trademarks*, <http://www.budvar.cz/en/web/Znacka-Budvar/Znamka-Budvar.html> (last visited Nov. 14, 2007).

89. The World Intellectual Property Organization (WIPO) defines a GI as a "sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin." World Intellectual Property Organization, *About Geographical Indications*, [http://www.wipo.int/about-ip/en/about\\_geographical\\_ind.html#P16\\_1100](http://www.wipo.int/about-ip/en/about_geographical_ind.html#P16_1100) (last visited Nov. 14, 2007). The TRIPs Agreement has a similar definition. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPs].

90. The Lisbon Agreement defines an appellation of origin as "the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors." Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, art. 2(1), Oct. 31, 1958, last amended Sept. 28, 1979, 923 U.N.T.S. 205. For a discussion of the relationship between GIs and appellations of origin, see Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPs Agreement*, 5 J. WORLD INTEL. PROP. 865, 867–69 (2002).

91. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 833–34 (Grand Chamber 2007). The 1968 registration was filed pursuant to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, which was opened for signature on October 31, 1958. *Id.*

Budějovický's registration. An additional six years elapsed before a lower court ruled in favor of the American company in 1995, cancelling the registration on the ground that "Budweiser Bier" was not a valid appellation of origin.<sup>92</sup>

In the wake of this ruling, the industrial property office promptly registered Anheuser-Busch's trademark.<sup>93</sup> It was now the Czech brewer's turn to petition the Portuguese courts, invoking a 1986 bilateral treaty between Czechoslovakia and Portugal that provided reciprocal protection for each country's indications of source and appellations of origin. Budějovický argued that the bilateral agreement required Portugal to register "Budweiser Bier" as a Czech GI. But the lower court held that only "ČeskoBudějovický Budvar"—a Czech phrase indicating a beer from České Budějovice, a town in the Bohemia region of the Czech Republic where the brewer is based—was an appellation of origin.<sup>94</sup> The German name of that town—"Budweis" or "Budweiss"—and the German translation of the phrase designating beer from that town—"Budweiser Bier"—were not.<sup>95</sup>

An intermediate appellate court reversed this decision and ordered the cancellation of Anheuser-Busch's trademark. The Supreme Court of Portugal affirmed. It interpreted the 1986 bilateral treaty to protect each signatory's national products in translation as well as in their original language.<sup>96</sup> The German translation of ČeskoBudějovický Budvar—"Budweiser Bier"—was therefore eligible for protection as a GI under the 1986 treaty. Moreover, the refusal to register the American company's mark in reliance on that treaty did not violate the trademark priority rules in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").<sup>97</sup>

92. *Id.* at 834. The Lisbon Court of First Instance held that, under the terms of the Lisbon Agreement, appellations of origin were "reserved to the geographical name of a country, region, or locality, which served to designate a product originating therein . . . 'Budweiser' did not come within this category." *Id.* For a more detailed explanation of this issue, see *infra* note 95 and accompanying text.

93. *Id.* Budějovický had filed an opposition to the application to register the Anheuser-Busch mark with the industrial property office. Notwithstanding this opposition, the office issued a certificate of registration to the American brewer in June 1995. *See id.*

94. *Id.* at 834–35.

95. The translation from Czech to German is not serendipitous. Until the middle of the last century, a large German-speaking population resided in the Bohemia region of the Czech Republic (formerly Czechoslovakia and, before 1918, a province of the Austro-Hungarian Empire). According to the Budweiser Budvar website, "[s]ince the 14th century the official name of [České Budějovice] was Budweis. Only in 1918 was the name changed into the Czech name of České Budějovice. However, the indication Budweis is today the official translation of the name of the city into many foreign languages." Budweiser Budvar, Information About Trademarks, <http://www.budvar.cz/en/web/Znacka-Budvar/Znamka-Budvar.html> (last visited Nov. 14, 2007).

96. Anheuser-Busch disputed that the appellation of origin "ČeskoBudějovický Budvar" corresponds to the German expression "Budweiser," with the result that, even if the bilateral treaty applied to translations, it did not support the registration of "Budweiser Bier" as a geographical indication. The Supreme Court of Portugal rejected this argument. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [846], 848–49 (Chamber 2007) (judgment of Oct. 11, 2005).

97. TRIPs, *supra* note 89, art. 24. Anheuser-Busch claimed a right of priority for its "Budweiser" mark application under Article 24(5) of TRIPs, which addresses a subset of the conflicts between geographical indications and trademarks. Article 24(5) gives priority to trademarks that have been applied

With the Portuguese litigation at an end, Anheuser-Busch filed a complaint with the ECHR. The beer manufacturer alleged that Portugal had violated Article 1 by invoking the 1986 bilateral treaty to deny registration of its “Budweiser” trademark that the company had applied to register in 1981, six years prior to the treaty’s entry into force.<sup>98</sup>

In their respective judgments, both the Chamber and the Grand Chamber began by surveying industrial property treaties, E.U. directives, and domestic laws. These sources treat registration as the key to obtaining protection of a trademark. But they also confer “certain rights” on trademark applications, such as fixing the beginning of the mark’s period of validity and exclusivity. In addition, “in some countries, an application to register a mark . . . may be the subject of an assignment, security assignment or licence and (provided the mark is subsequently registered) create an entitlement to compensation in the event of fraudulent use by a third party.”<sup>99</sup> These rights notwithstanding, most European states also authorize interested parties to oppose trademark applications and to bring actions to revoke or invalidate a mark within a set time period after its registration.<sup>100</sup> The key issue facing the ECHR was whether, in light of this palimpsest of legal rules, Article 1 protects not only registered marks but trademark applications as well.

*The Chamber Judgment.* By a five-to-two vote, the Chamber ruled that Article 1 was inapplicable to the dispute before it.<sup>101</sup> The majority offered two justifications for this conclusion. The first rationale was limited to the case’s complex procedural history. Among the twists and turns of twenty years of litigation, two events stood out: First, that the American company’s right to use its mark in Portugal “was already contested by Budějovický Budvar when [Anheuser-Busch first] filed its application” in 1981; and second, that the 1986 bilateral treaty had been in force for more than two years when the company first challenged Budějovický’s GI registration in 1989.<sup>102</sup> As a result of these events, Anheuser-Busch

for or registered in good faith before the entry into force of TRIPs or before the geographical indication is protected in its country of origin. The Supreme Court rejected the American company’s claim of priority under this provision. *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 848–49 (Chamber). For a more detailed discussion of the court’s decision, see Antonio Corte-Real, *The Budweiser Case in Portugal*, 24 EUR. INTEL. PROP. REV. 43 (2002).

98. *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 853–56 (Chamber). The 1986 bilateral agreement entered into force for Portugal on March 7, 1987. *Id.* at 848.

99. *Id.* at 852; *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 840–41 (Grand Chamber 2007). The Portuguese courts had held that “the mere filing of an application for registration conferred on the applicant a ‘legal expectation’ that warranted the protection of the law.” *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 852 (Chamber). This expectation was later codified in a provision of the Portuguese Code of Industrial Property—enacted after the conclusion of the domestic litigation between Anheuser-Busch and Budějovický—that provided “provisional protection” to trademark applicants and authorized them to bring infringement actions on the basis of that protection. *Id.*

100. See *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 854–55 (Chamber); *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 843 (Grand Chamber).

101. *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 858 (Chamber).

102. *Id.* at 857.

could not be sure of being the owner of the trademark in question until after final registration and then only on condition that no objection was raised by a third party. In other words, the applicant company had a conditional right, which was extinguished retrospectively for failure to satisfy the condition, namely that it did not infringe third-party rights.<sup>103</sup>

This narrow, fact-specific rationale was sufficient to support the Court's conclusion that Article 1 was inapplicable. The Chamber went further, however, holding that Article 1 applies only "after final registration of the mark, in accordance with the rules in force in the State concerned."<sup>104</sup> Prior to that time, while an application to register is pending, the applicant has "a hope of acquiring" a possession. But it does not have a "legally protected legitimate expectation" of a future proprietary interest.<sup>105</sup>

This second, categorical construction of Article 1 easily disposed of Anheuser-Busch's principal argument—that the Portuguese Supreme Court had expropriated its property when it invoked the 1986 bilateral treaty to reject the company's previously filed application to register "Budweiser." Under the majority's second, broader holding, the court's adherence to the later-in-time treaty was simply "irrelevant, since, when that Agreement entered into force . . . the applicant did not have a 'possession.'"<sup>106</sup>

In contrast to the judges in the majority, the two dissenting judges believed that Anheuser-Busch had a legitimate expectation protected by Article 1.<sup>107</sup> That expectation was based on the Portuguese Code of Industrial Property, which conferred three rights on trademark applicants: (1) a right of priority over subsequent applications, (2) a right to compensation for illegal uses of the mark by third parties, and (3) a right to have their "application[s] examined in accordance with the rules" in force when they file an application.<sup>108</sup> The Portuguese courts had interfered with these rights by refusing to register the "Budweiser" mark in reliance on the 1986 bilateral agreement.<sup>109</sup> The refusal resulted in a "total inability to exploit the mark commercially" in Portugal without the payment of compensation. For this reason, the interference did not strike a fair balance between the company's property rights and the general interest.<sup>110</sup>

*The Grand Chamber Judgment.* Anheuser-Busch petitioned for a review of the Chamber's ruling before the Grand Chamber. The ECHR granted the company's request, received additional arguments from the parties, and is-

103. *Id.* at 858.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 858–60 (Costa & Cabral Barreto, JJ., dissenting).

108. *Id.* at 859.

109. *Id.*

110. *Id.* at 859–60.

sued a revised judgment in January 2007. By a fifteen-to-two vote, the ECHR held that Portugal had not violated Article 1. Unlike the Chamber judgment, however, the Grand Chamber advanced one step further in the analytical framework outlined above.<sup>111</sup> Specifically, the majority held that property rights in the European Convention apply to trademark applications as well as to registered marks.<sup>112</sup>

To reach this result, the Grand Chamber reviewed the “bundle of financial rights and interests that arise upon an application” to register a mark. These rights and interests enable applicants to enter into transactions (such as assignments or licensing agreements) that may have “substantial financial value.”<sup>113</sup> The majority categorically rejected Portugal’s claim that these transactions have only “negligible or symbolic value,” citing the numerous rights that domestic law grants to trademark applicants. The economic value of trademark applications was especially likely in the case of Anheuser-Busch’s “Budweiser” mark, which the ECHR recognized as enjoying “international renown.”<sup>114</sup>

The Court next turned to the Chamber’s conclusion that trademark applicants possess only conditional rights prior to registration, a status that precludes their protection under Article 1. The majority acknowledged the conditional status of the rights that attach to trademark applications. But it reasoned that

when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights . . . that were recognised under Portuguese law, even though they could be revoked under certain conditions.<sup>115</sup>

The Court thus held that Article 1 was “applicable in the instant case,” a conclusion that made it “unnecessary . . . to examine whether the applicant company could claim to have had a ‘legitimate expectation.’”<sup>116</sup>

111. See *supra* Part III (introductory paragraph).

112. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 850 (Grand Chamber 2007).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* The majority’s holding logically implies that trademark applications are “existing possessions,” the only other temporal category of property rights protected by Article 1. See *supra* Part II.B. It is uncertain, however, whether the Grand Chamber placed trademark applications in this category, since it stated only that such applications “[give] rise to interests of a proprietary nature.” *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 850 (Grand Chamber). In contrast to the majority, the concurrence and dissent analyzed trademark applications under the rubric of “legitimate expectations.” *Id.* at 853 (Steiner & Hajiyev, JJ., concurring), 856 (Caflisch & Cabral Barreto, JJ., dissenting).

b. *The Significance of Anheuser-Busch's Extension of Article 1 to Trademark Applications*

Before analyzing the next stage in the Grand Chamber's analysis, it is worth pausing to consider the significance of the Court's decision to overrule the Chamber and apply the Convention's property rights clause to Anheuser-Busch's application to register the "Budweiser" mark. In particular, the Grand Chamber's judgment raises at least three issues that will affect the future relationship between the European human rights system and national and regional intellectual property laws.

The first issue concerns the European-wide influence of the Court's ruling. As a formal matter, ECHR judgments only bind the parties to the dispute. They do not have binding precedential effect for future controversies involving other complainants or respondent states. In practice, however, many ECHR rulings have transjurisdictional consequences. These effects are especially pronounced when the Court departs from its normal practice of resolving cases on narrow, fact-specific grounds and includes general statements of principle in its judgments.<sup>117</sup>

A close reading suggests that *Anheuser-Busch* is just such a case. Although the Grand Chamber refers to facts specific to the dispute between the two brewers, such as the claim that "Budweiser" is a well-known mark, several aspects of the decision suggest that the judges intend the case to apply more broadly. These include the Court's canvassing of international, regional, and national trademark treaties and statutes; its discussion of the economic value of trademark applications in a market economy; and the phrasing of its holding—that "the applicant company's legal position *as an applicant for the registration of a trade mark* came within Article 1."<sup>118</sup> The Court's inclusion of these general principles strongly suggests that its analysis of Article 1 applies to applications to register trademarks in all forty-seven European Convention member states.

A second unsettled issue concerns the consequences of the Grand Chamber's analysis for applications to register other forms of intellectual property, such as patents, industrial designs, plant varieties, and integrated circuits. The Court's twin focus on (1) the priority, exploitation, and transfer rights that international, regional, and national laws grant to trademark applicants, and (2) the practical economic value that such applications possess, suggests that the ECHR will examine these same two factors to decide whether to extend Article 1 to applications to register other forms of intellectual property.

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117. See Robert Harmsen, *The European Convention on Human Rights After Enlargement*, 5 INT'L J. HUM. RTS. 18, 32–33 (2001) (discussing ECHR's common practice of issuing narrow, fact-specific rulings rather than broad statements of principle). The most recent past President of the ECHR has urged the Court to abandon this practice. See Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HUM. RTS. L.J. 161, 162–63 (2002).

118. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 850 (Grand Chamber) (emphasis added).



The Court's judgment does not expressly delineate the relationship between the two factors. Its analysis strongly suggests, however, that the legal recognition of these exclusive rights creates a presumption of economic value, even if the applicant did not itself assign, license, or otherwise derive financial benefit from the application.<sup>119</sup> Thus, to the extent that patent, industrial design, and similar laws confer such rights upon applications to register, those applications will fall within Article 1's ambit.<sup>120</sup> By contrast, if the relevant legal rules do not confer such rights, applicants will need to prove that they in fact engage in "legal transactions, such as a sale or license agreement for consideration."<sup>121</sup> Such evidence demonstrates that applications to register these other forms of intellectual property are "capable of possessing . . . substantial financial value" even in the absence of formal legal protection.<sup>122</sup>

A third consequence of the Grand Chamber's decision relates to the ECHR's jurisdiction to review the refusal of domestic industrial property offices and domestic courts to register trademarks on grounds such as consumer confusion or lack of distinctiveness.<sup>123</sup> These issues lurked in the background of the *Anheuser-Busch* case. The parties disputed whether the Portuguese courts had rejected the American brewer's 1981 application to register "Budweiser" not only because it conflicted with the 1986 bilateral agreement, but also because it was confusingly similar to the Czech brewer's appellation of origin.<sup>124</sup> Neither the Chamber nor the Grand Chamber addressed this issue. But its importance to the parties—and to future ECHR intellectual property disputes—is easy to explain.

Consumer confusion has long been accepted as a valid basis for refusing to register trademarks. Had such confusion in fact been the basis for the refusal to register "Budweiser," *Anheuser-Busch* could not have argued that Portugal had interfered with its statutory right of priority by enforcing the subsequently adopted bilateral treaty. Rather, the American brewer could only

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119. The fact that the ECHR did not reference *Anheuser-Busch's* attempt to license its trademark application to Budějovický Budvar in its analysis of the scope of Article 1 supports this view. See *id.* at 834 and 849.

120. See, e.g., European Patent Convention, Oct. 5, 1973, 1065 U.N.T.S. 199, art. 67 (defining the rights conferred by a European patent application after publication) and arts. 71–73 (describing a European patent application as "an object of property" and enumerating rights of applicants including transfer, assignment, and licensing); Council Regulation (EC) No. 6/2002, Community Designs, 2002 O.J. (L 3) 1, 5, available at [http://oami.europa.eu/en/design/pdf/reg2002\\_6.pdf](http://oami.europa.eu/en/design/pdf/reg2002_6.pdf), art. 12 (term of protection exists from the date of filing of an application to register a Community design) and art. 34 (describing an "application for a registered Community design as an object of property").

121. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 850 (Grand Chamber).

122. *Id.*

123. See Council Directive (EC) 89/104, arts. 3–4, 1989 O.J. (L 40) 1 (setting forth mandatory and permissive grounds for denying registration of a trademark).

124. Compare *Anheuser-Busch's* claim that during the domestic litigation, "there had never been any question of a risk of confusion with the Czech company's products," *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [846], 854 (Chamber 2007) (judgment of Oct. 11, 2005) with Portugal's response that the Supreme Court considered both the risk of confusion and the 1986 bilateral agreement in refusing to register the American company's trademark, *id.* at 855.

have complained that the domestic courts had misjudged the reputation and consumer associations of the two companies' brands in the Portuguese beer market.

It is here that the consequences of the different approaches adopted by the Chamber and Grand Chamber are illustrated most starkly. By deciding that Article 1 is not implicated until after a trademark registration is final, the Chamber adopted a bright-line rule that categorically precluded the ECHR from reviewing national court and administrative agency decisions that refuse to register trademarks. By extending Article 1 to trademark applications (and, as I argue above, to applications for other registered rights) and holding that Anheuser-Busch was "entitled to expect that [its application] would be examined under the applicable legislation,"<sup>125</sup> the Grand Chamber expanded the ECHR's jurisdiction to review the denial of registrations on any ground recognized in national and regional intellectual property laws. As I explain below, the ECHR's review of complaints challenging refusals to register is likely to be quite limited.<sup>126</sup> It nevertheless creates an additional layer of European human rights scrutiny over domestic intellectual property registration systems.

### B. *Has the State Interfered with a Possession?*

After concluding that a particular form of intellectual property qualifies as an "existing possession" or a "legitimate expectation" protected by Article 1, the ECHR and the European Commission must next consider the second question identified above—whether the state has "interfered" with such a possession or expectation. The tribunals have identified two distinct types of interferences: (1) government restrictions on the exercise of intellectual property rights, and (2) interferences that result from domestic intellectual property litigation between private parties.<sup>127</sup>

125. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 850 (Grand Chamber).

126. See *infra* notes 188, 191–192 and accompanying text.

127. The ECHR and the European Commission have also indirectly considered the interference issue in two other categories of Article 1 cases. In the first category, the tribunals decline to review a claim under Article 1 if they have already examined it under another provision of the Convention. See *British Am. Tobacco Co. Ltd. v. Netherlands*, App. No. 19589/92, 331 Eur. Ct. H.R. (ser. A) at 29 (1995) (refusing to consider Article 1 claim challenging denial of patent application where claim was "in substance identical to that already examined and rejected in the context of" complainant's Article 6 challenge to the independence and impartiality of the Appeals Division of the Dutch Patent Office); *Dimitrievski v. The Former Yugoslav Republic of Macedonia*, App. No. 26602/02, para. 7 (2006) (admissibility decision) (refusing to examine alleged violation of right of property where the complaint under Article 1 "relate[d] solely to the outcome of the proceedings" and was "in fact a restatement of the complaints under Article 6").

A second category of indirect interference has arisen in challenges to the authority of the European Patent Office ("EPO") to review patent applications and register patents. Inventors file applications directly with the EPO, whose examiners decide whether the applications meet the eligibility requirements of the European Patent Convention ("EPC"). If the EPO grants the application, the patent is automatically protected in all states that have ratified the EPC. National industrial property offices and national courts may not deny a patent that the EPO has granted nor grant a patent that the EPO has denied. In four cases, inventors whose patent applications were rejected challenged the state's delegation

### 1. *Restrictions on the Exercise of Intellectual Property Rights*

As explained above, government “interferences” with property rights take two principal forms: use controls and deprivations.<sup>128</sup> The ECHR and the European Commission have considered state interferences with intellectual property on only two occasions. In both instances, the tribunals concluded that the government had restricted the exercise of intellectual property rights—that is, had controlled their use—but had not completely deprived rights holders of their possessions.

The most recent analysis of use controls appears in the dissenting opinion to the *Anheuser-Busch* Chamber judgment. According to the two dissenting judges, the Portuguese Supreme Court’s “refusal to register” the Budweiser trademark in Portugal “indisputably amount[ed] to [an] interference with the applicant company’s right of property.” The dissenting judges rejected the American brewer’s claim that the refusal to register was an expropriation of its trademark. The state had not deprived Anheuser-Busch of its ownership interest but instead had prevented the company from “exploit[ing] the mark commercially” in the country.<sup>129</sup>

Fifteen years earlier, the Commission considered whether a compulsory license issued by the Dutch Patent Office amounted to an interference within the meaning of Article 1.<sup>130</sup> The government argued that such licenses were not interferences because “patents are granted subject to the provisions of the Patent Act, which expressly limits the scope of the patent owners’ rights by providing for the grant of compulsory licences . . . .”<sup>131</sup>

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of decisionmaking authority to the EPO. In each case, the European Commission rejected the challenge. The Commission highlighted the numerous benefits of the EPO’s centralized review and registration system and emphasized the EPC’s “procedural safeguards,” including an appeals procedure staffed by independent legal and technical experts. In light of these “equivalent protections” for the rights of patent applicants, the states’ delegation of authority to the EPO to review patent applications and register patents did not interfere with a possession in a manner proscribed by Article 1. *Lenzing AG v. Germany*, App. No. 39025/97, para. 20 (1998) (admissibility decision); *Lenzing AG v. United Kingdom*, App. No. 38817/97, 94 Eur. Comm’n H.R. Dec. & Rep. 136, 144 (1998) (admissibility decision); *Heinz v. Contracting States also Parties to the European Patent Convention*, App. No. 21090/92, 76 Eur. Comm’n H.R. Dec. & Rep. 125 (1994) (admissibility decision); *Reber v. Germany*, App. No. 27410/95, 22 Eur. H.R. Rep. 98 (1996) (admissibility decision). The ECHR has never addressed this issue, although it recently cited the Commission’s case law with approval. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 42 Eur. H.R. Rep. 1 [1], 32, 45 (Grand Chamber 2006) (judgment of June 30, 2005) (analyzing the delegation of authority by the European Convention’s member states to the European Union).

128. See *supra* Part II.C.

129. *Anheuser-Busch*, 44 Eur. H.R. Rep. 42 at 859 (Chamber) (Costa & Cabral Barreto, JJ., dissenting). The two judges who dissented from the Grand Chamber’s judgment did not discuss whether Portugal’s refusal to give priority to the Budweiser trademark was a control of a possession or a more substantial deprivation of property. They merely concluded that, by applying the 1986 bilateral agreement retroactively, “the Portuguese authorities have objectively caused damage to the applicant company.” *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 857 (Grand Chamber) (Caflisch & Cabral Barreto, JJ., dissenting).

130. *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm’n H.R. Dec. & Rep. 70, 79 (1990).

131. *Id.*

The Commission disagreed. It reasoned that “a patent initially confers on its owner the sole right of exploitation. The subsequent grant of rights to others under the patent is not an inevitable or automatic consequence.” The Patent Office’s decision to grant a compulsory license thus “constituted a control of the use of property.”<sup>132</sup>

## 2. *Interferences Resulting from Litigation between Private Parties*

A second category of interference cases arises from domestic litigation between private parties. It is axiomatic that only states parties to the European Convention can violate the rights and freedoms it protects. The ECHR thus has “no jurisdiction to consider applications directed against private individuals or businesses.”<sup>133</sup> When those individuals or businesses turn to national courts to resolve their property disputes, however, the decisions of those courts trigger the application of Article 1.

The ECHR and the European Commission have thus recognized that domestic judicial rulings are a form of state action.<sup>134</sup> At the same time, they have been wary of treating those rulings as “interferences” with property. The tribunals have considered the interference issue in three types of intellectual property disputes involving private parties: (1) cases in which national courts adjudicate contract disputes involving the licensing or transfer of intellectual property; (2) cases in which national courts reject complaints alleging intellectual property infringement; and (3) cases in which national courts resolve competing claims of intellectual property ownership. I analyze these three categories of disputes below, highlighting the ways in which the Grand Chamber in *Anbeuser-Busch Inc. v. Portugal* expanded member states’ obligations relating to domestic litigation between private parties.

### a. *Adjudication of Intellectual Property Contracts*

*Aral v. Turkey*,<sup>135</sup> a previously unnoticed admissibility decision, reveals the tribunals’ treatment of the first type of dispute—private contract claims involving the licensing or transfer of intellectual property rights. In *Aral*, the Commission dismissed a complaint filed by three artists who alleged that Turkey had violated Article 1 when its courts enforced a contract that governed the rights to cartoon characters that the artists had created.<sup>136</sup> The Commission held that

132. *Id.* The Commission’s conclusion raises the question of whether such a control is justified. I address this issue below. See *infra* Part III.C.

133. *Reynbakh v. Russia*, App. No. 23405/03, ¶ 18 (2005). Only one decision applies this principle to intellectual property. See *Mihăilescu v. Romania*, App. No. 47748/99, paras. 22–28 (2003) (admissibility decision) (dismissing Article 1 claim by patent owner who was unable to enforce a domestic court damage award against a state enterprise which had been privatized and later declared bankrupt).

134. See *S.Ö. v. Turkey*, App. No. 31138/96, para. 20 (1999) (admissibility decision) (stating that a transfer of property ownership was “enforced by a court order and thus by an act of a State organ”).

135. App. No. 24563/94 (1998) (admissibility decision).

136. *Id.* at paras. 7–17, 21.

the case concerns a commercial dispute between private parties. The State's intervention in the case only occurred through its courts. . . . [T]here is no interference with the right to peaceful enjoyment of possessions when, pursuant to the domestic law and a contract regulating the relationship between the parties, a judge orders one party to that contract to surrender a possession to another, unless it arbitrarily and unjustly deprives that person of property in favour of another.<sup>137</sup>

After briefly reviewing the domestic court decisions, which had interpreted the contract and Turkish intellectual property law to divide ownership of the cartoons between the parties,<sup>138</sup> the Commission found no evidence that "the courts acted in an arbitrary and unreasonable manner. Accordingly, there is no shortcoming attributable to the State."<sup>139</sup>

*b. Rejection of Domestic Infringement Claims*

*Melnychuk v. Ukraine* exemplifies the ECHR's analysis of the second category of private disputes—cases in which an intellectual property owner challenges a national court's dismissal of its infringement claims against a third party.<sup>140</sup> *Melnychuk* involved a dispute between a writer and a newspaper that published disparaging reviews of his books. The writer asked the newspaper to publish his reply to the reviews. When the newspaper refused, the author filed a complaint with the Ukrainian courts seeking "compensation for pecuniary and non-pecuniary damage caused by the publication" of the critical book reviews. He also claimed that the newspaper had violated his copyright, although he did not explain the basis for the alleged infringement.<sup>141</sup> The trial court dismissed Melnychuk's complaint in its entirety. As to the copyright claim, the court stated simply that his allegations were "unsubstantiated."<sup>142</sup>

After exhausting all domestic appeals, Melnychuk filed a complaint with the ECHR. His complaint included a claim that "the newspaper articles about his books violated his copyright."<sup>143</sup> The Court rejected the claim, stating that "the fact that the State, through its judicial system, provided a forum for the determination of the applicant's rights and obligations does not automatically engage its responsibility under Article 1 of Protocol No. 1." Rather, the state's responsibility in such cases is only triggered in "exceptional circumstances" for "losses caused by arbitrary determinations."

137. *Id.* at para. 38.

138. *Id.* at para. 39. The Turkish court held that the magazine publisher owned cartoons which had been "published or which were unpublished but held in the archives of the magazines." But it also held that the artists "could continue to draw the same characters . . . in association with other subjects and stories [and] in other magazines or newspapers." *Id.*

139. *Id.* at para. 40.

140. See *Melnychuk v. Ukraine*, App. No. 28743/03 (2005) (admissibility decision).

141. *Id.* at para. 7.

142. *Id.* at para. 9.

143. *Id.* at para. 30.

Melnychuk's complaint did not meet this high threshold. To the contrary, "the national courts proceeded in accordance with domestic law, giving full reasons for their decisions. Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness."<sup>144</sup>

The European tribunal's limited scrutiny of national court rulings in *Melnychuk* and *Aral* indicates that challenges to garden variety infringement and breach of contract actions will rarely succeed. The ECHR did not simply dismiss Melnychuk's weak copyright claims out of hand, but instead emphasized the exceptionally narrow scope of review in such cases. This suggests that the Court will defer to domestic judges' resolution of infringement and breach of contract disputes even where an applicant's claims have greater merit. Such an approach is consistent with the European Convention's core objective—preventing governments and public officials from violating civil and political liberties. As stated above, the treaty has no "horizontal effect" between non-state actors.<sup>145</sup> The ECHR will thus only rarely find fault with "the determination of [property] rights in disputes between private persons."<sup>146</sup>

### c. Resolution of Competing Ownership Claims

A third category of Article 1 interference cases arises when national courts resolve competing claims of intellectual property ownership. This issue arose in *Anheuser-Busch*, a case in which the Portuguese courts confronted "the conflicting arguments of two private parties concerning the right to use the name 'Budweiser' as a trade mark or [as an] appellation of origin."<sup>147</sup> As explained above, the courts ruled in favor of the Czech owner of the appellation on the basis of a 1986 bilateral agreement between the two countries. The American brewer challenged that ruling before the ECHR, alleging that Portugal had violated the right of priority attaching to its previously filed 1981 application to register Budweiser as a trademark.<sup>148</sup>

After concluding that trademark applications were protected by Article 1, the Grand Chamber considered whether the Portuguese courts had interfered with Anheuser-Busch's application to register Budweiser. In analyzing this issue, the ECHR struggled to knit together two previously unrelated strands of case law.

144. *Id.* at para. 31.

145. This contrasts with many provisions of EC law, which have both a "vertical effect (between the State and the individual), [and] a horizontal effect (between individuals)." *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 42 Eur. H.R. Rep. 1 [1], 28 (Grand Chamber 2006) (judgment of June 30, 2005) (internal quotations omitted). It bears noting, however, that some national court decisions have given horizontal effect to certain provisions of the European Convention. See Geiger, *Constitutionalizing Intellectual Property Law*, *supra* note 15, at 384.

146. *Voyager Ltd. v. Turkey*, App. No. 35045/97, para. 104 (2001) (admissibility decision).

147. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 852 (Grand Chamber 2007).

148. See *supra* Part III.A.2.a.

One line of decisions concerned “the retrospective application of legislation whose effect is to deprive someone of a pre-existing asset.”<sup>149</sup> The retroactivity of such domestic laws “may constitute [an] interference that is liable to upset the fair balance that has to be maintained between the demands of the general interest on the one hand and the protection of the right to peaceful enjoyment of possessions on the other.”<sup>150</sup> Previously, the ECHR had applied this principle to interactions between the government and private parties.<sup>151</sup> But in the year prior to the Grand Chamber’s judgment, the Court extended the principle “to cases in which the dispute is between private individuals and the State is not itself a party to the proceedings.”<sup>152</sup> These decisions provided support for Anheuser-Busch’s claim that Portugal had violated Article 1 by applying the 1986 bilateral treaty retroactively to its 1981 trademark application.

The American brewer’s complaint also intersected with a second strand of ECHR jurisprudence—cases challenging the interpretation or application of domestic law by national courts. When confronted with such challenges, the Court has consistently held that it cannot review errors of fact or law that domestic judges have allegedly committed. Rather, its jurisdiction is limited to ensuring that national court rulings “are not flawed by arbitrariness or otherwise manifestly unreasonable” and that their interpretations of domestic law do not violate the Convention.<sup>153</sup> To the extent that Anheuser-Busch’s arguments were premised on the Portuguese courts’ misinterpretation of the bilateral treaty and the Code of Industrial Property, the ECHR had solid jurisprudential grounds for rejecting its complaint.

The Grand Chamber reconciled these two lines of case law by emphasizing that the retroactive application of the 1986 bilateral treaty was itself an unsettled issue. Unlike prior decisions in which “the retrospective effect of the legislation [was] indisputable . . . [and] intentional,” the application of the bilateral treaty to pending trademark applications presented “difficult questions of interpretation of domestic law.”<sup>154</sup> The complexities of the case were compounded by the fact that, at the time of the treaty’s entry into force, the appellation of origin was still registered and the parties were attempting to negotiate a license agreement. Given these unique circumstances, the ECHR concluded that the Portuguese Supreme Court’s rejection of Anheuser-Busch’s claim of priority and its interpretation of the bilateral treaty were neither arbitrary nor manifestly unreasonable.<sup>155</sup> As a result, the

149. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 851 (Grand Chamber).

150. *Id.* at 852.

151. See *Kopecký v. Slovakia*, App. No. 44912/98, 2004-IX Eur. Ct. H.R. 125, 142–43 (Grand Chamber 2004) (reviewing case law).

152. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36 at 851 (Grand Chamber) (citing *Lecarpentier v. France*, App. No. 67847/01, ¶¶ 48, 51, 52 (2006); *Cabourdin v. France*, App. No. 60796/00, ¶¶ 28–30 (2006)).

153. *Id.* at 851.

154. *Id.* at 852.

155. See *id.*

Supreme Court's ruling did not "interfere" with the application to register Budweiser as a trademark and thus did not violate Article 1.

The ECHR's narrow, fact-specific disposition of the case gives broad deference to national courts to interpret intellectual property statutes and treaties incorporated into domestic law. But the Grand Chamber did not limit its analysis to resolving the dispute between parties. In addition to affirming the difficulty of reconciling retroactive property restrictions with the Convention, the Court made the following general statement:

[E]ven in cases involving litigation between individuals and companies, the obligations of the State under Art. 1 of Protocol No. 1 entail the taking of measures necessary to protect the right of property. In particular, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law.<sup>156</sup>

The Grand Chamber did not elaborate upon these seemingly basic due process requirements. As I explain below, however, the Court's statement has important implications for its future review of intellectual property disputes under Article 1. In particular, the ECHR may interpret these due process guarantees as requiring member states to provide statutory, administrative, and judicial mechanisms to enable intellectual property owners to prevent private parties from infringing their protected works.<sup>157</sup>

### C. *Has the State Adequately Justified its Interference with a Possession?*

If the ECHR concludes that a possession exists and that the state has interfered with that possession, it must then consider a third and final issue: whether the state has adequately justified that interference. The standard for assessing such justifications is well-settled. Every interference must be specified by law, pursue a legitimate aim, and achieve a fair and proportional balance between the rights of the property owner and the public interest.<sup>158</sup> The European tribunals use this multi-part standard to assess the social policies and values that underlie state regulations of property.<sup>159</sup>

#### 1. *Dependent Patent Compulsory Licenses*

The ECHR has never applied this standard to intellectual property, and the European Commission has done so only once. In *Smith Kline & French Laboratories*, discussed above, the Commission upheld the grant of a compulsory license to the owner of a dependent patent to use a previously registered

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156. *Id.* at 851.

157. See *infra* Part IV.B.

158. See *supra* Part II.D.

159. See ÇOBAN, *supra* note 26, at 195–210.



invention.<sup>160</sup> After the company that owned the dominant patent refused to negotiate a license, the dependent patent owner asked the Dutch Patent Office to award a compulsory license. The Office issued the license, which the Dutch courts upheld on appeal.<sup>161</sup>

The dominant patent owner then filed a complaint with the European Commission, alleging that the compulsory license violated its exclusive exploitation rights. The Commission agreed that the license interfered with a possession, but it held that the interference was justifiable and thus did not violate Article 1.

The Commission first found that the compulsory license was provided by law—the Dutch Patent Act—and pursued the legitimate aim of “encouraging technological and economic development.” The Commission then emphasized that “many” European Convention member states restrict a patentee’s exclusive rights to enable “other persons to make use of a particular patented product or process . . . for the purpose of preventing the long term hampering of technological progress and economic activity.”<sup>162</sup> As to the crucial issue of proportionality, the Commission emphasized the social benefits of granting compulsory licenses to dependent patent owners as well as the protections such licenses afford to dominant patent owners:

[T]he Commission notes that the provision only comes into effect where such license is necessary for the working of a patent of the same or later date and the license should be limited to what is required for the working of the patent. Further, the owner of the dominant patent is entitled to royalties in respect of each compulsory license granted under the legislation and receives reciprocal rights under the dependent patent. . . . [T]he Commission finds that the framework imposed by the legislation is intended to prevent the abuse of monopoly situations and encourage development and that this method of pursuing that aim falls within the margin of appreciation accorded to the Contracting State. The Commission accordingly finds that the control of use in the circumstances of this case did not fail to strike a fair balance between the interests of the applicant company and the general interest. . . .<sup>163</sup>

This short paragraph reveals a fairly sophisticated understanding of patent policy, especially for a human rights tribunal’s foray into substantive intellectual property law.<sup>164</sup> It also appears to afford considerable leeway to national decisionmakers to restrict exclusive rights as a means of furthering

160. See *supra* Part III.B.1.

161. *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm’n H.R. Dec. & Rep. 70, 72–73 (1990) (admissibility decision).

162. *Id.* at 80.

163. *Id.*

164. The Commission’s decision in *Smith Kline* was its first analysis of an intellectual property dispute under Article 1. See *supra* Part III.B.1 and note 54.

intellectual property's underlying social functions. As I explain in the next section, however, several factors limit the precedential value of the Commission's analysis for future Article 1 disputes over the validity of exceptions and limitations to intellectual property rights.

## 2. *Other Exceptions and Limitations to Exclusive Rights*

First, the Commission's holding is narrow and fact-specific. The scope of a dependent patent compulsory license is carefully limited to the justifications for granting it. In addition, dominant patent owners receive considerable benefits in exchange for the diminution of their exclusive rights, including remuneration and a cross-license to exploit the dependent invention. Where these benefits are absent—such as for exceptions to exclusive rights whose substantive contours are more capacious and do not require remuneration—the ECHR may be less willing to defer to national decisionmakers in striking a balance between private property and the public interest. In this respect, it is noteworthy that the two dissenting judges in *Anheuser-Busch* believed that Portugal had violated Article 1's proportionality requirement by failing to compensate the American company for the refusal to register its trademark application.<sup>165</sup>

Second, the Commission upholds a limitation on patents that unambiguously protects both the rights of other intellectual property owners and the public interest in technological progress. The European Convention repeatedly refers to rights of others as a justification for limiting civil and political liberties.<sup>166</sup> The Commission's reasoning therefore suggests that other exceptions to intellectual property rights, such as private copying, parody, and noncommercial uses, are more likely to be upheld if the ECHR interprets them as safeguards for protecting the human rights of users and consumers—an issue that the Court has yet to address.

The subsequent history of *Smith Kline & French Laboratories* provides a third basis for giving limited precedential weight to the Commission's analysis. Although the Commission rejected the dominant patent owner's Article 1 claim, it was more troubled by the assertion that the Dutch Patent Office was not an independent or impartial tribunal.<sup>167</sup> After the Commission decided to review this claim on the merits, the patent owner and the Dutch government entered into settlement negotiations. The chief component of the state's settlement offer was a pending revision of Dutch patent law, which vested the civil courts, rather than the Patent Office, with "the

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165. See *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [846], 858–59 (Chamber 2007) (judgment of Oct. 11, 2005) (Costa & Cabral Barrero, JJ., dissenting).

166. See European Convention, *supra* note 2, arts. 8(2), 9(2), 10(2), 11(2) (all recognizing "the rights and freedoms of others" as a legitimate basis for restricting rights).

167. *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. 70, 78 (1990) (admissibility decision).

decision making power for the grant or refusal of a compulsory license."<sup>168</sup> The amendment also restricted the compulsory licenses for dependent patent owners to "cases where the dependent, competing patent involves substantial technical progress in the field."<sup>169</sup>

The Commission, which reviewed all proposed settlements to determine whether they manifest "respect for [h]uman [r]ights," approved the parties' agreement.<sup>170</sup> This suggests that its rejection of the company's Article 1 claim was in fact a close question. It also suggests that the Commission was untroubled by the state's decision to narrow the statutory exceptions to a patent owner's exclusive rights without considering the social policies underlying such a change in the law. The Commission's approval of the settlement thus leaves unresolved precisely how much discretion national decisionmakers enjoy to restrict intellectual property in the public interest.

#### IV. FORECASTING THE FUTURE: THREE PARADIGMS FOR ECHR ADJUDICATION OF INTELLECTUAL PROPERTY DISPUTES

The preceding sections of this Article developed a tripartite framework to analyze the ECHR's intellectual property case law under Article 1. Such a framework has three benefits. First, it provides an organizing principle to explain the relationships among a group of diverse judicial rulings, including several decisions that commentators have not previously analyzed. Second, it exposes the numerous points of intersection between European human rights law and international and domestic intellectual property law. And third, it provides an informed basis for predicting how ECHR intellectual property jurisprudence will develop in the future.

This Part forecasts the evolution of the ECHR's intellectual property case law in greater depth. It does so by developing and analyzing three paradigms that the ECHR may apply when deciding future disputes relating to intellectual property. I label these approaches the rule of law paradigm, the enforcement paradigm, and the intellectual property balancing paradigm.

These three paradigms, illustrated below with contemporary examples, provide competing visions of how to conceptualize intellectual property's place in the European human rights system. Each paradigm finds support in

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168. *Smith Kline & French Lab. v. Netherlands*, App. No. 12633/87, ¶ 11 (1991) (Commission Report). This revision was later enacted. See Patents Act of the Kingdom 1995, art. 57.4, Seb. 1995 No. 51 (Dutch Patent Act of 1995), available at [http://www.wipo.int/lea/docs\\_new/en/nl/nl020en.html#JD\\_NL020\\_57\\_4](http://www.wipo.int/lea/docs_new/en/nl/nl020en.html#JD_NL020_57_4) (authorizing dependent patent compulsory licenses only where "the patent for which the license is requested represents a considerable advance"). This clause implements a provision of TRIPs that requires the dependent patent to contain "a considerable technical advance of considerable economic significance" in relation to the dominant patent. *Id.* at n.4 (paraphrasing TRIPs, *supra* note 89, art. 31(d)(i)).

169. *Smith Kline*, App. No. 12633/87, ¶ 3.

170. *Id.* Following the Commission's abolition in 1998, the ECHR performs this settlement review function and applies the identical legal standard. See European Convention, *supra* note 2, art. 38(1)(b).

the Court's case law and in the interpretive methodologies that ECHR judges use to further the European Convention's objectives and values.<sup>171</sup> However, the three paradigms have radically different consequences for the region's innovation and creativity policies. I analyze these consequences below, emphasizing the sometimes problematic effects of overlaying two previously distinct legal regimes.

### A. *The Rule of Law Paradigm*

Many legal scholars and philosophers recognize the importance of protecting property as a fundamental right, although they differ on the appropriate justification for and scope of that protection.<sup>172</sup> As noted above, the decision to include a right of property in the European Convention was contested and controversial.<sup>173</sup> The drafters did not endorse any single philosophical or theoretical rationale for property rights. But the history and text of Article 1 reflects a consensus on the basic proposition that protection of private property is essential to preserving the rule of law.

The rule of law is a concept that suffuses the entire European Convention.<sup>174</sup> But it is expressed with particular forcefulness in Article 1, which provides that deprivations of property must be "subject to the conditions provided for by law" and requires controls on the use of property to be based on "such laws as [the state] deems necessary."<sup>175</sup> The ECHR has interpreted this dual reference to law as establishing Article 1's "first and most important requirement"—that "any interference by a public authority with the peaceful enjoyment of possessions should be lawful. . . . [T]he principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application."<sup>176</sup> By compelling states to regulate property pursuant to previously established rules with these characteristics, the Court prevents arbitrary and excessive exercises of government power.<sup>177</sup> The desire to uphold the rule of law also explains and justifies Article 1's application to corporations, since arbitrary deprivations of property do not affect only natural persons.<sup>178</sup>

171. See *supra* notes 23–25 and accompanying text (analyzing the ECHR's interpretive methodologies).

172. See generally JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1990). For a comprehensive review of the literature, see ÇOBAN, *supra* note 26, at 35–77.

173. See *supra* Part II.A.

174. See EMBERLAND, *supra* note 23, at 44.

175. Protocol 1, *supra* note 5, art. 1.

176. *Edwards v. Malta*, App. No. 17647/04, ¶ 60 (2006); see also *Zlinsat, Spol. S R.O. v. Bulgaria*, App. No. 57785/00, ¶ 98 (2006) ("The requirement of lawfulness . . . means not only compliance with the relevant provisions of domestic law, but also compatibility with the rule of law.").

177. EMBERLAND, *supra* note 23, at 46 ("When the Court invokes the rule of law as an interpretive argument, it emphasizes its capacity to prevent governmental arbitrariness and the excessive wielding of public power.").

178. See *id.* at 44 ("The rule of law also helps explain why corporate persons enjoy ECHR protection.").

Under a rule of law paradigm, therefore, the ECHR would treat intellectual property no differently than any other type of real, personal, or intangible property protected by Article 1. The Court would not consider the public-good qualities of intellectual property rights, nor would it concern itself with the social and cultural policies which justify the state's protection of those rights. Instead, it would find fault only with arbitrary government conduct, such as *ultra vires* actions, failure to follow previously established rules and procedures, or laws that contravene the rule of law principles described above.<sup>179</sup> The Court's scrutiny of national decisionmakers would thus be minimal and unobtrusive. It would allow governments unfettered discretion to fashion their domestic innovation and creativity policies as they see fit, provided that they adhere to previously established rules embodying those policies.

Does the ECHR believe that intellectual property complaints should be analyzed under the rule of law paradigm? The Grand Chamber intimated as much in *Anheuser-Busch* when it emphasized that it could not "take the place of the national courts, its role being rather to ensure that the decisions of those courts are *not flawed by arbitrariness or otherwise manifestly unreasonable*."<sup>180</sup> Similarly, in *Melnychuk*, the Court held that providing intellectual property owners with a judicial forum to adjudicate domestic infringement claims did not "automatically engage [the state's] responsibility" under Article 1. Only "in exceptional circumstances" could the state "be held responsible for losses caused by arbitrary determinations."<sup>181</sup> These quotations suggest that the ECHR will avoid using Article 1 as a vehicle to review the micro-foundations of domestic intellectual property laws.

Other than these general statements, however, neither the Court nor the Commission has considered how the rule of law paradigm applies to intellectual property. But the tribunals have frequently addressed arbitrary government conduct in other property rights contexts. For example, the ECHR has found fault with a domestic law that authorized an executive branch official to obtain a court order quashing a final, executed judgment that restored nationalized real property to its former owner.<sup>182</sup> It has disapproved of a statute conferring unbounded discretion on a prosecutor to suspend a contract to privatize real property.<sup>183</sup> It has criticized the withdrawal of a banking license without prior notice or a procedure for subsequent administrative or judicial review.<sup>184</sup> It has condemned a state's arbitrary use of supervisory review to quash final judgments ordering it to pay disability

179. See ÇOBAN, *supra* note 26, at 196–97 (reviewing case law).

180. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 851 (Grand Chamber 2007) (emphasis added).

181. *Melnychuk v. Ukraine*, App. No. 28743/03, para. 28 (2005) (admissibility decision).

182. See *Brumărescu v. Romania*, App. No. 28342/95, 1999-VII Eur. Ct. H.R. 201.

183. *Zlînsat, Spol. S R.O. v. Bulgaria*, App. No. 57785/00, ¶ 23 (2006).

184. See *Capital Bank AD v. Bulgaria*, App. No. 49429/99, 44 Eur. H.R. Rep. 48 [952], 984–85 (2007) (judgment of Nov. 24, 2005).

pension benefits.<sup>185</sup> And it has found a violation of Article 1 when the eviction and continuing dispossession of a lessee was “manifestly in breach” of domestic law.<sup>186</sup>

Extrapolating from these cases, it is possible to predict how the ECHR would apply the rule of law paradigm to intellectual property disputes. Government agencies that themselves infringe intellectual property rights arguably provide the strongest case for finding a violation of Article 1 using this approach. A ministry that installs copyrighted software on all of its desktop computers without obtaining a license from the software’s owner provides a ready example. Equally problematic from a rule of law perspective would be a state-owned enterprise’s failure to pay royalties to an inventor whose patented product or process it had previously licensed.<sup>187</sup>

Other instances of arbitrary government conduct may involve the judiciary. A domestic court that refuses to consider a trademark applicant’s plausible arguments in favor of registration illustrates one possible scenario.<sup>188</sup> Another involves domestic infringement proceedings that are inexplicably or inexcusably prolonged, such that the right holder is effectively precluded from preventing unauthorized exploitation by third parties.<sup>189</sup> In both instances, the state has failed to provide the minimal procedural guarantees to which property owners are entitled under the ECHR’s conception of the rule of law.<sup>190</sup>

The above examples must be distinguished from court decisions that invalidate a previously registered patent or trademark. It is an inherent feature of patent and trademark systems that third parties may challenge the validity and scope of inventions and marks after administrative agencies have registered them. In fact, roughly half of all patents whose validity is later tested in litigation are found to be invalid.<sup>191</sup> In this sense, registered rights

185. *Chebotarev v. Russia*, App. No. 23795/02, ¶ 6 (2006).

186. *Iatridis v. Greece*, App. No. 31107/96, 30 Eur. H.R. Rep. 97, 116 (Grand Chamber 2000) (judgment of Mar. 25, 1999).

187. *Cf. Mihăilescu v. Romania*, App. No. 47748/99, paras. 22–28 (2003) (admissibility decision) (holding that inability to execute a judgment against a state-owned enterprise that had unilaterally reduced royalties paid to a patent owner did not violate Article 1 because the state only owned a minority stake in the enterprise and thus was not a state actor).

188. *Cf. Hiro Balani v. Spain*, App. No. 18064/91, 303 Eur. Ct. H.R. 23 (ser. A) at 30 (1995) (finding a violation of the right to a fair hearing where the Supreme Court failed to consider a trademark owner’s argument that its mark had priority over the trade name of a competitor that had successfully applied to cancel the mark).

189. *See Stele v. Slovenia*, App. No. 6549/02, para. 13 (2006) (friendly settlement) (approving the settlement of a complaint alleging a violation of Article 1 by a domestic court for failing to issue a judgment in a patent infringement action for nearly 11 years).

190. *See, e.g., Capital Bank AD v. Bulgaria*, App. No. 49429/99, 44 Eur. H.R. Rep. 48 [952], 984 (2007) (judgment of Nov. 24, 2005) (stating that although Article 1 “contains no explicit procedural requirements,” its provisions nevertheless imply that “any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision.”).

191. Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, J. ECON. PERSP., Spring 2005, at 76.

are always conditional. Although it is therefore accurate to state that if a patent or trademark “is found invalid, the property right will have evaporated,”<sup>192</sup> the dissolution of that property right raises no Article 1 concerns.

Domestic laws that authorize governments to exploit patented inventions and copyrighted works without rights holders’ consent present a closer question.<sup>193</sup> On the surface, these statutes appear to authorize wholesale infringements similar to the software infringement and patent royalty examples described above. In fact, however, such laws allow governments to use private knowledge goods for the public’s benefit under previously specified conditions and for particular purposes.<sup>194</sup> Because intellectual property rights are state-created monopolies, the ECHR should reject rights holders’ challenges to the application of these laws, provided that they are publicly available and drafted with sufficient prevision to enable rights holders to predict when the government may use their protected works.<sup>195</sup> By contrast, the ECHR should find a violation of Article 1 where the state fails to comply with the conditions specified in these statutes, for example by refusing to pay the required compensation or by exceeding the scope of the privilege.

In summary, the rule of law paradigm has several virtues. It enables the ECHR to police arbitrary excesses of state power and unambiguous violations of national law without interfering with domestic intellectual property systems. Application of the Court’s authority in such cases is fully consistent with the objectives of the European Convention and the shared intent of Article 1’s drafters. These disputes thus merit a place on the Court’s overloaded docket, whether the complaints are filed by individuals or by corporations. In addition, any violations that the ECHR finds in such cases would not exacerbate the adverse human rights consequences of overly capacious intellectual property protection standards.<sup>196</sup> On the contrary, a state would be free to either expand or reduce such standards without fear of violating Article 1, provided that the government did not itself infringe protected works and provided that the laws were precise, accessible, and foreseeable.

192. *Id.* at 75.

193. For summaries of such government use exemptions relating to copyright, see, for example, 2 MELVILLE B. NIMMER & PAUL E. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, GER § 8(2)(d)(iii) (2005) (Germany); *id.* ITA § 8(2)(b)(iii) (Italy); *id.* POL § 8(2)(c) (Poland); *id.* SWE § 8(2)(d)(iii) (Sweden); *id.* UK § 8(2)(c) (United Kingdom); LiLan Ren, Note, *A Comparison of 28 U.S.C. § 1498(a) and Foreign Statutes and an Analysis of § 1498(a)’s Compliance with TRIPS*, 41 *Hous. L. Rev.* 1659, 1664–69 (2005) (analyzing foreign statutes authorizing government use of patented inventions).

194. See Ren, *supra* note 193, at 1666, 1669 (reviewing European laws that provide for government use of patented inventions for purposes of, *inter alia*, national defense and producing or supplying drugs and medications).

195. *Cf.* De Graffenried v. United States, 29 Fed. Cl. 384, 387 (1993) (stating that a patent owner’s rights “do not include the right to exclude the government from using his or her patented invention” because “the statutory framework that defines a patent owner’s rights gives the government the authority to use all patented inventions”).

196. See *supra* notes 15–16 and accompanying text.

### B. The Enforcement Paradigm

There is solid support for the rule of law paradigm in recent ECHR jurisprudence. But the cases also contain a broader vision for the Court's adjudication of intellectual property disputes. Embedded in the Grand Chamber's *Anheuser-Busch* ruling are the seeds of an enforcement paradigm, in which the ECHR interprets Article 1 to require states to provide statutory, administrative, and judicial mechanisms that allow intellectual property owners to prevent private parties from infringing their protected works.

Whereas the rule of law paradigm targets arbitrary government interferences with possessions, the enforcement paradigm emphasizes the state's "positive obligations" to protect private property.<sup>197</sup> Positive obligations require public authorities to take affirmative steps to ensure that rights holders can effectively exercise their rights. It is the state's wrongful omission, not its wrongful action, that triggers its responsibility under international law.<sup>198</sup>

As applied to Article 1, positive obligations include "provid[ing] a legal system so that property rights can be enforced."<sup>199</sup> For example, the Court has required states to provide police assistance to landlords seeking to recover possession of leasehold property after the termination of a tenancy.<sup>200</sup> States must also "afford judicial procedures which offer the necessary procedural guarantees and therefore enable . . . domestic courts and tribunals to adjudicate effectively and fairly any [property] disputes between private persons."<sup>201</sup> The Grand Chamber in *Anheuser-Busch* quoted this language almost verbatim, although it did not acknowledge that it was implicitly referencing the Court's positive obligations case law.<sup>202</sup>

The ECHR's application of positive obligations to private intellectual property disputes is likely to generate a fresh set of complaints challenging the adequacy of domestic enforcement procedures. These complaints will require the Court to articulate with greater precision which mechanisms states must provide to enable rights holders to prevent and punish infringements by third parties. In determining Article 1's implicit affirmative re-

197. See *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, 38 Eur. H.R. Rep. 44 [911], 938 (2004); see also *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 56 (Grand Chamber).

198. See MOWBRAY, *supra* note 24; see also CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 51-52 (4th ed. 2006).

199. ÇOBAN, *supra* note 26, at 164.

200. See *Immobiliare Saffi v. Italy*, App. No. 22774/93, 1999-V Eur. Ct. H.R. 73, 90-92 (Grand Chamber).

201. *Sovtransavto Holding*, 38 Eur. H.R. Rep. 44 at 916 ("[P]ositive obligations may entail certain measures necessary to protect the right of property even in cases involving litigation between individuals or companies.") (internal citation omitted).

202. See *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830], 851 (Grand Chamber 2007) ("[T]he State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law.")



quirements, the ECHR may draw inspiration from the domestic enforcement provisions of the TRIPs Agreement.<sup>203</sup>

TRIPs requires countries to establish “fair and equitable” procedures that “permit effective action against any act of infringement of intellectual property rights,” including procedures to prevent and deter infringements.<sup>204</sup> The treaty also contains detailed rules for civil and administrative remedies, provisional measures, border enforcement, and criminal penalties.<sup>205</sup> Tempering these obligations, TRIPs acknowledges that intellectual property enforcement measures may vary from country to country depending upon the resources available for law enforcement in general.<sup>206</sup>

Several factors suggest that the ECHR may refer to TRIPs when defining the positive obligation to protect intellectual property. First, TRIPs binds thirty-nine of the forty-seven European Convention members.<sup>207</sup> The Court has held that the Convention “must be applied in accordance with the principles of international law,” including treaties to which the respondent state is a party.<sup>208</sup> For these thirty-nine countries, consulting TRIPs to interpret Article 1 would help harmonize the states’ treaty obligations.<sup>209</sup> Second, the ECHR has held that the Convention must be interpreted in light of regional and international trends in law and social policy.<sup>210</sup> Thus, even for countries that are not World Trade Organization (“WTO”) members, the ECHR may

203. As a formal matter, TRIPs protects only foreign intellectual property owners, whereas Article 1 protects the owners of all possessions regardless of nationality. As a political and practical matter, however, states rarely protect foreign intellectual property owners without extending equivalent protections to domestic creators, innovators, and businesses. See Helfer, *Adjudicating Copyright Claims*, *supra* note 1, at 367 & n.38. As a result, the formal differences in scope between the two treaties are unlikely to deter the ECHR from consulting TRIPs when fashioning Article 1 positive obligations.

204. TRIPs, *supra* note 89, arts. 41(1)–(2).

205. *Id.* arts. 42–51, 61. These provisions have resulted in substantial changes to domestic enforcement procedures in many countries. See Jerome H. Reichman, *Enforcing the Enforcement Procedures of the TRIPs Agreement*, 37 *VA. J. INT’L L.* 335 (1997).

206. TRIPs, *supra* note 89, art. 41(5). For a detailed analysis of how WTO dispute settlement panels might draw on ECHR jurisprudence to interpret TRIPs’ enforcement obligations, see Helfer, *Adjudicating Copyright Claims*, *supra* note 1, at 416–20.

207. See World Trade Organization, *Understanding the WTO: The Organization—Members and Observers*, [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 Nov. 14, 2007); Council of Europe, *Member States of the Convention for the Protection of Human Rights and Fundamental Freedoms*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=2/23/2007&CL=ENG> (last visited Nov. 14, 2007). The eight European Convention members who have not yet ratified the WTO Agreement are Andorra, Azerbaijan, Bosnia and Herzegovina, Montenegro, the Russian Federation, San Marino, Serbia, and Ukraine. *Id.*

208. *Guichard v. France*, App. No. 56838/00, 2003-X Eur. Ct. H.R. 419, 431 (admissibility decision); see also *Paradis v. Germany*, App. No. 4783/03 (2004) (judgment of May 15, 2003) (admissibility decision).

209. The case for using TRIPs as a benchmark is strengthened by the fact that both treaties require states to use practical effective enforcement mechanisms to protect intellectual property rights. Compare TRIPs, *supra* note 89, art. 41(1) (TRIPs enforcement provisions aim “to permit effective action against any act of infringement of intellectual property rights”), with *Artico v. Italy*, App. No. 6694/74, ¶ 33 (1980) (holding that “the Convention is intended to guarantee . . . rights that are practical and effective”).

210. See Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 *HUM. RTS. L. REV.* 57, 60–71 (2005).

consult TRIPs to elucidate the domestic enforcement mechanisms that Article 1 requires.

To be sure, the Court is unlikely to incorporate every nuance of TRIPs into Article 1, especially in cases involving countries that are not WTO members. Rather, the ECHR would use the treaty as a rough benchmark to aid it in fashioning minimum enforcement standards that respect “the fair balance that has to be struck between the general interest of the community and the interests of the individual” and that do not “impose an impossible or disproportionate burden on the authorities.”<sup>211</sup>

Aware of the helpful analogies that TRIPs provides, rights holders are likely to invoke the treaty in three types of Article 1 enforcement cases. First, rights holders may contest the remedies awarded in individual infringement proceedings, even where a domestic legal system in the aggregate satisfies the Convention’s rule of law requirements. These challenges are unlikely to succeed. Disputes over issues such as the amount of damages, the denial of injunctive relief, or the failure to impound infringing articles are precisely the sort of case-specific applications of domestic law with which the ECHR rarely finds fault.<sup>212</sup> In addition, nothing in TRIPs limits the discretion of national courts to tailor remedies to the facts and circumstances of individual disputes.<sup>213</sup> Only in extraordinary cases, such as where national courts refuse to award a remedy mandated by domestic law, might the ECHR plausibly intervene.

A second category of cases concerns a state’s failure to provide one of the enforcement measures that TRIPs requires.<sup>214</sup> In the late 1990s, for example, the United States successfully challenged the lack of *ex parte* civil remedies in Denmark and Sweden.<sup>215</sup> Most European countries now authorize *ex parte* orders.<sup>216</sup> Some intellectual property owners claim, however, that the procedures for obtaining these orders are “unnecessarily complicated” and “costly” in some jurisdictions. These claims could be refashioned as arguments that the states concerned have failed to provide the effective enforcement measures required by Article 1.

The third and most serious non-enforcement claim concerns the wholesale failure to prevent private infringements of intellectual property. Cases of this nature target pervasive, systemic defects in civil, administrative, or criminal procedures which prevent intellectual property owners from enforce-

211. *Özgür Gündem v. Turkey*, App. No. 23144/93, 2000-III Eur. Ct. H.R. 1, 21.

212. See *supra* Part III.B.2.b.

213. Cf. *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (emphasizing the discretionary nature of injunctive relief in patent infringement cases).

214. See INT’L INTELL. PROP. ALLIANCE, COPYRIGHT ENFORCEMENT UNDER THE TRIPs AGREEMENT 5 (2004) (summarizing in chart form the TRIPs deficiencies found in national copyright laws and enforcement practices), available at [http://www.iipa.com/rbi/2004\\_Oct19\\_TRIPs.pdf](http://www.iipa.com/rbi/2004_Oct19_TRIPs.pdf).

215. See Notification of Mutually Agreed Solution, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/2 (June 13, 2001); Notification of Mutually Agreed Solution, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2 (Dec. 11, 1998).

216. See INT’L INTELL. PROP. ALLIANCE, *supra* note 214, at 3.

ing their rights. Such system-wide enforcement deficiencies exist principally (although by no means exclusively) in Eastern Europe.<sup>217</sup> Piracy and counterfeiting in the Ukraine, Russia, and Turkey are especially flagrant.<sup>218</sup>

The ECHR recently established a “pilot judgment procedure” that is well suited to redressing widespread piracy of intellectual property rights. Under this new class-action mechanism, the Court adjudicates a single case that represents a large number of similar human rights claims, and it uses the case to develop systemic reforms for the entire class. The ECHR first applied the procedure in a 2004 decision affecting nearly 80,000 real property claimants in Poland.<sup>219</sup> It later approved a settlement of the dispute, but only after the state had enacted legislation to prevent future Article 1 violations and provide remedies to all affected property owners.<sup>220</sup> The case publicized the Court’s determination to scrutinize systemic problems that affect large numbers of similarly situated property owners.<sup>221</sup>

Intellectual property rights holders could invoke the pilot judgment procedure if they are unable, after reasonable diligence, to protect their works within a respondent state’s territory. If rights holders prove that piracy in the jurisdiction is pervasive, the ECHR could require the government to adopt system-wide reforms. Depending on the nature and scope of the violations, such measures could include enacting domestic legislation, streamlining judicial procedures, or allocating additional resources to criminal or

217. See Ed Bates, *Supervision of the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 49, 84–96 (Theodora Christou & Juan Pablo Raymond eds., 2005) [hereinafter ECHR REMEDIES] (describing systemic and structural problems, including lack of resources, infrastructure, and slow or corrupt domestic judicial processes, leading to widespread violations of the European Convention in Turkey and in several Eastern European countries).

218. According to a recent report, the deficiencies include the “lack of an effective and deterrent criminal enforcement system . . . , the lack of effective plant inspection [for optical media production and distribution] . . . ; the lack of civil ex parte search procedures; an extremely porous border; delays in criminal prosecutions and adjudications; and infrequent destruction of seized pirate goods.” OFFICE OF U.S. TRADE REPRESENTATIVE, 2005 SPECIAL 301 REPORT 32 (2005), available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file195\\_7636.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf); see also *id.* at 24 (highlighting the need for Ukraine to “deter[] optical media piracy through adequate enforcement”), 33 (highlighting “concerns over patent protection, copyright piracy, trademark counterfeiting, and IPR enforcement problems” in Turkey). Not coincidentally, both Russia and Ukraine have yet to be admitted to the WTO, in part because of their poor record of enforcing intellectual property rights. See Gary G. Yerkey, *Russia Needs to Do ‘Much More’ Before U.S. Will Sign Off On WTO Accession Agreement*, 6 WTO REP. (BNA) No. 184 (Sept. 22, 2006).

219. Broniowski v. Poland, App. No. 31443/96, 2004-V Eur. Ct. H.R. 1, 76 (Grand Chamber). The Article 1 violations in this case concerned the state’s failure to meet its positive obligations and its interference with property rights. *Id.* at 57.

220. Broniowski v. Poland, App. No. 31443/96, 43 Eur. H.R. Rep. 1 [1], 19–20 (Grand Chamber 2006) (judgment of Sept. 28, 2005) (friendly settlement).

221. See Philip Leach, *Beyond the Bug River—A New Dawn for Redress Before the European Court of Human Rights*, 10 EUR. HUM. RTS. L. REV. 148 (2005). The Court has since issued a pilot judgment involving an even larger number of property claimants. See Hutten-Czapska v. Poland, App. No. 35014/97, 45 Eur. H.R. Rep. 4 [52] (Grand Chamber 2007) (judgment of June 19, 2006) (holding that domestic legislation which prevented 100,000 landlords from raising rents to cover property maintenance for between 600,000 and 900,000 tenants violated Article 1).

administrative enforcement actions. Here too the ECHR may turn to TRIPs' enforcement provisions for guidance in fashioning appropriate systemic remedies, although the Court should also be mindful of the statement that nothing in the agreement "creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."<sup>222</sup>

Should the ECHR endorse the enforcement paradigm described above? The arguments in favor of its doing so are equivocal. On the one hand, once a government has recognized exclusive rights in knowledge goods, the owners of Article 1 possessions can reasonably expect that government to provide the means to prevent and punish infringements by third parties. This expectation is bolstered where the state is a WTO member and has accepted the obligation to conform its domestic laws to TRIPs. In addition, once a state has incorporated intellectual property enforcement mechanisms into its domestic legal system, rights holders can reasonably expect it to devote sufficient resources to make those mechanisms practical and effective.

Yet the enforcement paradigm also raises troubling issues. The first relates to the different judicial access rules of the WTO and the ECHR. In the WTO dispute settlement system, only states can file complaints alleging violations of TRIPs. This limitation on WTO standing acts as a key political filter that limits the number and type of TRIPs controversies<sup>223</sup> and colors how disputes are resolved.<sup>224</sup>

The enforcement paradigm bypasses this political filter by allowing private parties to litigate breaches of TRIPs' enforcement provisions in the guise of violations of Article 1's positive obligations. As the years of ceaseless judicial battles between Anheuser-Busch and Budějovický Budvar illustrate, many businesses have the incentive and the means to litigate in every

222. TRIPs, *supra* note 89, art. 41(5).

223. See Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005) (analyzing "political filters" that allow states to limit WTO litigation to disputes that produce joint welfare gains). In the intellectual property context, governments litigate only a subset of TRIPs disputes that rights holders bring to their attention. In some cases, a state may decline to file a complaint because it fears a WTO countersuit. In others, it may refuse to do so because the probability of success is low or because victory will only marginally benefit domestic industries. In still others, geostrategic factors unrelated to trade or intellectual property may lead governments to refrain from litigating. In each instance, the "decision whether to challenge a practice of a member may be made only by another member government, not by the private party who is directly aggrieved by that practice." Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 358 (1997).

224. When governments do file TRIPs complaints, they often prefer a politically palatable settlement or an ambiguous panel decision to a definitive WTO Appellate Body ruling. Such compromises allow both sides to claim victory and resolve the litigation in ways that both states are willing to accept. See Notification of a Mutually Satisfactory Temporary Arrangement, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2003) (notifying WTO of lump-sum payment by United States to the EC to settle TRIPs copyright dispute in which the EC prevailed); see also Eva Gutierrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 HASTINGS INT'L & COMP. L. REV. 29, 48–49 (2005) (stating that both the United States and the EC claimed victory and did not appeal a WTO panel decision partially invalidating EC protection of GIs).

available forum. The ECHR's adoption of the enforcement paradigm would thus presage an increase in litigation of intellectual property enforcement disputes framed as human rights complaints, including cases that, under the current system, would not have been litigated or would have been resolved through politically palatable settlements. It is highly questionable whether these cases warrant a place on the Court's already overcrowded docket.

A second concern of the enforcement paradigm relates to the dissimilar remedies that the WTO and the ECHR award. Although both tribunals recommend responses for states that have violated their treaty commitments, the ECHR's remedial powers are more expansive. Its recent judgments have included recommendations to reopen closed court proceedings, revise domestic statutes, and award restitution in kind.<sup>225</sup> In addition, the ECHR awards "just satisfaction" to "injured parties."<sup>226</sup> Damage awards are usually less than €10,000, and the Court has discretion to award no monetary relief. In property rights cases, however, pecuniary damage awards "can assume gigantic proportions," the largest on record being nearly \$31 million.<sup>227</sup> Governments have promptly paid these sums in all but a handful of cases.<sup>228</sup>

The ECHR's award of these remedies when states violate Article 1's positive obligations could impose significant constraints on national legal systems. If countries do not adopt the remedies that the Court recommends, injured rights holders could file complaints with the Court seeking compensation. In addition, under the new pilot judgment procedure described above, the ECHR could recommend systemic reforms benefiting all similarly situated rights holders. In counterfeiting and piracy cases, for example, the Court may award large monetary awards to an entire class of rights holders if states do not improve their judicial procedures.<sup>229</sup> These concerns suggest, on balance, that the ECHR should avoid interpreting Article 1 to enable intellectual property owners to challenge the adequacy of domestic enforcement mechanisms.

225. See Leach, *supra* note 221, at 149–51 (describing evolution of ECHR's approach to remedies).

226. European Convention, *supra* note 2, art. 41.

227. Marius Emberland, *Compensating Companies for Non-Pecuniary Damage: Comingersoll S.A. v. Portugal and the Ambivalent Expansion of the ECHR Scope*, 74 BRIT. Y.B. INT'L L. 409, 412 (2003); see also ÇOBAN, *supra* note 26, at 228. In addition, the ECHR has "awarded monetary compensation for moral injury in almost all of the property cases where it found [a] violation of" Article 1. *Id.* at 230. Moral damage suffered by corporations includes harm to business reputation, uncertainty in future planning, disruption in management, and inconvenience to directors and officers. EMBERLAND, *supra* note 23, at 132.

228. Bates, *supra* note 217, at 74 ("[I]n the vast majority of instances settlement is made, at the latest, within six months of the date due for payment expired.").

229. See *Hutten-Czapska v. Poland*, App. No. 35014/97, 45 Eur. H.R. Rep. 4 [52], 139 (Grand Chamber 2007) (judgment of June 19, 2006) (Zupančič, J., concurring in part and dissenting in part) (stating that judgment finding a violation of Article 1 in a pilot judgment case "bind[s] the state to indemnify all similarly situated rights holders").

### C. *The Intellectual Property Balancing Paradigm*

If the merits of the enforcement paradigm are at best ambiguous, the Court's adoption of an intellectual property balancing paradigm would have indisputably negative consequences for innovation and creativity law and policy. Such deleterious effects would result from the ECHR's inevitably ad hoc interventions at the upper and lower boundaries of intellectual property protection standards. Under the balancing paradigm, the ECHR would interpret the European Convention to impose both a floor and a ceiling on domestic intellectual property rights. The Court would police the lower limit of protection by reviewing whether the government's diminution of exclusive rights or expansion of exceptions and limitations satisfies Article 1's fair and proportional balance standard.<sup>230</sup> And it would police the upper boundary by assessing whether expansions of exclusive rights or restrictions on exceptions and limitations violate other European Convention provisions, such as freedom of expression and the right of privacy.<sup>231</sup>

The intellectual property balancing paradigm finds some support in recent European human rights jurisprudence. With respect to Article 1, the Court in both *Anheuser-Busch* and *Dima* suggested that retroactive laws that deprive intellectual property owners of an existing asset may violate Article 1. This concern extends not only to interactions between the state and rights holders, but also to disputes between private parties.<sup>232</sup>

With respect to other human rights, the ECHR recently decided a string of cases challenging the Austrian Copyright Act's ban on public dissemination of "[p]ortraits of persons" that cause injury to "the legitimate interests of the persons portrayed."<sup>233</sup> In each case, the Court held that injunctions prohibiting newspapers from publishing photographs of politicians or individuals involved in matters of public interest violated the right to freedom of expression.<sup>234</sup> In reaching this result, the ECHR stated that freedom of expression "protects not only the substance of ideas and information but also

230. See *supra* Part II.D.

231. European Convention, *supra* note 2, art. 10(1) ("Everyone has the right to freedom of expression. This right shall include freedom to . . . receive and impart information and ideas without interference by public authority and regardless of frontiers."); *id.* art. 8(1) ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

232. See *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830] (Grand Chamber 2007); *Dima v. Romania*, App. No. 58472/00, paras. 87–92 (2005) (admissibility decision).

233. Urheberrechtsgesetz—UrhG. Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte [UrhG] [Federal Law on Copyright in Works of Literature and Art and on Related Rights] Bürgerliches Gesetzbuch [BGB1] No. 111/1936, § 78 (1) (Austria) ("Portraits of persons may not be exhibited or otherwise distributed in a manner which would make them available to the public if legitimate interests of the person portrayed, or, should he have died without authorizing or ordering the publication of the portrait, of a close relative would be prejudiced.").

234. See, e.g., *Österreichischer Rundfunk v. Austria*, App. No. 35841/02, ¶¶ 72–73 (2006); *Verlagsgesellschaft News GmbH v. Austria* (No. 2), App. No. 10520/02, ¶ 29 (2006); *Krone Verlags GmbH & Co KG v. Austria*, App. No. 34315/96, 36 Eur. H.R. Rep. 57 [1059], 1066 (2003) (judgment of Feb. 26, 2002); *News Verlags GmbH & CoKG v. Austria*, 2000-I Eur. Ct. H.R. 157, 174–75.

the form in which they are conveyed.”<sup>235</sup> The Court also conducted a detailed and fact-intensive balancing analysis, weighing the interests of the individuals whose images were disseminated against the media’s interest in conveying information to the public.<sup>236</sup>

Several predictions follow from these two lines of decisions. The first concerns retroactive restrictions of property rights. When governments revise intellectual property protection standards, they generally apply the revisions to works already in existence as well as to those yet to be created.<sup>237</sup> Where such modifications reduce the level of protection, they may upset rights holders’ reasonable expectations and investments made in reliance on the prior legal regime.<sup>238</sup> Although expansions of exclusive rights have received the lion’s share of attention in recent years,<sup>239</sup> contractions are more widespread than is commonly believed.

Consider a few examples of diminutions of intellectual property protection standards that apply to pre-existing works. Belgium recently introduced a new research exemption and a compulsory license for public health uses of biotechnology patents.<sup>240</sup> The United Kingdom eliminated perpetual protection for unpublished copyrighted works in 1989.<sup>241</sup> Germany and Belgium amended their copyright statutes to implement a 2001 EC Directive on the harmonization of copyright.<sup>242</sup> The new laws authorize users “to demand from the right holder any support required for the exercise of certain legitimate uses. This means that if a technical measure hinders a user in a use permitted by law, the user can ask a judge to enforce his limitation.”<sup>243</sup>

235. *Verlagsgruppe News GmbH*, App. No. 10520/02, ¶ 29.

236. *See News Verlags GmbH*, 2000-I Eur. Ct. H.R. at 175-77; *Österreichischer Rundfunk*, App. No. 35841/02, ¶¶ 62-73; *Verlagsgruppe News GmbH*, App. No. 10520/02, ¶¶ 34-44.

237. Nothing in Article 1 or ECHR case law prohibits governments from limiting diminutions of intellectual property protection standards to inventions, creations, and signs that have yet to be created. In practice, however, states rarely limit protection in this way.

238. *See* Rochelle Cooper Dreyfuss, *Patents and Human Rights: Where Is the Paradox?*, *Molengrafica Series*, at 9 n.43 (2006) (unpublished), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929498](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929498) (arguing against protecting patents as human rights but stating that “there is a grey area where investments made in reliance on a particular scheme of patent protection are frustrated by a change in regime; whether the change amounts to a taking of property is arguably a hard question”).

239. *See id.* at 9-12.

240. *See* Geertruij Van Overwalle, *The Implementation of the Biotechnology Directive in Belgium and Its After-Effects*, 37 *INT’L REV. INTEL. PROP. & COMP. L.* 889, 905-18 (2006) (describing the scope of the exemption and compulsory license in Belgium).

241. *See* R. Anthony Reese, *The New Property*, 85 *TEX. L. REV.* 585, 608 (2007). The law provides a 50-year transition period so that works unpublished in that year date will be protected until the end of 2039.

242. Council Directive 2001/29/EC, *pmbl.*, 2001 O.J. (L 167) 10, 11. The Act of May 22, 2005 amended Belgium’s copyright legislation to implement the directive. *See* 1 MELVILLE B. NIMMER & PAUL E. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, BEL § 1 (BELGIUM). THE AMENDMENT OF SEPT. 10, 2003 implemented the directive in Germany. *See* NIMMER & GELLER, *supra* note 193, GER § 1 (GERMANY).

243. Christophe Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 28 *EUR. INTEL. PROP. REV.* 366, 370 & n.44 (2006).

As applied to pre-existing works, each of these statutory revisions interferes with an existing possession and thus raises the retroactivity concerns identified by the Grand Chamber in *Anheuser-Busch*. If rights holders challenge these laws as violating Article 1, the ECHR would need to address the third and most difficult issue in the tripartite framework developed above: whether the laws strike a fair and proportional balance between the rights of intellectual property owners and the broader public interest.<sup>244</sup>

This inquiry raises questions whose answers have important systemic consequences. For example, what is the relationship between the fair and proportional balance standard and the “three-step test” that TRIPs uses to regulate exceptions and limitations in national copyright, patent, and trademark laws?<sup>245</sup> If the Article 1 standard is more *lenient* than the three-step test, rights holders whose complaints are rejected by the ECHR could petition their governments to challenge the exceptions as a violation of TRIPs, taking what is, in effect, an appeal from the ECHR to the WTO. If the Article 1 standard is more *restrictive* than the three-step test, rights holders will have an incentive to challenge exceptions and limitations before the ECHR, bypassing the WTO dispute settlement system’s political filters<sup>246</sup> and adding more cases to the Court’s docket. Even if Article 1 and the three-step test impose *equivalent* restrictions, their substantive standards will undoubtedly differ. This will create complexity and uncertainty for both rights holders and users and increase opportunities for protracted, duplicative litigation and forum shopping.

These problems will only be compounded if the ECHR invokes other individual liberties to establish an upper human rights boundary on intellectual property protection standards. Although a detailed treatment of these issues is beyond the scope of this article, recent national court rulings and the writings of commentators suggest the kinds of cases that the ECHR may soon face.<sup>247</sup> As one scholar has predicted:

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Not all European countries have successfully limited intellectual property protection standards. In France, for example, a draft law implementing the EC Directive initially included a provision requiring Apple Computer to license its FairPlay digital rights management for use in devices that compete with its highly successful iPod. The Constitutional Council declared the provision to violate the right of property in the French Constitution. Crampton, *supra* note 20, at C9; Charles Jade, *Parts of French “iPod Law” Ruled Unconstitutional*, ARS TECHNICA, July 29, 2006, <http://arstechnica.com/news.ars/post/20060729-7380.html>. French courts are widely known for their strong support for authors’ rights. Hugenoltz, *supra* note 22, at 357. A similar law in a different jurisdiction might well survive a constitutional challenge, paving the way for rights holders to file a complaint with the ECHR.

244. See *supra* Parts II.D & III.C.

245. For example, Article 13 of TRIPs confines exceptions and limitations to copyright to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” TRIPs, *supra* note 89, art. 13; see also *id.* art. 17 (trademark), art. 30 (patent).

246. See Sykes, *supra* note 223 (discussing how the restriction of judicial access to states functions as a political filter on WTO dispute settlement).

247. See Geiger, *Constitutionalizing Intellectual Property Law*, *supra* note 15, at 394–96 (discussing court decisions from Austria, the Netherlands, and Germany in which freedom of expression and the public’s right to information prevailed over claims for protection by copyright and trademark owners).



[F]reedom of expression arguments are likely to succeed against copyright claims aimed at preventing political discourse, curtailing journalistic or artistic freedoms, suppressing publication of government-produced information or impeding other forms of “public speech.” In practice, this might imply that the [ECHR] would be willing to find violations of Article 10 [protecting the right to freedom of expression] if national courts fail to interpret broadly or “stretch” existing copyright limitations to permit quotation, news reporting, artistic use or reutilization of government information. The Court might also be willing to find national copyright laws in direct contravention of Article 10 if they fail to provide exceptions for uses such as parody.<sup>248</sup>

There are several reasons to be concerned about the ECHR imposing upper and lower limits on intellectual property protection standards. First, the rights and freedoms in the European Convention, even when viewed collectively, do not provide a coherent blueprint for the Court to undertake such a sensitive and policy-laden function. Unlike the Universal Declaration of Human Rights<sup>249</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>250</sup> the Convention does not contain a single provision that expressly balances the rights of authors and inventors<sup>251</sup> against the public’s right to benefit from the scientific and cultural advances that knowledge goods can engender.<sup>252</sup> In the absence of such a provision, the ECHR’s interventions at the upper and lower boundaries of protection will inevitably be ad hoc. They also create a risk of both underprotection and overprotection, depending on the vagaries of which cases are filed, in what order, and how the Court extends its jurisprudence over time.<sup>253</sup>

Second, and more fundamentally, the European Convention does not provide a mechanism to address the utilitarian and social welfare arguments that are central to intellectual property law and policy.<sup>254</sup> If the ECHR

248. Hugenoltz, *supra* note 22, at 362.

249. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

250. International Covenant on Economic, Social and Cultural Rights, arts. 15(1)(b), 15(1)(c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

251. UDHR, *supra* note 249, art. 27(2) (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”); ICESCR, *supra* note 250, art. 15(1)(c) (recognizing the same right in nearly identical language).

252. ICESCR Article 15 recognizes “the right of everyone” to “enjoy the benefits of scientific progress and its applications,” and obligates states to take steps “necessary for the conservation, the development and the diffusion of science and culture.” ICESCR, *supra* note 250, arts. 15(1)(b), 15(2). Similarly, the UDHR protects the right of everyone “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” UDHR, *supra* note 249, art. 27(1).

253. The above statement does not imply that the authors’ rights provisions of the ICESCR and UDHR provide a fully coherent framework for a human rights-inspired conception of intellectual property. To the contrary, such a framework remains to be specified through, for example, additional general comments of the ICESCR Committee, the decisions of national courts, and the writing of commentators.

254. See Dreyfuss, *supra* note 238, at 13–18 (critiquing human rights approaches to intellectual property as ignoring utilitarian concerns). *But see* Geiger, *Constitutionalising Intellectual Property Law*, *supra* note

adopts the balancing paradigm, the disputes it reviews will be framed not in utilitarian terms but as clashes pitting one group of rights holders (intellectual property owners) against another (such as consumers or the media). The Court will respond to these competing claims by weighing one right against the other. Much has been written about the problematic nature of constitutional balancing methodologies.<sup>255</sup> These concerns are even more compelling when rights claims are infused with the myriad contestations of economic and social policy that intellectual property disputes inevitably engender.

A third and final reason to eschew the intellectual property balancing paradigm concerns the multiplier and feedback effects of ECHR rulings. Formally, the Court's judgments are only binding as a matter of international law and only upon the parties to each dispute.<sup>256</sup> But the influence of European human rights jurisprudence is far more sweeping in practice. In some countries, national courts give direct effect to ECHR judgments, a method of compliance that leaves little room for legislative compromises that preserve competing national values.<sup>257</sup> In addition, legislators and courts across Europe—including the European Court of Justice<sup>258</sup>—consult ECHR case law when drafting or interpreting statutes and constitutions.<sup>259</sup> These consultations extend the Court's influence and further constrain the discretion of domestic decisionmakers to set national intellectual property

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15, at 388 (arguing that human rights "are effective tools to guarantee a balanced development and understanding of IP rights and a remedy for the overprotective tendencies of lobby-driven legislation").

255. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–83 (1987) (critiquing case-by-case or ad hoc balancing standards in constitutional adjudication). The difficulties with balancing tests include determining which factors a court should weigh against each other and whether those factors can be measured on the same scale. More generally, balancing "expands judicial discretion [and] frees it substantially from the need to justify and persuade. . . . [I]t gives a view of judicial review that is intuitional, if not incomprehensible." Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047–49 (1978).

256. European Convention, *supra* note 2, art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in a case to which they are parties.").

257. See, e.g., Council of Europe, Committee of Ministers, Judgments by the European Court of Human Rights, ResDH(2006)27E (June 7, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1008059&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (quoting the government of Greece's statement that "the Convention and the Court's case law enjoy direct effect in Greek law," and citing a 2005 Court of Cassation decision that "recognised and stressed the supra-statutory force of Article 1 of Protocol No. 1 to the Convention"); see also Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT'L J. CONST. L. 722, 726–28 (2006) (reviewing the legal status of the European Convention in member states).

258. See, e.g., Regione Autonoma Friuli-Venezia Giulia v. Ministero delle Politiche Agricole e Forestali, 2005 E.C.R. I-3785, ¶ 125 (referencing the "case-law of the European Court of Human Rights" as establishing the standard for assessing whether government controls on the use of property are compatible with European Community law); *Laserdisken ApS v. Kulturministeriet*, 2006 E.C.R. I-08089, ¶ 65 (stating that "intellectual property rights . . . form part of the right to property").

259. See Tom Barkuysen & Michel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights* 1, 15, 19, in ECHR REMEDIES, *supra* note 217.

policies.<sup>260</sup> As a result, even if the ECHR intervenes in intellectual property issues only rarely, its rulings will likely have extensive regional effects.

## V. CONCLUSION

This article provides the first comprehensive analysis of the intellectual property jurisprudence of the European Court and Commission of Human Rights under the property rights clause of the European Convention on Human Rights. It organizes the tribunals' decisions interpreting Article 1 of Protocol 1 into a tripartite framework that exposes the many points of intersection—and of potential conflict—between human rights and intellectual property. It also provides a vision of how the ECHR's intellectual property jurisprudence may evolve in the future by developing three paradigms that the Court may follow, each of which has very different consequences for innovation and creativity policies in Europe.

The article concludes that the rule of law paradigm, which targets arbitrary government conduct, presents the strongest justification for the ECHR to find in favor of intellectual property owners. Such a minimalist approach serves the core European Convention values of promoting predictability, certainty, and adherence to the rule of law. And it does so without unduly constraining the discretion of national legislators and judges to tailor domestic intellectual property rules to local circumstances.

A more equivocal case can be made for the enforcement paradigm, which requires national governments to provide the minimal administrative, judicial, and criminal procedures necessary for intellectual property owners to challenge infringements of their protected works. Finding Article 1 violations where a state fails to adopt such procedures provides an alternative enforcement mechanism for rights holders to prevent widespread intellectual property piracy. It does so, however, by circumventing the political filter that prevents private parties from litigating intellectual property complaints in the WTO dispute settlement system.

The intellectual property balancing paradigm presents the least persuasive case for ECHR intervention. Under this approach, the Court determines the legality of diminutions of intellectual property by applying Article 1's fair and proportional balance standard. It assesses the legality of expansions of intellectual property under other European Convention provisions, such as freedom of expression and the right of privacy. Adoption of the balancing paradigm would create several interrelated problems, including greater complexity and uncertainty and increased opportunities for forum shopping. The paradigm would also transform the ECHR into an arbiter of intellectual

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260. *See id.* at 12 (describing Dutch legislative proposals that were modified to comply with Article 1 and stating that "in recent years the right to property, contained in Article 1 . . . seems to have been discovered in legal practice" and "is gaining more attention in the legislative process").

property law and policy in Europe, a role that the Court is jurisprudentially and institutionally ill-suited to play.

Finally, this article highlights the broader theoretical and doctrinal controversies over the intersection of human rights, property rights, and intellectual property. The boundaries between these three areas of law are increasingly overlapping, leading to contestations among rights holders, governments, consumers, and nongovernmental organizations. These contestations are playing out in multiple venues, including domestic courts, international tribunals, national legislatures, and intergovernmental organizations. As these controversies become more contentious and more pervasive, government officials, scholars, and policymakers in Europe and elsewhere would benefit from the cautionary lessons that the ECHR's intellectual property jurisprudence offers.



## COPYRIGHT INFORMATION

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