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MODELS OF APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTELLECTUAL PROPERTY PROTECTION DISPUTES

Abstract

Human rights play an increasingly important role in the protection of intellectual property rights in Europe, thus influencing various policies of innovation and creativity. Namely, the European Court of Human Rights has provided protection of intellectual property rights by adopting decisions that interpret the right to property, in relation to intellectual property protection claims. This paper has placed its focus on analysis of the jurisprudence of the European Court of Human Rights as regards the treatment of intellectual property rights. It concludes that there are three main models of approach of the European Court of Human Rights to the adjudication of intellectual property protection disputes and answers the question of what should be the role and approach of the Court in the protection of intellectual property rights.

Key words: human rights, intellectual property, right to property, European Court of Human Rights, European Convention on Human Rights

INTRODUCTION

The intellectual property protection system in Europe is developing intensively over the last couple of decades and the human rights play an increasingly important role in its development. Yet, this intellectual property protection system has developed relatively isolated form the influence of the European Court of Human Rights (hereinafter "ECtHR"), as an international human rights court set up to protect individuals against human rights abuses by Member States of the European Convention on Human Rights (hereinafter "ECHR") (Douglas-Scott, 2006: Helfer, 2008: 1).

At first glance, it is not very clear what is the connection between an international human rights court and the human rights treaty it interprets and intellectual property. However, the answer as regards the connection between the ECHR and intellectual property can be found in the right to property, which is protected by Article 1 of Protocol 1 to the ECHR (Helfer: 2008: 2; Welkowitz, 2013: 681)

The protection of "the peaceful enjoyment of . . . possessions", foreseen in Article 1 of Protocol 1, has been considered among the weakest rights in the Convention system for a long time, affording governments broad discretion to regulate private property in the public interest. This treatment of the right to property is one of the reasons due to which the ECtHR and the European Commission of Human Rights (hereinafter "European Commission") did not provide protection as regards intellectual property issues for decades (Coban, 2004: 124-125; Helfer, 2008: 2-3).

Namely, until the early 1990s, there were no complaints filed alleging violations of intellectual property rights. And when there were complaints filed alleging such violations, the Court and the European Commission summarily dismissed these complaints. The restrictive interpretation of Article 1 applied in these cases resulted in an absence of searching scrutiny of national courts and administrative agencies. At the same time, it allowed Europe's intellectual property system to develop largely isolated from human (Heifer, 2008: 2-3)

Today, this is not the case anymore. Namely, the European Court of Human Rights has already issued a couple of significant decisions as regards the protection of intellectual property rights before the Court, within which it concludes that patents, trademarks, copyrights, and other economic interests in intangible knowledge goods are protected by the European Convention's right of property. Moreover, the general principles established as regards reviewing alleged violations of Article 1 of Protocol No. 1 are also applied in case of reviewing alleged violations of intellectual property rights, whose protection arise from the protection of the right to property, provided by Article 1 of Protocol 1 of the Convention (Helfer, 2008: 3, 11).

Besides the right to property, there are two other provisions of the ECHR that could be connected with intellectual property rights. Those provisions are the right to respect for private and family life, guaranteed by Article 8 of the Convention and freedom of expression, guaranteed by Article 10 of the Convention. Although these two provisions are less directly related to property rights, their interpretation "may have a significant impact on intellectual property rights and on the application of Article 1 of Protocol 1 to intellectual property cases" (Welkowitz, 2013: 682).

At first glance, it might not be very clear how these two provisions could have direct impact on intellectual property. However, Article 10, as will be seen further, clearly has a potential to limit intellectual property rights. As regards Article 8, particularly its subsection 2, according to which "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law…", it appears that it affords protection from unwarranted governmental intrusion. However, as will explained further, Article 8 is a broader and more affirmative right than it might seem at first glance, which could provide basis for expanding intellectual property rights (Welkowitz, 2013: 683).

The analysis of the intellectual property jurisprudence of the ECtHR shows that two scenarios could be distinguished as regards the intellectual property protection disputes that the Court is dealing with: the Court is applying the right to property under Article 1 of Protocol 1 in order to protect intellectual property assets against national measures which constrain or limit intellectual property rights; or the Court examines allegations that national intellectual property protection or enforcement measures, supported by the right to property, are violating other human rights (Grosse Ruse-Khan, 2013: 11).

Having in mind the development of the intellectual property protection system in Europe that is increasingly influenced by human rights, as well as the expansion of human rights claims relating to intellectual property, many questions are emerging as regards the relationship between the two legal regimes. On the one hand, the question is whether human rights should serve as a corrective when intellectual property rights are used excessively and contrary to their functions, especially bearing in mind that the expansion of intellectual property protection standards raises numerous conflicts and concerns as regards certain human rights, such as the right to life, health, food, privacy, freedom of expression, and enjoying the benefits of scientific progress. On the other hand, human rights have been increasingly invoked as a justification for protecting intellectual property rights (Helfer, 2008: 4-5)

In this sense, it is important to answer the question about the role and the approach of the ECtHR to the adjudication of intellectual property protection disputes. Thus, this paper has placed its focus on analysis of the jurisprudence

of the European Court of Human Rights as regards the treatment of intellectual property rights, aiming to determine the models of approach of the ECtHR to the adjudication of intellectual property protection disputes as well as its role in the protection of intellectual property rights.

PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AGAINST NATIONAL MEASURES WHICH CONSTRAIN OR LIMIT INTELLECTUAL PROPERTY RIGHTS: APPLICATION OF ARTICLE 1 PROTOCOL 1

In the 1990s, the European Commission has held that patents and copyrights fall within the scope of Article 1 of Protocol 1 (Lenzing AG v. United Kingdom, Aral v. Turkey and Smith Kline & French Lab. Ltd. v. Netherlands). However, the Court did not directly addressed the issue until 2005, when three significant judgements were issued in connection with the intellectual property protection before the European Court of Human Rights, whereby the Court applied Article 1 of Protocol 1 to intellectual property disputes: Dima v. Romania, Melnychuk v. Ukraine и Anheuser-Busch Inc. v. Portugal (Helfer, 2008: 12).

The case Anheuser-Busch Inc. v. Portugal is the most well-known of these three cases. In that judgment, a Chamber of the ECtHR consisted of seven judges has concluded that "intellectual property as such incontestably enjoys the protection of Article 1 of Protocol 1." In 2006, the case was reargued before the Grand Chamber of the Court, consisted of seventeen judges. The Grand Chamber has unanimously confirmed the conclusion of the Chamber in its judgment issued in 2007, finding that Article 1 "is applicable to intellectual property as such." In other words, it confirmed that the right to property protects the financial interests of the intellectual property owners as regards their inventions and creations (Helfer, 2008: 12; Santos, 2013: 11-12).

The judgment of the Grand Chamber of the Court, issued in 2007 in the case of Anheuser-Busch Inc. v. Portugal, is particularly striking also because the Court concluded that both registered trademarks and applications to register trademarks fall within the scope of the property rights clause of the ECHR. The analysis of this case suggests that the Court actually recognizes wider human rights implications on the regional innovation and creativity politics, as well as that its future decisions could have a significant impact on the intellectual property protection standards in Europe (Helfer, 2008: 3; Santos, 2013: 11).

The only justification of the Court to reach the conclusion that intellectual property enjoys the protection of Article 1 of Protocol 1 is found in a brief quotation of the admissibility decision, adopted in 1990 by the European Commission, in the

case of Smith Kline & French Lab. Ltd. v. Netherlands. It was the first intellectual property decision issued by the European Commission, within which it is stated that "under Dutch law, the holder of a patent is referred to as the proprietor of a patent and that parents are deemed, subject to the provisions of the 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 1" (Grosse Ruse – Khan, 2013: 11-12; Helfer, 2008: 12-13).

In cases where Article 1 of Protocol 1 intersects with intellectual property subject matter and ownership rules, for example, where ownership is contested or where it is unclear whether an inventor or creator has satisfied the requirements for protection under domestic law. Literary and artistic works are protected from the moment of their creation or fixation. If the ownership and eligibility of these works is undisputed, the Court will simply rely to the national copyright or neighboring rights laws and conclude that Article 1 is applicable. However, this manner may not always give answers, especially when domestic law provides limited directions concerning a creator's proprietary interests (Helfer, 2008: 13-14).

These complexities can be noticed in the admissibility decision from 2005 as regards the case of Dima v. Romania. This case is concerned with a design submitted to government-sponsored competition, which was ultimately chosen as an official state emblem. The focus of the dispute in the national courts was on the question of who ought to be recognized as the 'author' of the design: Dima, the original creator, or the Romanian Parliament, which had commissioned the design. The national court decided that the Parliament was to be deemed the 'author' of the design in such circumstances and therefore no fee was payable. Dima brought a complaint under the ECHR, claiming that this decision violated his rights under Article 1 of Protocol 1. However, his claim was held to be inadmissible. The Court concluded that the national court has simply resolved a dispute about the interpretation of the scope of a property right in national law in a manner that was not arbitrary and, therefore, it was inappropriate for the Strasbourg Court to intervene. Moreover, the Court concluded that in cases where the existence or extent of copyright is uncertain, it is the task of the domestic courts to resolve any ambiguities. Only once those ambiguities have been resolved, the Court can determine the extent of the applicant's property right and whether the state had violated that right (Griffiths and McDonatgh, 2013: 87-88).

The eligibility of industrial property for protection is determined by a registration procedure. A different set of ambiguities arises with respect to the Court's treatment of industrial property (Helfer, 2008: 13, 18).

The case of Anheuser-Busch Inc. v Portugal considered a dispute between the American company, Anheuser-Busch Inc., and the Czech brewer, Budejovicky

Budvar. Anheuser-Busch claimed that the Portuguese court had violated Article 1 of Protocol 1, in upholding the national authority's refusal to register its application for registration of the trade mark, 'Budweiser'. The decision to refuse the application had been based on the fact that Budejovicky Budvar owned a registered 'protected geographical indication' for 'Budweiser Bier', a registration which the national decision maker held to take precedence over Anheuser-Busch's trade mark application by virtue of a complex effect of an international treaty on domestic law. The Court, in its Grand Chamber judgment from 2007, held that the mere application for trade mark application could qualify as a 'possession' for the purposes of Article 1 Protocol 1, and, therefore, that Anheuser-Busch's claim fell within the scope of the protected right. The application constituted a possession because an applicant had a legitimate expectation that it would be handled fairly by national authorities and because there was evidence that such applications were tradeable. However, the Court concluded that the national court had simply interpreted an uncertain aspect in national intellectual property law and it was not the Court's role to review such a determination of the competing claims to entitlement to a mark, stating that: "…The Court reiterates that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable" (Griffiths and McDonatgh, 2013: 87).

Similarly, in Melnychuck, the Court held that providing intellectual property owners with a judicial forum to adjudicate domestic infringement claims did not automatically engage the state'sresponsibility" under Article 1. Only "in exceptional circumstances" could the state "be held responsible for losses caused by arbitrary determinations" (Helfer, 2008: 37).

However, some cases also contain a broader vision for the Court's adjudication of intellectual property disputes. In the Grand Chamber's Anheuser-Busch ruling, the Court's interpretation of Article 1 of Protocol 1 is that states are required to provide statutory, administrative, and judicial mechanisms that allow intellectual property owners to prevent third parties from infringing their protected works. Namely, the Court concluded that public authorities have positive obligations to take affirmative steps in order to ensure that rights holders can effectively exercise their rights (Helfer 2008: 40).

PROTECTION OF OTHER HUMAN RIGHTS AGAINST NATIONAL MEASURES WHICH PROTECT INTELLECTUAL PROPERTY RIGHTS: APPLICATION OF ARTICLE 8 AND ARTICLE 10

The cases *Von Hannover v. Germany, Ashby Donald and Others v. France* and *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden* are the most famous cases within the jurisprudence of the ECtHR, relating to protection of other human rights, such as the right to respect for private and family life and freedom of expression, whose violation is allegedly deriving from the national protection of intellectual property.

The decision adopted by the ECtHR in 2004 in the case *Von Hannover v. Germany* "brought privacy issues to the forefront of intellectual property rights" (Welkowitz, 2013: 683).

In this case, Princess Caroline of Monaco complained that her privacy was violated, because photographs were taken of her and her family in various unofficial public and private occasions and those photographs were later published by three German magazines. She sued the German magazines in the German courts, claiming violations of her right to privacy, her rights to control her image under the German Copyright Act and her personality rights under the German Basic Law. However, the lower German courts did not find violation due to her status of a public figure. In the further proceeding, the court partly granted her appeal, holding that the photographs taken of her in a restaurant, as a "secluded place", constituted a violation of her right to privacy, but the other photographs did not. This decision was appealed to the Federal Constitutional Court of Germany (Welkowitz, 2013: 683-684).

The Federal Constitutional Court ruled that some of the photographs did violate her right to privacy, while some others did not, due to her status of public person. The decision of the Federal Constitutional Court is very significant, because the Court balanced the right to privacy against the right to free expression, holding that the concept of free expression also encompasses entertainment and that the press has a right to certain discretion when deciding what would be in a public interest to print (Welkowitz, 2013: 684).

Princess Caroline was dissatisfied with the rulings of the German courts and took her case to the ECtHR, which ruled in her favour. The EChHR also believed that, in this case, it is necessary to conduct balancing between the right to privacy, foreseen in Article 8 of the Convention, and the freedom of expression, foreseen in Article 10 of the Convention. However, unlike the German courts, the ECtHR attributed very little importance to the public figure status of Princess Caroline. Namely, the ECtHR noted that although she has certain public duties as a princess, the photographs do

not reflect any of those duties, but simply satisfy the curiosity of the public about the lifestyle of a princess. According to the Court, this was not sufficient reason to disregard her right to privacy. This treatment of the freedom of expression by the ECtHR clearly demonstrates that it may not be afforded particularly strong protection, if there is a commercial context at stake (Welkowitz, 2013: 685; 688).

The *Von Hannover* case is also important because the supremacy of the right to privacy, in certain contexts, over free expression could lead directly to an intellectual property right, namely the right to publicity, which would be protected as a property right under Article 1 of Protocol 1 as well as a right under Article 8. Also, this decision is important because it creates a positive obligation in the context of Article 8. Namely, by ruling in favour of Princes Caroline, the Court did not only protect her against governmental intrusions, as a negative obligation, but also required from the government to protect her privacy against intrusions of private parties, which is a positive obligation. This positive obligation included providing an appropriate civil action in the courts (Welkowitz, 2013: 686).

The affirmative obligation of states under Article 8 has been confirmed by the ECtHR in a second *Von Hannover* case, which also involved publishing of photographs of Princess Caroline and her family. However, in this case the Court did not rule in her favour. Namely, it upheld a decision brought by the German courts to allow publication of photographs of the Princess and her husband taken in St. Moritz, followed by an article where her decision to go on a vacation while her father is in poor health is contrasted with the decision of her sister, who decided to stay with her father. In this case, the ECtHR noted that the article has an informative value and that the German courts had succeed to prevent the publication of photographs whose value was less informative (Welkowitz, 2013: 687; 689).

In the cases *Ashby Donald and Others v. France* and *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden,* the ECtHR provided how it balances two conflicting rights: copyright and freedom of expression.

In *Ashby Donald and Others v. France*, for the first time in a judgment on the merits, the Court has held that a conviction for illegally reproducing or publicly communicating copyright protected material can be considered as a violation of Article 10 of the ECHR. Namely, the Court found that the online publication of fashion photographs falls under the ambit of Article 10, as a commercial speech, and that the imposed fines and damages awarded by the courts can be regarded as an interference with the freedom of expression. However, such interference can be justified if it meets the three requirements enshrined in the second paragraph of Article 10. This significant decision means that Article 10 of the ECHR is applicable in copyright cases interfering with the freedom of expression and information of others (Grosse Ruse-Khan, 2013: 19-20).

After a couple of weeks after the judgment in the *Ashby Donald and Others* case, the ECtHR has decided a similar case of balancing copyright and freedom of expression. Namely, it brought a similar judgment in the case *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, concerning the complaint filed by two co-founders of the company "The Pirate Bay" that their conviction under the Copyright Act constitutes a violation of their freedom of expression and information. Pirate Bay was a web site, which allowed to users to share digital material, including various copyright protected material, such as movies, music and computer games. In this regard, the applicants were convicted for their involvement in Pirate Bay (Grosse Ruse-Khan, 2013: 20-21).

In this case, the Court ruled that sharing, or allowing others to share this type of files on the internet, even if they are copyright-protected files and for the purpose of making profit, falls within the right to "receive and impart information", guaranteed by Article 10. However, the Court considered that the Swedish courts had rightly balanced the rights of the applicants to receive and impart information and the need to protect copyright and therefore found no violation of Article 10 (Grosse Ruse-Khan, 2013: 20-21).

APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTELLECTUAL PROPERTY PROTECTION DISPUTES

The analysis of the development and treatment of intellectual property, within the jurisprudence of the ECtHR, indicates that the cases involving intellectual property rights protection can be divided into several groups, based on the approach of the Court to the adjudication of intellectual property protection disputes.

In most cases, the ECtHR treats intellectual property no differently than any other type of property under Article 1 of Protocol 1. The Court, in general, does not take into consideration the public-good qualities of intellectual property rights, nor it considers the social and cultural policies which justify the protection of those rights by the state. In these cases, the Court finds violation 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", namely, which are not "sufficiently accessible, precise and foreseeable in their application". This approach of the ECtHR allows governments to have wide discretion as regards shaping their domestic innovation and creativity policies, given that the rule of law principles are met (Helfer, 2008: 36-37).

Potential negative consequence of this approach would be that if a state manages to provide laws which are precise, accessible and foreseeable and if it does not itself

violate protected works, then the state could easily expand or reduce the domestic standards for intellectual property protection, without fear of violating Article 1 of Protocol 1 (Helfer, 2008: 39).

Another group of cases contain a wider vision about the ECtHR's adjudication of intellectual property protection disputes, in the sense that the states should provide statutory, administrative and judicial mechanisms, which will protect the intellectual property right holders against actions of private parties and allow them to effectively exercise their rights. Namely, this approach of the Court focuses on implementation of various positive obligations by the national authorities (Helfer, 2008: 40).

It is very likely that the consequence of this approach would be a new wave of complaints as regards the adequacy of the domestic enforcement procedures, which will require from the Court to determine more precisely the mechanisms that need to be provided by the state, in order to enable the intellectual property rights holders to prevent and punish violations by third parties (Helfer, 2008: 40).

At the same time, a growing number of other cases also contain a wider vision for the Court's adjudication of intellectual property rights disputes, in the sense that the Court makes an effort to strike a balance between intellectual property and other human rights. In these cases, the approach of the Court lies on the principle of establishing a fair and proportional balance between intellectual property rights and other competing rights protected by the ECHR (Grosse Ruse-Khan, 2013: 19; Helfer, 2008: 40; Welkowitz, 2013: 724).

This approach of the Court also has potential negative consequences, especially in the sense that it could contribute to undervaluing the rights of the perpetrator of an alleged violation, such as the right to free expression and information, especially if they are not in their traditional form. The result would be a reduced value of the right opposing the intellectual property right, even out of the context of intellectual property (Welkowitz, 2013: 724).

CONCLUSION

The analysis of the jurisprudence of the ECtHR, concerning the intellectual property protection, shows that the cases involving intellectual property rights protection, according to the approach of the Court to the adjudication of intellectual property protection disputes, can be divided into three main groups. Moreover, based on the analysis of these three groups of cases, it could be concluded that the Court has developed three basic models of approach to the adjudication of intellectual property disputes: protection of rule of law; implementation of positive obligations and striking a fair and proportional balance.

The first model of approach is derived from the first group of cases. The main characteristic of the first group of cases is that the ECtHR, when deciding about an alleged violation of intellectual property rights, treats intellectual property as any other type of property protected under Article 1 of Protocol 1. In addition, it finds violation of the intellectual property rights only in case of arbitrary conduct of the national authorities. Through this approach, the Court protects the rule of law principle.

The second group of cases provides support for the second model of approach. Namely, the second group of cases implies that the ECtHR has expanded its approach to the adjudication of intellectual property disputes. Namely, in these cases, the Court requires certain positive obligations to be undertaken by the states, in order to enable the intellectual property right holders to exercise their rights effectively. The approach of the Court in these cases concentrates on the implementation of various positive obligations by the national governments.

The third model of approach is connected with the third group, which includes cases where the Court made an effort to strike a balance between intellectual property and other human rights guaranteed by the ECHR, in the context of deciding on alleged violation of certain right. Namely, the Court's approach in these cases is based on striking a fair and proportional balance between the intellectual property right and other competing rights.

Each of these ECtHR's models of approach has its positive and negative features. Bearing in mind these features, it seems that the first model of approach, which targets the arbitrary government conduct in order to protect the rule of law principle, would be the most appropriate model of approach to the adjudication of intellectual property disputes by the ECtHR.

Namely, this approach is in accordance with "the core European convention values of promoting predictability, certainty, and adherence to the rule of law", while it does not limit excessively the discretion of the national authorities to design domestic intellectual property rules and policies (Helfer, 2008: 51).

However, it should be noted that some of the ECtHR's case law shows tendencies toward significant protection for intellectual property rights emanating from the ECHR as well as expanding or even creating intellectual property, which could have serious effect on human rights enforcement. Bearing in mind that "the possibility that the Convention could be used to expand intellectual property rights raises several concerns, not the least of which is the appropriateness of the ECtHR as arbiter of intellectual property rights among the forty-seven members of the Council of Europe", it seems sensible to conduct thorough analysis of its real effect on human rights enforcement before allowing it to take a swing (Welkowitz, 2013: 726).

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