CHAPTER 14

INTERNATIONAL COOPERATION IN THE FIELD OF INTELLECTUAL PROPERTY PROTECTION

14.1. International Development of the Intellectual Property Protection

The international phylogeny of intellectual property protection (copyright and industrial property) paints a colorful picture in both time and space. Albeit some form of protection existed in the Roman Empire for company names and authors of literary works, but – absent their formal state recognition and enforcement – these did not amount to independent rules of intellectual property protection.[1] Therefore, it is a generally accepted notion that the need for copyright regulation first appeared when the **printing press** was invented by *Gutenberg*, in the mid-15th century. The protection of patents developed in the 18th century era of the industrial revolution. In both cases, it was a decisive factor that the technological developments incorporated the possibility of mass reproduction and marketing.

The 15th century, hallmarked also with the appearance of the printing press, meant the simultaneous beginning of the Renaissance and the Age of Discovery, and it also gradually brought into question blindfolded religious dogmas. In the Middle Ages, for instance „*people believed that art was inspired by superhuman forces rather than by human feelings*. *The hands of painters*, *poets*, *composers and architects were supposedly moved by muses*, *angels and the Holy Spirit. Many a time when a composer penned a beautiful hymn*, *no credit was given to the composer*, *for the same reason it was not given to the pen. The pen was held and directed by human fingers which in turn were held and directed by the hand of God*."[2]

The spread of the printing press – and in time every achievement of the **industrial revolution** – made it possible to express and disseminate opinions questioning the monocracy of the Roman Catholic Church. Due to the spectacular and tight interconnection of the State and the Church at that time, a monopolistic privilege given based on a decision by the monarch (or religious leader) of a given geographic territory was a prerequisite of practicing activities related to production and distribution of publisher's and inventor's works. The works/inventions, the term of protection, and the content of the legal relationship was determined in such charters, 'patents'.

> The Hungarian version of the foreign expression of '*pátens*' is patent or letter of privilege. The original word of *patent* in modern legal terminology can be used only for the special forms of patents in industrial property law. This is especially true compared to author's rights which is translated to *copyright* as the word 'copyright' is traditionally derived from the name of the first ever English act by that name.

The spread of the Renassaince in the 15th century led to the emergence of another important circumstance relevant to the creation of copyright regulation: **individualism** suddenly appeared. Unknown and anonymous medieval troubadours and Minnesängers were replaced by the geniuses of their times, especially in the field of fine arts, literature, architecture, the mechanical and natural sciences. The Italian polymath *Leonardo da Vinci*, embodying an artist, an author, an inventor, a military

[1] Lendvai 2008, 61-78.
[2] Harari 2017, 198-199.

engineer and a teacher in one person, was far ahead of everybody else. Different discoveries in physics came to light not only as authors' works, but also provided indispensable assistance to the activities of modern inventors. The stronger and stronger fame of family and company names characterized the industrial revolution. Enormous (private and state-owned) firms were established to expolit the commercially beneficial assets of inventions, which had a growing interest in institutionalized legal protection independent of the ruler's grace.

All in all, a total of three phylogenetical events outlined during the 15th and 17th centuries, which led to the emergence of modern copyright: **technological novelties**, **strengthening markets** and 'exhibitionist' **authors wishing to show themselves** to the world. The first place where the system of privileges, maintained for more than two centuries without any problem, was dismantled was England. The *Stationers' Company* simultaneously operated as both a printer's guild and the organ of the king's censorship. At the end of the 17th century, however, winds changed and monopolistic book publishing, under siege already from several places, was replaced by the new statutory legal construction of *copyright* in 1709.

The first patent acts were issued in the 15th-17th centuries, first in Venice (1474), then in England (1624). In both cases the aim was to grant monopoly for a limited time based on state regulated and enforced rules to make use of beneficial knowledge that can be useful to the industry.

Copyright and patent acts were adopted worldwide in the 18th and 19th centuries. Nevertheless, all of these acts suffered from the same problem rooted in the **territorial scope of the laws**. National laws exclusively protected nationals in the given country and their works/inventions. Consequently, in most cases, the authorities were helpless against the cross-border trade of these works and inventions, and the unlawful exploitation thereof by 'pirates'.

An exemplary debate relevant to the history and international development of copyright erupted regarding reprints of French books by Belgian publishers. Belgian publishing practice was, as a matter of fact, detrimental to almost everyone, except for the publishers themselves. The French authors, publishers and the state as well suffered economic losses due to the Belgian books being cheaper as a result of being printed on inferior quality paper, and due to the lack of payments of any royalties to the rightholders. Many of the purchasers felt defrauded, too, due to excuses over lower quality. Belgian authors also lost manifold on the practice, as the Belgian publishers, governed by the Belgian law, became more and more unwilling to publish French-language manuscripts by Belgian authors, since they should have been paid royalties. In a country like Belgium, being strongly divided by languages, only gaining its independence in 1830, making national literature stronger was an essential cultural interest. Thus, unsurprisingly, it was France and Belgium, who – although not at all for the first time in history – concluded a bilateral agreement in 1881, wherein they granted reciprocal protection to each other's national authors. This protection was based on the **principle of reciprocity (mutuality)**, which substantially meant that one party would only grant protection to the other's citizens, if and to such extent as the other party was also willing to protect the interests of the first country's authors. In a manner of speaking, the principle of reciprocity can be considered as the minimum standard of international copyright protection.

Bilateral copyright agreements – the number of which was estimated at 35 prior to 1886, according to authors *Ginsburg and Treppoz*[3] – provided limited international protection in practice, since their scope was limited to the specific conlcuding parties. Broadening international trade, also affecting works and inventions, and the ever more regular industrial and cultural world exhibitions, however, acted as catalysts to negotiations taking place in the 1870s and 1880s aiming at concluding multilateral conventions.

[3] Ginsburg–Treppoz 2015, 15.

Chronologically, the first in line was the **Paris Convention for the Protection of Industrial Property**, adopted in 1883 by 11 countries (Belgium, Brasil, El Salvador, France, Guatemala, Italy, the Netherlands, Portugal, Serbia, Spain, and Switzerland). According to the convention, the subject matter of industrial property encompasses patents, utility models, industrial designs, industrial or commercial trademarks, service marks, trade names, certificates of origin, apellations of origin, as well as the repression of unfair competition.[4] Besides ascertaining the minimum standards regarding the above subject matter, the convention also declared the **principle of national treatment**.[5] All countries acceding to the convention shall grant, based on this principle, the same level of protection to the nationals of the countries of the (Paris) Union as the one they grant to their own nationals.

More or less simultaneously, famous artists (among them the French *Victor Hugo*) took a stand for concluding copyright conventions of wider scope. Intergovernmental negotiations started in 1883, resulting in the adoption of the **Berne Convention** in 1886 by ten countries (Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the UK).

The Berne Convention unified many substantive norms in copyright law. It set forth economic rights subject to mutual protection, originally extending only to the rights of reproduction and adaptation. Later, moral rights were added to the scope of protection, while the minimum term of protection was also defined (currently being 50 years counted from the beginning of the year after the death of the author – *post mortem auctoris*). The Convention first allowed but over time prohibited any formalities conditioning the existence or exercise of copyrights. The Convention also gave up the principle of reciprocity and made the principle of national treatment[6] a precondition of protection. These created an optimally harmonized level of protection (which was continuously widened until the 1970s).

14.2. BIRPI, WIPO and UN – The Cultural Aspect of Protecting Intellectual Property

Between 1883 and 1886, the first two multilateral agreements of intellectual property law were born. Slowly but decisively growing membership, emerging doctrinal, procedural, regulatory (as in modifications of the norms), and financial questions soon necessitated the development of an organizational structure. In the case of both the Paris and the Berne Conventions, the **BIRPI** (*Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*), established in 1893, undertook these tasks. As at that time, no such global organization like the UN existed neither in Europe nor elsewhere in the world, BIRPI could function independently under the oversight of the Swiss government.

As part of this activity, both the Paris and the Berne Conventions were amended and modified several times. Nonetheless, many new industrial property and copyright-related agreements were adopted over time, requiring close international coordination. Conseuquently, the **World Intellectual Property Organisation** (WIPO, in French OMPI) was established during the 1967 Stockholm Conference.[7] The WIPO started its work in 1970 and since 1974, it has been functioning as one of the specialized agencies of the UN.[8]

The growth of the number of multilateral agreements is continuous and apparent. The primary reason of this is that while the Berne and the Paris Conventions do not cover every problem, amending

[4] Berne Union Convention, current Article 1 (2).
[5] Berne Union Convention, current Article 3 (a).
[6] Berne Union Convention, current Article 5
[7] Deer Birkbeck 2016, 55-58. See the text of the agreement: http://www.wipo.int/treaties/en/convention/
[8] Deer Birkbeck 2016, 58-60. See the text of the agreement: http://www.wipo.int/treaties/en/text.jsp?file_id=305623

them necessitates consensus. Considering the number of the members of both conventions (more than 180 states in 2018), it is difficult (i.e. practically impossible) to find room for compromise.[9] Thus, continuous technological and social change, the growing need of the fast and effective registration of different forms of industrial protection, the emergence of new interests to be protected and new questions to be regulated justified new treaties to be drafted by the WIPO from the 1980s.

Accordingly, **administering** (managing) the 26 international intellectual-property-protection **agreements** is one of the most important tasks of WIPO. In addition to its own founding document, 15 more property protection-related (substantive law), 4 registration-related (classification), and 6 global protection agreements (regarding the international validity of the registered forms of protection) are among the administered agreements. Furthermore, the WIPO provides administrative and monetary assistance for the realization of the convention on the International Union for the Protection of New Varieties of Plants (UPOV). From the treaties administered by the WIPO, the above-mentioned Berne and the Paris Conventions stand out as well as the 'Internet treaties' adopted in 1996 in the field of copyright. These agreements, responding to the challenges of digital technologies, assign protection to new types of works, set forth new economic rights, introduce effective technological measures and protection for rights-management data, and define certain minimum standards of enforcement. Additional outstanding treaties administered by the WIPO in the field of industrial property law are the Nairobi Treaty on the Protection of the Olympic Symbol (1981), the Trade Mark Law Treaty (1994) or the Patent Law Treaty (2000). Strong Hungarian ties to intellectual property protection are demonstrated by the fact that the Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure was signed in Budapest in 1977.

Further tasks of WIPO include the provision of fee-paying services related to the agreements, including international registration procedures and alternative dispute resolution procedures regarding *domain names*. The WIPO Center for Arbitration and Mediation provides help in questions related to contractual and delictual liability in the latter case. The procedures regarding abusive registration of *domain names* (*cybersquatting*) stand out among the arbitration procedures.[10] Furthermore, the WIPO provides help to MS intellectual property protection organizations in operating databases, organizing education and in connection with legislation.[11] The WIPO is the only UN specialized agency which almost completely covers (in 95 percent) its two-year budget from its own income, mainly due to these services. This budget is currently 725 Mn Swiss Francs (2019-2020).

The **major organ** of the WIPO is the **General Assembly**, primarly exercising administrative, budgetary and appointment powers. On paper, the second most important organ is the WIPO Conference, organised – at the same time and venue – together with the General Assembly, and membership is almost identical as well. (The last separate conference took place in 2005.) The WIPO Conference primarily serves as a forum of discussion, it may make recommendations in the field of the regulation of intellectual property law, and amend the WIPO Treaty. Another important organ is the WIPO Coordination Committee, which primarily performs advisory and executive tasks within WIPO. In addition to these, twenty further commissions operate within WIPO, responsible for many of the organization's special tasks as well as their preparation and consultation thereon. The Secretariat helps the functioning of the organization, with the head of the organization being the director general, supported in his work by deputies.[12]

[9] Boytha 2015, 367-379.

[10] On the alternative dispute resolution practice of the WIPO, see: Tan 2018

[11] On the tasks of the WIPO, see: Deer Birkbeck 2016, 9-31.

[12] For further information regarding the structure of the organization see: WIPO: WIPO Governance Structure WO/PBC/17/2, May 2011 http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_17/wo_pbc_17_2_rev.pdf

The WIPO had four Directors-General so far: the Dutch *Georg Bodenhausen* (1970-1973); the American *Árpád Bogsch* (1973-1997); the Sudanese *Kamil Idris* (1997-2008) and the Australian *Francis Gurry* (since 2008 expectedly until 2020). Over time several Hungarians participated in the leadership of the WIPO. Besides *Árpád Bogsch*, of Hungarian origin, *György Boytha* was Deputy Director-General for Copyright from 1979 to 1985. *Mihály Ficsor* Sr. acted as Deputy Director-General from 1985 to 1992.

The WIPO is not the only UN **specialized agency**, which performs tasks related to the protection of intellectual property, but the UNESCO specifically stands out from these. Its functions include the protection of cultural heritage, social diversity and traditional knowledge, also education (for further details, see Chapter 7). These issues are tied to intellectual properties in many aspects, such as the protection of the manifestation of folklore (dances, songs, poems), undertaking public education and public library services, utilization of goods and samples of handicraft. There are only two international intellectual property treaties that were not adopted by BIRPI or WIPO. The adoption of one of the two agreements not adopted under the aegis of BIRPI or the WIPO, namely the Universal Copyright Convention, can be tied to UNESCO. (The other being TRIPS as part of the WTO.) The explanation to adoption of the Universal Copyright Convention in 1952 within UNESCO was exactly reasoned by efforts which aimed at UNESCO establishing connections on cultural grounds between the two super powers of that age (the USA and the USSR) as none of them were willing to join the existing Berne Convention, which already contained wide-reaching norms. The Universal Copyright Convention wanted to realize this 'harmonization' by decreasing the scope of minimally protected interests, paving the way for compromise based on the idea of the 'lowest common denominator'. Although many countries joined the Universal Convention, its current importance is evanescent since the US joined the Berne Convention in 1989 and the USSR fell apart.

Other UN specialized agencies, such that also have indirect competences in the field of intellectual property law, are: the ILO and the WHO. The ILO is relevant due to intellectual 'works for hire' in an empolyment relationship and the performers' performances. The WHO plays a role in the juxtaposition of pharmaceutical patents and social/public legal interests. (Let us just think what could have happened if the pharmaceutical companies had abused their monopolistic positions of producing medicine in the 20th century struggle against smallpox. Balance between intellectual property protection and the public order is indispensable for the success of global healthcare campaigns.)

Several legal policy interests are brought together by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971), and the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974). These include the principles of protection of copyright and related rights, as well as the right to access to culture and information. With regard to these, the WIPO administers the above conventions in collaboration with the ILO and the UNESCO.

The WIPO, seated in Geneva, benefits from all exemptions and immunities that UN specialized agencies receive, including especially tax-exemptions. Hungary is being represented by the delegates of the Hungarian Intellectual Property Office (HIPO) and the Ministry of Justice in the work of WIPO committees.

Although the widening of global commercial relations stem from before the 20th century, it gained central importance after WWII. It was not only due to the efforts to avoid a potential third world war (which also motivated the foundation of the EEC), and to the endeavour to strenghten the positions of Capitalism against Communism, but also to the general necessity of mass production. Besides many countries dedicated to free trade (e.g. the Netherlands), the US was one of the leading advocates of free trade. It is also true, however, that before entering WWII, the country followed such an isolation policy according to the *Monroe Doctrine*, which, beside allowing free trade, prohibited interference with other countries' internal affairs. After the 1940, however, the US became a leading power, in no small part due to its potential in intellectual property protection.

As a sign of lightening in free trade, the **General Agreement on Tariffs and Trade (GATT)** was adopted in 1947. In 1986, a series of negotiations started in Uruguay, which after many deadlocks resulted in the establishment of the **World Trade Organization**. The new GATT became part of the WTO, and so did the agreements on services (GATS) and intellectual property protection (TRIPS). (For further information, see Chapter 8.)[13]

Adopting **the TRIPS Agreement** is a condition of WTO membership (as the obligatory Annex 1C of the WTO Agreement). The document expressly sets forth – with a few exceptions – that former intellectual property treaties also form part of TRIPS, and it also contains several new substantive law regulations in the field of copyright and industrial property. In addition, it introduces strict rules of rights enforcement and an alternative dispute resolution procedure – as a first in the international history of intellectual property law. Added to the principle of National Treatment (Article 3), TRIPS also contains the MFN principle (Article 4). Based on this, the contracting parties provide every such preferences or advantages to each other, which have already been granted to other countries. Such principle can guarantee to maximize international intellectual property protection.[14]

> According to historical research, the MFN principle can be traced back to the 11th century. More importantly, this principle was first included in a treaty of friendship and commerce concluded by the United States and France on 6 February 1778, right before the United States declared its independence.[15]

Two of the above novelties of the TRIPS Agreement are the **normative rules related to rights enforcement and the dispute resolution mechanism applied in practice**. The former requires MS to provide for high-level rights enforcement both in civil and criminal cases (as indiated by TRIPS), including means prior to court procedures or out-of-court possibilities, and customs regulation. In addition, the TRIPS Agreement has introduced a completely new international framework for alternative dispute resolution. It is a historical fact that under the Berne Convention, any MS could have exercised their right to apply to the ICJ with reference to any perceived or actual violations or grievances. No such cases are known though. On the contrary, the alternative dispute resolution mechanism under TRIPS is rather successful, as it is flexible and strict at the same time.

The essence of **flexibility** is that the applicant MS claiming a violation of their rights are first obliged to consult with the MS causing the alleged harm, and only turn to the WTO to set up a dispute resolution panel, if consultation was unsuccessful. (Surprisingly, a significant number of the cases are

[13] For a further brief summary regarding the establishment of WTO, see: Frankel–Gervais 2016, 9-10.
[14] Frankel–Gervais 2016, 54-56.
[15] Magyarics 2014, 22.

settled in this consultation phase.) **Strictness** is ensured by the enforceable report (never a judgment or decision) of the panel. Although it is possible to appeal against the report of the panel to the second instance, however, if the culpable party is unwilling to modify its relevant rules, it shall face trade restrictions and, ultimately, trade sanctions. It is important that within the framework of the dispute resolution procedure the principle of *stare decisis* is not known, therefore it is not obligatory to follow previous reports in any new procedures. (Nonetheless, the panels are trying to pay attention to each other's opinions.)

> Member States have initiated 561 consultations in front of the WTO between 1 January 1995 and 31 July 2018. Most of the consultations were closed in this phase, but in 313 disputes 261 dispute resolution panels were established during the above period. Among these, 195 reports were published in 245 disputes. The appellate body published 114 reports.[16]

The WTO, including TRIPS, and the WIPO's international treaties envisage a high level of protection of intellectual property. However, this high level of protection seemed to be achievable only by the developed countries, and otherwise it fundamentally served their interests. The developing and the least developed countries amended their national regulations in the hope of economic advantages provided by joining the WTO, but in general they reacted to the intellectual property claims of the 'colonising West' in three ways.

One possibility was to enforce flexible exceptions from under the international agreements ('*flexibilities*'). Many countries were, e.g. exempted from the execution of the TRIPS Agreement. Most recently, the least developed countries have been allowed to postpone the implementation of the TRIPS Agreement until up to 2033. Another excellent example is the Doha Declaration, which provides flexibility to the developing countries regarding manufacturing vital medicine based on compulsory licenses, or regarding the ever stronger African/Asian needs for (some kind of) copyright-protection over traditional knowledge.[17]

The other possibility is to lighten national practices of rights enforcement. (In other words, in several cases national authorities turn a blind eye and overlook unlawful activities.) One form of the response to the absence of any consequent reaction against unlawful conduct may evoke the Section 301 Report of the United States Trade Representative (USTR). In this report, the USTR lists those states that are not in compliance with their international obligations, thus negatively affecting American economic interests. The strength of this document mostly lies in that it may recommend economic/political countermeasures against the states involved.

The third option is the intentional appropriation of intellectual goods on a massive scale (with the assistance or upon the approval of or by turning a blind eye by the state). China carries out these kind of activities on the widest possible scale to develop its economy, including its intellectual property sectors to reach the level of developed Western countries.[18]

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[16] For the data, see: https://www.wto.org/english/tratop_e/dispu_e/numbers_of_disputes_by_stage_e.xlsx For scientific analysis of the data, see in particular: Leitner–Lester 2017, 171-182.

[17] Frankel–Gervais 2016, 32-34.

[18] Yu 2007, 173-220.

Although many consider the above departures from the mainstream adverse, it is best to keep in mind, that countries currently considered developed (mainly of North America and Europe), have followed the logic of 'grab the money and run' instead of the principle of national treatment for a long time. Until giving up the Monroe Doctrine, the United States was one of the biggest 'pirate nations'. As soon as these pirate nations reached a certain level of development, however, namely, when they exported more intellectual property than they imported, they became economically interested in intellectual property protection. To put it this way, it is not surprising if some countries (currently mostly the BRICS countries) try to strengthen their intellectual property protection systems while they continue to engage in significant 'piracy'. The only difference is that the United States and the European Union are now very cautious of their practices.

14.4. Regional Intellectual Property Protection Systems of the EU and Europe

The selection of the title of this subchapter is not a coincidence. The European continent in the broad sense and the European Union, which unites only a part of European countries, have several completely independent organizations and relevant bodies of law that are directly or indirectly affiliated with intellectual property law.

In general, the **Council of Europe** is the most significant in Europe, which, among others, is responsible for securing the protection of human rights in its current 47 MS. The **ECHR** and its court, the **ECtHR**, which applies the Convention on the merits are also parts of this system (see Chapter 9 for more details). Article 10, declaring freedom of expression is one of the most outstanding provisions of the ECHR. This right not only encompasses freedom of expression, but also an interest in getting to know others' opinions, and – finally – it incorporates the right of access to information. Moreover, the right to respect for private life (Article 8), the right to a fair trial (Article 6), the right to an effective remedy (Article 13), the prohibition of discrimination (Article 14), the right to life (Article 2), the freedom of assembly and association (Article 11), and the protection of property (Protocol I, Article 1) might also connect to intellectual property law. The ECtHR has already delivered judgments in several cases along these rights.[19]

The **European Patent Organization**, brought to life in 1973, works also independently from the European Union. The essence of the **European Patent Convention** adopted within this framework is that it facilitates the uniform management by the rights holders of several separate patent applications in a single standard 'European patent'. The organization is headquartered in Munich, Germany, however, European patent applications can be submitted in the patent offices of every MS.

The **European Union** (earlier EEC) is such an economic and political cooperation, of 28 MS and indirectly some further European countries, which endeavours to secure the functioning of the internal market along the lines of the traditional "four freedoms" (free movement of goods, services, capital and persons, and nowadays as a fifth freedom: the free flow of knowledge and innovation). As a part of the economic and political integration, the EU/EEC may also regulate cultural and other socially significant issues (for more details on this, see Chapter 10). Article 36 TFEU **allows for the limitation of the scope of the four freedoms along** "**industrial and trade property**" (which, according to a widely accepted view, also covers copyright). Nonetheless, the functioning of the internal market might be endangered by the different MS regulations, and by the territorial character of copyright. Therefore,

[19] Helfer 2008, 1-52.

sequential harmonisation is a generally accepted solution in the EU to find common denominators and to guarantee the most effective functioning of the internal market.

Eventually, the preparation of **harmonization through directives** started through the 1988 Green Paper. Following the transformation of EEC into the European Union, the legal grounds for copyright legislation are provided by Article 114 TFEU. Although, over time, its arguments for copyright legislation policy have changed considerably. While in 1991 the European Commission had emphasized how technology affects the common market, in 1996 the high level of protection and the fair balance between the rights and obligations of rights holders were articulated. In 2009, the above was complemented by endeavouring to spread the knowledge in the common market as widely as possible, and in 2011, by the need for a "digital single market". The copyright-related legislation and law enforcement is also determined by the **Charter of Fundamental Rights of the European Union**, by specifying the protection of intellectual property [Article 17 (2)]. Furthermore, the respect for private and family life (Article 7), the freedom of expression (Article 11), the right to education (Article 14), the freedom to conduct a business (Article 16), cultural, religious and linguistic diversity (Article 22), and the integration of persons with disabilities are such fundamental rights that are relevant to the field of copyright law and to content consumption as well.

Until 31 August 2018, the EU/EEC has accepted **2 regulations** and **11 directives** altogether, in areas touching upon copyright law (as well). (This number is higher if we consider amending directives and the E-Commerce Directive.) Most of these legal norms are so-called vertical norms – mirroring an Anglo-Saxon legislative practice – i.e. covering one (maybe two) topics or subject matters. On the contrary, there are horizontal norms as well, which affect multiple areas, such as the most important copyright directive, reacting to the challenges of the information society (the so-called InfoSoc Directive) or the newest copyright reform concept of the European Union.

The European Union can also be considered active in the field of industrial property protection. The **uniform EU trademark protection** was introduced by a regulation in 1994, which is supplemented by other norms as well (with the last directive being adopted in 2015). As part of this, the rightholders might register their trademarks in front of their national agencies or directly at the European Union Intellectual Property Office (EUIPO, headquartered in Alicante), and receive an EU-wide protection based on trademark rules that have been harmonized in many aspects. Another regulation from 2002 provides the same type of protection for **utility models**. Since 2016, **trade secret**s are also protected in the EU, although the effectiveness of the relevant regulation has been brought into question EU-wide. No unified **protection for geographical indications** exists yet in the European Union.

It is even more important that though the MS have agreed to introduce a **unitary EU patent system** in 2012, this norm is not yet effective. Setting up a Unified Patent Court is also in the making. The legitimacy of this court has been questioned in several cases and countries. The agreement on establishing the Unified Patent Court was signed by 25 MS, among them by Hungary, but for it to come into force, the agreement needs to be ratified by at least 13 signatories. Furthermore, Germany, France and the United Kingdom shall also ratify the agreement (among the 13), since they had the most EU patents in force in 2012, the year before the agreement was signed. Hungarian ratification, however, is apparently not expected. The Constitutional Court in its fresh decision of 29 August 2018, declared that "*an international treaty that was created within the framework of such an enhanced cooperation*, *which transferred jurisdiction*, *regarding the assessment of a particular group of private law disputes based on Article 25* (*2*) *a*) of the *Fundamental Law of Hungary*, *to an international institution not included in the founding treaties of the European Union – thereby fully negating the power of the Hungarian state jurisdiction to adjudicate such disputes*, *and to have the court decisions in these cases be subjected to*

constitutional review based on Article 24 (2) c)-d) of the Fundamental Law of Hungary – cannot be promulgated based on the effective provisions of the Fundamental Law of Hungary."[20]

Finally, it is very important that the European Commission is the guardian of fair competition (as well). As a part of this activity, it aspires enforce compliance with **competition law regulations**. The Commission has brought damning decisions in several cases, when one of the companies or groups of companies (for example *Microsoft* or *Google*), with strong ties to intellectual property protection, abused their market dominance. Prevalence of fair competition is also ensured by the prohibition of monopolies. Copyright collective rights management organisations with centuries of experience, however seem to often contravene this expectation. Namely, effective rights management would presuppose the possibility of licence agreements being obtained from one single place. Accordingly, competition law and intellectual property law exist in a delicate balance.

14.5. Future Prospects

The pace of legislation is significant on a global and regional level, regarding all forms of intellectual property protection, and it is to be expected for the future as well. However, there is a development these days, which makes it hard to predict the future of commercial development of intellectual property law.

At present, the United States and China seem to enter into a **trade war** – also engulfing other countries – by introducing protective customs duties on each others' products. What sparked the debate, among others was that according the USTR report in the case of the Chinese establishment of joint ventures, foreign parties are obliged to transfer technologies to the Chinese joint venture. Such forced technology transfers may violate several interests of national economy and not only in the US, but also for European companies.

The current American leadership (especially President *Donald Trump*) holds the foregoing order of the free trade responsible for these and similar global economic problems, as he also claims WTO is dysfunctional. The strenghtening of such arguments (irrespective of globalizing populist politics) represents an event fitting the decending branch of a 'sine wave'.

Up to 1940, the United States paired its traditionally open and free economic policy with strict, closed state and foreign policies. Prior to it, the US aimed at concluding as much economically beneficial agreements as possible. Where it was not possible (or they were reluctant), the United States traded without taking international interests into account. Meanwhile, it protected its own economic interests with ironclad rigor or even through use of military force, if necessary.

> *Edward Preble* (1761-1807), who played a leading role as a commodore of the American navy in the war of the United States against Tripolitania (Libya) between 1801-1805, negotiated with the Moroccan sultan as follows:
> "*Then the sultan listened as Preble „endeavored to impress on his mind the advantages of a free commercial intercourse … and that the revenues of the Emperor arising from that source, would be much greater than any thing they could expect if at war with us. It was an American argument, a case made for free trade*."[21]

[20] HCC Dec. 9/2018 (VII. 9) AB határozat, delivered on 9 July 2018.
[21] Kilmeade–Yaeger 2017, 135-136.

In the field of intellectual property protection, this actually meant that the United States signed as few international treaties as possible, did not protect other nationals' interests on US soil, however, it did not enforce American intellectual property interests abroad either.

After opening up to enter WWII, the United States have grown into a net exporter due to many of the technological innovations of the 20th century, which brought illustrious development in the fields of motion picture and music industry. Its economic interests have now necessitated the protection of its own intellectual goods overseas as well. For this reason, the United States gave up its isolation policy in the field of intellectual property law and joined several international treaties (especially the Berne Convention in 1988) as part of this process. On the other hand, it also pushed intellecual property protection into a free trade context. As a result, the WTO and TRIPS were born in 1995.

In the past barely twenty years, intellectual property protection (including both the creative industry and rights enforcement) has become so strong in many developed and developing countries that the United States now considers it as a threat to the idea of free trade promoting equality. That is why the current change in direction, wherein the American government takes a protectionist lead in its international economic policy once again, is neither a coincidence nor it is surprising. It is hard to predict the outcome of such developments.

QUESTIONS FOR SELF-CHECK

1. What hidden difficulties could have been implied in the application of the principle of reciprocity? What burden was put on the courts in determining the scope of protection?
2. What is the biggest advantage of the principle of national treatment for the national courts when analyzing the existence or determining the infringement of copyright or/and patents?
3. What are the benefits of the settlement of international intellectual property disputes by the means of alternative dispute resulotion?
4. According to Article 10 ECHR:
   „*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
   2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
   Which of these expressions/rules might be directly connected to intellectual property law, especially copyright?
5. What might be the biggest advantage of unitary (global or European) patent and trademark applications?
6. What might be the biggest peril of the unified registration of trademarks in the EU?
   For your consideration: in case No. T-232/10 the General Court of the CJEU discussed whether the Seal of the Soviet Union with the Red Star and the hammer and sickle can be registered as a trade mark. In another case (T-266/13) the General Court had to decide if it is possible to register the word "Curve" as a name of a medicament, which was confusable with the Romanian expression "curvă" (which is also well understood in Hungarian).
7. Try to argue, which aspect of intellectual property protection is more convincing: the cultural or the economic one?

RECOMMENDED LITERATURE

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