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A New Referee in the Intellectual Property-Competition Law Interplay?

Shaping a New Judicial Standard Through Fundamental Rights and Freedoms

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Statutory Declaration

I hereby declare that the thesis has been written by myself without any external unauthorised help, that it has been neither presented to any institution for evaluation nor previously published in its entirety or in parts. Any parts, words or ideas, of the thesis, however limited, and including tables, graphs, maps etc., which are quoted from or based on other sources have been acknowledged as such without exception.

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Abstract

The inherent tension between intellectual property and competition law, lying in the apparent contradictory tools employed to achieve their objectives, has given rise to a great deal of controversies. The overlapping areas between these two sets of laws are wide and attempts by the Court to reconcile their concurrent application far-reaching. The thesis aims at demonstrating that a comprehensive solution accommodating effectively every parties' interests might opportunely be reached through conducting a balancing exercise of the fundamental rights and freedoms at stake.

The paper first presents the interplay between the two sets of laws by underlining the broad principles guiding antitrust intervention within the intellectual property realm. After having exposed the main controversial competition issues as regards patents, trademarks and copyrights, a special focus will be dedicated to displaying how fundamental rights and freedoms have entered both intellectual property and competition law fields. These fundamental interests include not only freedoms aimed at promoting the single market, but also rights specifically protected by the Charter of Fundamental rights: freedom of expression, freedom to conduct a business…

The remaining of the thesis seeks to determine, through three case-studies, the rights and freedoms whose exercise might be impaired when simultaneously applying competition law and intellectual property provisions. *Huawei v ZTE*, relating to Standard Essential Patents, demonstrates how an emphasis by Advocate General Wathelet on the need to accommodate the right to intellectual property, the right to access to courts and freedom to conduct a business has helped shaped a balanced decision by the Court. *L'Oréal v Bellure*, illustrates the fine line between legally reproducing one's trademark in comparative advertising and acquiring an unfair competitive advantage in doing so. We discuss how the failure to take due account of both the specific structure of the market and the range of rights and freedoms at stake, such as freedom of speech and freedom of information, has amounted to an unbalanced decision at the expense of competitors' and consumers' protection.

The focus then shifts to the pay-TV sector within the copyright area. An analysis of the case-law's evolution as regards the admissibility of absolute territorial licensing agreements depicts the Court's sporadic approach. Given the severe consequences limitation of cross-border provision of services entail on market integration, the Court progressively shifts

towards a broad prohibition of such licensing practices. Yet, an extensive judicial intervention risks neglecting the national scope of the market and undermining contractual freedom, intellectual property protection and *in fine*, consumers' protection.

Overall, the paper illustrates that while a judicial standard based on a balancing exercise of the fundamental rights and freedoms at issue has the potential to enhance legal certainty and fairness, it remains to day inconsistently applied and a precise legal framework remains to be determined by the Court.

Keywords

Balancing exercise

Comparative advertising

Competition law

Copyright

Cross-border provision of services

Exclusive territorial licensing

Fair balance

Fundamental rights and freedoms

Intellectual Property

SEP

Trademark

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List of Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
ECJ	European Court of Justice
EU	European Union
GC	General Court
IP	Intellectual Property
IPR	Intellectual Property Right
OECD	Organisation for Economic Co-operation and Development
SEP	Standard Essential Patent
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

The self-protective stance held by many intellectual property ("IP") rightsholders, naturally driven by a desire to safeguard their assets, has paved the way for competition authorities' intervention for decades. Ranging from the application of articles 101 et 102 TFEU to verifying that circumvention of regulatory rules does not distort competition, multiple tools ensure competition remains stimulated while protecting intellectual property rights ("IPRs") within the single market.

It remains nevertheless essential to monitor the enforcement of such competition rules in order to ensure effective IPR protection, sole guarantee of rightsholders' incentives to create and innovate[1]. Conferring fundamental right status to IPR through the introduction of article 17(2) of the Charter of Fundamental Rights[2] ("CFR") has been pivotal to strengthen the legal wall built around the property in question[3]. As for all Charter rights, any limitation on their exercise must indeed fulfil the appropriateness, necessity and proportionality criteria[4].

The increasing references to fundamental rights permeate yet additional fields[5] and the exercise of IPR is therefore also in turn subject to limitations. While copying is viewed as ethically unfair, the exercise of IPR shall remain within reasonable borders "because other people have rights too"[6]. Increasingly, interaction between IP and other fields is presented as opposing private to public rights. The latter are understood in a broad sense. They include, on the one hand, the freedoms aimed at promoting the single market, namely, the traditional four freedoms and freedom of competition. On the other, they also encompass rights benefiting both individuals and the public at large: freedom of expression, freedom of information, freedom to conduct a business…

This paper aims at assessing how fundamental rights and freedoms – as broadly defined above – enter the realm of the traditional IP-competition conflict. While the Court seems to generally acknowledge the wide range of interests at issue depending on the circumstances at stake, the

1 L. R. HELFER, "Human Rights and Intellectual Property: Conflict or Coexistence?", (2003) 5 *Minnesota Intellectual Property Review*, p. 48
2 Charter of Fundamental Rights of the European Union of March, 30, 2010, [2010], O.J. C 89/389
3 D. SPEIERS, *Intellectual Property Law Essentials*, Dundee University Press, 2009, p. 1
4 Article 52(1) CFR
5 Commission, Annual reports on the application of the Charter, 2018, retrieved 6 May 2020 <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en>
6 H. BREAKEY, "Natural Intellectual Property rights and the public domain" (2010) 73 MLR 208, p. 210

consideration of fundamental rights and freedoms in different cases lacks a systemic approach. This inconsistency entails two main shortcomings. First, an irregular approach logically goes at the expense of legal certainty. Second, failure to carry out consistent assessments of the value of the interests at hand risks producing unbalanced solutions.

Overall, this paper aims to demonstrate that relying on fundamental rights and freedoms to resolve conflicts helps to achieve a better balance of interests. In order to reach a fair solution this balancing exercise must be conducted carefully; not only by determining the rights at stake but also by exhibiting their respective weight according to the specific circumstances of the case. In order to illustrate how balancing rights influences case-law, the impact of fundamental rights and freedoms in trademark, patent and copyright cases will successively be assessed.

After having laid down the traditional issues governing IP-competition interplay, the progressive interactions between IP and competition law and the effect of fundamental rights and freedoms thereof will be displayed. Two cases will be analysed. The first deals with Standard Essential Patents ("SEP"). This paper assesses how the *Huawei*[7] case has been shaped by the Advocate General's ("AG") bringing of fundamental rights to the fore[8]. The *L'Oréal* judgement[9] will then illustrate how failure to acknowledge the range of rights at issue in this trademark case has led to an unbalanced solution.

The second part of the thesis will entail a broad study of the copyright area. The evolution of the Court's case-law as regards the pay-TV field will be analysed. It will be demonstrated how only an appropriate balance of the specific circumstances of the sector ensures providing a solution while considering all parties' interests.

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7 Judgement of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*., C-170/13, EU:C:2015:477 (hereinafter, "*Huawei*")

8 Opinion of AG Wathelet in Case C-170/13 *Huawei Technologies Co Ltd v ZTE Corp. and ZTE Deutschland GmbH*, EU:C:2015:477, delivered on 20 November 2014 (hereinafter, "Opinion of AG Wathelet")

9 Judgement of 18 June 2009, *L'Oréal SA and others v Bellure NV*, C-487/07, EU:C:2009:378 (hereinafter, "*L'Oréal*")

1. INTRODUCTING FUNDAMENTAL RIGHTS AND FREEDOMS IN THE INTELLECTUAL PROPERTY AND COMPETITION LAW CONFLICT

As the current Commissioner for competition, Margrethe Vestager, has pointed out, encouraging innovation requires "both competition and reward for innovators"[10]. While the need to promote innovation has thus classically shaped policy choices and courts' judgements, a greater conflict of interests comes into play when resolving IP-competition conflicts given the various types of cases (1.1). Examples of how this conflict is resolved in both trademarks and patents' cases will help grasp the wide range of fundamental rights and freedoms necessary to weigh in the balancing exercise (1.2.).

1.1. The interplay between IP and competition law: a conflict of wider interests

While IPR are essentially national in scope and confer upon their owners exclusive rights capable of fending off competitors[11], competition law aims on the opposite side at keeping markets open and providing means to challenge monopolistic situations[12]. Despite the apparent antinomy, acknowledgement of their underlying common objectives has given rise to the development of a set of principles aimed at "marry[ing] the innovation bride and the competition groom"[13] (1.1.1.). More recently, the focus on fundamental rights and freedoms has added a new dimension to the conflict (1.1.2.).

10 M. VESTAGER, "How competition supports innovation", Speech of 24 May 2016, retrieved 6 May 2020 < https://wayback.archive-it.org/12090/20191129205543/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-supports-innovation_en >

11 Judgement of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v Commission*, T-321/05, EU:T:2010:266, paragraph 362

12 G. NIELS, H. JENKINS, J. KAVANAGH, Economics for Competition Lawyers, *Oxford University Press*, 2011, p. 16

13 M. MONTI, "The New EU Policy on Technology Transfer Agreements", Speech of 16 January 2016, retrieved 6 May 2020 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_04_19>

1.1.1. The traditional IP-competition conflict

1.1.1.1. Friends or foes?

Categorising IP and competition law systems as diametrically opposed rests on the mistaken assumption that conferring a property right equates legitimizing exclusionary conduct from its holder[14]. Yet, while competition by imitation is indeed excluded by the effect of the IPR, competition by substitution remains open[15]. IP and competition law in reality share the objective of improving incentives for innovation[16], promoting consumer welfare and allowing an efficient allocation of resources[17]. The difficulty in grasping this common *rationale* stems from the apparently contradictory tools employed to meet such objectives.

On the one hand, competition law seeks to promote dynamic competition in open and contestable markets[18]. It regulates firms' behaviour that threaten the competitive process by prohibiting anti-competitive agreements (article 101 TFEU) and abuses of market dominance (article 102). Resting on the premise that an economic environment of optimal competitive intensity promotes innovation[19], it ensures monopolistic positions remain challengeable[20].

On the other hand, IP law rests on the premise that rewarding an innovative effort entails conferring a temporary monopolistic position intended to enhance incentives to innovate and create productive knowledge[21]. IPRs remain today essentially national in scope and might thus artificially re-establish borders between Member States.

To avoid any negative effect on the objective of realising the single market, both free movement and competition laws regulate the exercise of those rights.

Grasping businesses' increasing longing to resort to IPRs to protect their assets' value, regulators have abandoned their assumption that IPRs automatically confer market power in

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14 Y. S. CHOI, A. HEINEMANN, "Restrictions of Competition in Licensing Agreements: The Worldwide Convergence of Competition Laws and Policies in the Field of Intellectual Property" (2016) 17 *Springer*, pp. 405-422

15, I. GOVAERE and H. ULLRICH (eds.), *Intellectual Property, Market Power and the Public Interest*, Cahiers du Collège d'Europe/College of Europe Studies, Brussels, P.I.E. Peter Lang, 2008, p. 61

16 Y. S. CHOI, A. HEINEMANN, *supra* note 14

17 Commission, *Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements*, OJ [2014] C 98/3

18 G. NIELS, H. JENKINS, J. KAVANAGH, *supra* note 12, p. 16

19 P. LOWE, L. PEEPERKORN, "Singing in tune with competition and innovation: the new EU competition policy towards licensing" (2004) 26 *Fordham Corporate Law Institute Thirty-first Annual Conference: Roundtable on Intellectual Property and Antitrust*, pp. 265-86

20 G. NIELS, H. JENKINS, J. KAVANAGH, *supra* note 12, p. 16

21 *Ibid*

favour of a more thorough approach. Rather than contesting the possession of a right as such, articles 101 and 102 TFEU thus only tackle the anticompetitive exercise of IPRs, such as the anticompetitive assignment of the latter. Early on, guiding principles aimed at governing this IP-competition interplay have thus been developed through an important stream of judgments.

Consten-Grundig[22] first laid down the dichotomy between the "existence" of an IPR which cannot be challenged, and its "exercise", holding only the latter may be limited to the extent necessary to uphold free movement[23]. Competition provisions then profited from this reasoning[24]. Thus, in principle, the "specific subject-matter" or "essential function" of patents[25], trademarks[26] and copyrights[27] are safeguarded. Nevertheless, in addition to remaining quite blurred, the distinction does not provide for a total safe harbour for IPR[28]. Indeed, the Court of Justice of the European Union ("ECJ") still considers that practices falling within the scope of the specific subject-matter of the IPR might in certain exceptional circumstances be abusive.

The doctrine of exhaustion developed in *Deutsche Grammophon*[29] attempts to mitigate the IPR-compartmentalization's effects. According to this principle, once goods subject to IP protection have been placed on the market of one Member State by or with the consent of the owner of the rights in that country, its rightsholder cannot prohibit the export, import or resale of such goods in other parts of the EU.

The application of these principles now essentially governs the resolution of the IP-competition conflict, whatever IPR is at stake.

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22 Judgment of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission,* joined cases 56 and 58-64, EU:C:1966:41 (hereinafter, "*Consten-Grundig*")

23 *Ibid*

24 Judgement of 29 February 1968, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, C-24/67,EU:C:1968:11

25 Judgement of 31 October 1974, *Centrafarm BV and others v Sterling Drug Inc.*, C-15/74, EU:C:1974:114, paragraph 9: "the exclusive right [of the patentee] to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements."

26 Judgement of 31 October 1974, *Centrafarm BV and others v Winthrop BV,* C-16/74, EU:C:1974:115, paragraph 8: "the exclusive right [of the trademark owner] to use that trademark, for the purpose of putting products protected by the trademark into circulation for the first time, and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trademark by selling products illegally bearing that trade mark."

27 The subject-matter depends on the form of exploitation of the protected work. See e.g. Judgement of 20 October 1993, *Phil Collins and others v EMI Electronla GmbH*, C-92/92 and C-326/91, EU:C:1993:847, paragraph 20, as regards artistic performances: "the right to exploit commercially the marketing of the protected work, particularly in the form of licenses granted in return for payment of royalties"

28 K. CZAPRACKA, *Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches*, Edward Elgar Publishing Limited, 2009, p. 98

29 Judgement of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.*, 78/70, ECLI:EU:C:1971:59

1.1.1.2. *Main competition issues in patent, trademark and copyright laws*

The first hints of competition law intervention within the IP field were discerned with regards to patent issues. A patent is a legal title granted for an invention having a technical character[30] and is perceived as a compromise between the holder's voluntary disclosure of its invention and society's concession to limit exclusionary rights[31]. The most competitively problematic practices involving patents comprise refusal to license, excessive pricing, and delaying market entry of competitors by abusing regulatory procedures. The practice of bringing injunctions by an SEP holder against a competitor will be the focus of paragraph 1.2.1.

Second, as regards trademarks, signs distinguishing the goods and services of one company from those of another[32], agreements through which owners seek to impose contractual restrictions preventing retailers from marketing their products through certain channels[33] have caught the attention of competition authorities. *Dior*[34] and *Coty Germany*[35] illustrate how a "luxury image" argument may justify the restrictive effect resulting from an online sales ban[36]. The Court has acknowledged that online sales might impair the quality of luxury goods resulting not only from material characteristics, but also from the "allure and prestigious image which bestows on them an aura of luxury". The use of a competitor's trademark in advertising and unfair publicity claims has also given rise to an important stream of judgements. The *L'Oréal* case, which will be analysed in paragraph 1.2.2., depicts the fine line between an authorised trademark use and an anticompetitive one.

Third, copyright ensures that authors, composers, artists, film makers and other creators receive recognition, payment and protection for their works[37]. Copyright holders typically restrict competition through practices such as refusals to license and tying, the favouring of own content and use of excessive royalties. The Court's focus on territorial licensing agreements for the

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30 Commission, "Patent protection in the EU", retrieved 3 May 2020, <https://ec.europa.eu/growth/industry/policy/intellectual-property/patents_en>

31 "SEP lessons learned from Huawei v ZTE", *China Law & Practice*, 2015, retrieved 3 May 2020, < https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5GXF-XXP1-JD1P-T01K-00000-00&context=1516831>

32 Commission, "Trade mark protection in the EU", retrieved 3 May 2020, <https://ec.europa.eu/growth/industry/policy/intellectual-property/trade-mark-protection_en>

33 H. STAKHEYEVA, *Multi-dimensional Approaches Towards New Technology*, Springer, 2018, p. 13

34 Judgement of 23 April 2009, *Copad SA v Christian Dior couture SA and others*, C-59/08, EU:C:2009:260

35 Judgement of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU: C:2017:941

36 H. STAKHEYEVA, *supra* note 33

37 Commission, "Copyright", retrieved 3 May 2020 <https://ec.europa.eu/digital-single-market/en/copyright>

exploitation of copyright holders' rights in the field of TV services will be the subject of paragraph 2's case-study.

1.1.2. An emerging dialogue with fundamental rights and freedoms

1.1.2.1. A late IP-fundamental rights and freedoms interaction

The birth of a European human rights system is a relatively recent phenomenon whose origin can be traced back to the end of the Second World War with the adoption of the European Convention on Human Rights[38] ("ECHR"). Despite IP law already existing by then, the two sets of laws developed in virtual isolation from each other for decades[39]. The first signs of interaction between IP and human rights law initially appeared through the acknowledgement that IP could be protected through the prism of the fundamental right to property.

While a crucial difference between "natural" property and intellectual property lies in the fact that IP only exists upon recognition by the legislature[40], the European Court of Human Rights nevertheless first recognised that the protection of ownership provided in article 1, Protocol No.1, was not limited to physical goods[41]. The major change as regards the interplay between IP and fundamental rights and freedoms came with the Treaty of Lisbon[42], which conferred binding effect on the CFR. Article 17(2) CFR expressly provides for the protection of IP itself. Now able to rely on a specific legal basis to protect their assets, rightsholders undoubtedly benefited from this evolution.

Despite the high level of protection prescribed on IPR[43], nothing in the ECJ's case-law suggests that their protection is absolute[44] and their exercise must thus be accommodated with competitors' and consumers' interests. Article 52(1) CFR provides the tools to determine how

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[38] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952

[39] L. R. HELFER, *supra* note 1, p. 47

[40] J. DREXL, "European and International Intellectual Property Law between Propertization and Regulation: How a Fundamental-Rights Approach Can Mitigate the Tension", (2016) 47 *The University of the Pacific Law Review*, p. 202

[41] European Court of Human Rights, *Gasus Fördertechnik GmbH v Netherlands* (App. No. 15375/89) (1995) Series A, No. 306-B

[42] EU, Treaty of Lisbon of 17 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306

[43] Judgement of 12 December 2018, *Servier and others v Commission*, T-691/14, EU:T:2018:922

[44] See e.g. Judgement of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*, C-70/10, EU:C:2011:771

to weigh the need to reward creativity and innovation against ensuring access to IP work[45]. Often perceived as the "central challenge" when bringing the two regimes together[46], it implies that the exercise of an IPR may be restricted, provided the restriction corresponds to objectives of general interest, is not disproportionate and intolerable, and does not impair the very substance of the right guaranteed.

1.1.2.2. Introducing fundamental rights and freedoms within the realm of competition law

Considering that the single market includes a system ensuring that competition is not distorted[47] stems from the need to prevent private parties from reinstating borders brought down by the four freedoms[48]. As pointed out by Margrethe Vestager, "the founding fathers of Europe understood that there would be […] no functioning Single Market without a strong competition policy enforced by a central competition authority"[49] and as such, provisions regulating the exercise of the four freedoms and of competition have always coexisted in the EU Treaties. The preamble of the TFEU[50] specifically provides for the objective of safeguarding competition and applying primary law is essential to enhance consumers welfare and ensure an efficient allocation of resources. Additionally, being able to operate in a market where competition is safeguarded forms part of an undertaking's freedom to conduct a business as enshrined in article 16 CFR[51].

Nevertheless, the intrusion of competition authorities in businesses choices severely encroaches both their contractual freedom and their freedom to conduct a business. Additionally and depending on the circumstances of the case at hand, a wide range of other CFR rights might be affected. Competition law provisions and the CFR rights having equal normative value,

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45 A. PEUKERT, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature" (2015) *Christophe Geiger (ed.), Research Handbook on Human Rights and Intellectual Property*, pp. 132-148
46 *Ibid*
47 TFEU, Protocol (No 27) on the internal market and competition
48 A. GERBRANDY, "Rethinking Competition Law within the European Economic Constitution" (2019) 57 *Journal of Common Market Studies*, pp. 127-142
49 M. VESTAGER, "The values of competition policy", speech of 13 October 2015, retrieved 3 May 2020 < https://wayback.archive-it.org/12090/20191129202939/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/values-competition-policy_en>
50 TFEU, preamble
51 European Union Agency for Fundamental Rights, "Freedom to conduct a business: exploring the dimensions of a fundamental rights", retrieved 5 May 2020 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf>

competition authorities will thus regularly be faced with the difficult task of deciding whether antitrust intervention is proportionate.

1.1.2.3. Bringing fundamental rights and freedoms at the forefront of the IP-competition interplay

Despite IPR and free competition both being located at the top of the normative hierarchy, they do not enjoy absolute protection and restrictions on their respective exercise might thus be imposed. Resolving IP-competition conflicts is even more complex given the wide range of fundamental rights and freedoms that the promotion of innovation and investment encompasses. References to the need to observe fundamental rights have entered the realm of most IP instruments[52]. While some aim at protecting rightsholders, such as the right to an effective remedy or the right to privacy, others may benefit both holders and the public globally – for example, freedom of expression or freedom of arts.

In the IP-competition area, the uprising of fundamental rights issues was sparked by AGs in the context of preliminary rulings. In respect of trademark law, AG Poiares Maduro highlighted in *Google France*[53] that the protection afforded to innovation and investment could never be absolute and had to be balanced against, amongst others, freedom of expression and freedom of commerce. Similarly, AG Jääskinen underlined in *L'Oréal/eBay*[54] the importance of taking freedom of expression and information into account. AG Wathelet, as will be seen below, urged the Court in *Huawei Technologies*[55] to take account of the importance of the right of access to courts in the balancing exercise. Finally, whatever right is at stake, protecting consumers must always be born in mind. In this context, AG Wahl in *Coty*[56] explained that it was in the consumers' interest that the luxury image of the products was not tarnished.

Identifying the rights at stake only constitutes the first step of the analysis. The difficulty lies

52 E.g. Recital 32 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45; Recital 70 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92

53 Opinion of AG Maduro in Cases C-236/08-238/08, *Google France and Google/Louis Vuitton et al.*, EU:C:2010:159, delivered on 22 September 2009, paragraph 102

54 Opinion of AG Jääskinen in Case C-324/09, *L'Oréal SA and Others v eBay International AG and others*, EU:C:2010:757, delivered on 9 December 2010, paragraph 49

55 Opinion of AG Wathelet, *supra* note 8

56 Opinion of AG Wahl in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941, delivered on 26 July 2017

in finding how to balance those rights adequately. AG Cruz Villalón elaborated in this regard useful guidelines in his Opinion in *UPC Telekabel*[57]. The balancing exercise to be conducted under article 52(1) CFR entails determining the appropriateness of the restriction – namely, whether the measure is capable of realising the legitimate aim pursed – before analysing its necessity and proportionality. According to him, it is for national courts to assess on a case-by-case basis whether the disadvantages caused by the measures are proportionate to the aim pursued.

In our opinion, a careful implementation of those two steps – identifying the rights at stake and carrying the balancing exercise – is decisive in reaching a fair solution. As has been exposed earlier, IP-competition conflicts are common but the range of rights at stake depends greatly on the circumstances of each case. The AGs' efforts to increasingly identify and analyse the rights at issue are unfortunately not systematically reproduced by the ECJ, which remains more timid in its references to the fundamental rights and freedoms when providing guidance on those IP-competition preliminary rulings[58]. The tendency to leave to national courts the final decision goes at the expense of the production of precise and comprehensive guidelines to resolve the balance. Not only does it allow to question the reasoning of the decision, it also threatens legal certainty as national courts will lack the legal tools to resolve future conflicts. Finally, as will be shown in the remaining of this paper, we are of the opinion that judgements reached after a careful exposition and balancing of the rights at stake are fairer.

1.2. Case studies

1.2.1. *Huawei v ZTE*: analysis of a case at the junction of patents and competition laws

Technical standardisation forms an essential component of the modern economy. By ensuring interoperability, facilitating the creation and integration of markets, reducing uncertainty in the marketplace and lowering costs and prices for downstream products[59], standards are not only crucial for innovation and growth but also essential for any operator wishing to enter a market.

[57] Opinion of AG Cruz Villalón in Case C-314/12 *UPC Telekabel*, EU:C:2014:192, delivered on 26 November 2013, paragraphs 91-109.
[58] By way of example, while the term "freedom" was cited eight times in AG Poiares Maduro Opinion in *Google Franc*e, this word is inexistent in the ECJ judgement.
[59] OECD, *Licensing of IP rights and competition law – Note by the EU*, 2019, DAF/COMP/WD(2019)52

Standards are protected by SEP. Eager to refrain third parties from competing with them, SEP holders tend to seek injunctions against potential infringers during licensing negotiations. This practice has given rise to challenging issues for the Commission and the Court. Before analysing the decisive *Huawei v ZTE* case (1.2.1.2.), the state of the law prior to the decision will be exposed (1.2.1.1.).

1.2.1.1. SEP and the right to access to courts in the IP-competition interplay

1.2.1.1.1. Setting the scene: the specific case of SEP

Contrary to a non-SEP patent, which can be circumvented through alternative solutions, it is impossible to manufacture standard-compliant products without using the technologies covered by the SEP[60]. An SEP holder might thus abusively use its economic power to establish extremely difficult conditions for accessing it[61]. In order to ensure access to the protected technology and compensate the SEP holder[62], standard setting organisations require the latter to license its SEP on fair, reasonable and non-discriminatory ("FRAND") terms. Despite this safeguard, SEP holders use injunctions against implementers of their technologies during licensing negotiations to exclude them from all market activities. This potential to exclude competitors has raised concern from the competition authorities.

The most recent cases prior to *Huawei* are the *Samsung* and *Motorola*[63] cases. According to the Commission, where SEPs holders have committed to (i) license their SEPs (ii) on FRAND terms and (iii) the licensee is willing to take a license on such terms, seeking to exclude competitors from the market by bringing an injunction is anticompetitive. The Commission's abuse analysis seeks to determine whether burdensome settlement terms have been imposed by the SEP holder, but does not go as far as requiring that willing licensees are completely excluded from the market[64]. Nevertheless, the absence of definition of "willingness" resulted both in legal uncertainty generally and under-protection for SEP holders given that mere

60 D. GERADIN, "European Union Competition Law, Intellectual Property law and Standardization" (2017) *J. Contreras Ed., Cambridge Handbook on Technical Standardization Law, Cambridge University Press*

61 D. GRYNFOGEL, « Une illustration de la confrontation entre concurrence et propriété intellectuelle : les licences FRAND » (2016) 5 *Revenue de jurisprudence de droit des affaires*, p. 341

62 Case AT.39939, *Samsung – Enforcement of UMTS Standard Essential Patents*, Commitments Decision, 29/04/2014, paragraph 40 (hereinafter, "*Samsung*")

63 Case AT.39985, *Motorola – Enforcement of GPRS Standard Essential Patents*, 29/04/2014 (hereinafter, "*Motorola*")

64 S.-P. BRANKIN, S. CISNAL DE UGARTE, L. KIMMEL, "*Huawei/ZTE:* Towards a More Demanding Standard for Abuse in Essential Patent Cases" (2016) 7 *Journal of European Competition Law & Practice*

demonstration of an inclination to accept FRAND terms by a third party seemed sufficient to demonstrate such "willingness". It thus rapidly became clear that this new test starkly undermined SEP-holders' protection.

1.2.1.1.2. Determining the rights at stake

The SEP-area particularly well reflects the complexity that may exist in reconciling interests defined in terms of fundamental rights and freedoms. The need to strike a balance between rewarding SEP holders and allowing unrestricted access for industry implementers wishing to market standard compliant products involves a set of equal-ranking rights that need to be carefully weighed to reach a fair solution.

The significant value resulting from the indispensability of accessing an SEP for potential competitors envisioning market entry entails two logical consequences. On the one hand, the patent owner has a legitimate interest in seeking to secure its right to access courts in order to protect its invention. On the other, however, an abusive recourse to injunctive relief after having agreed to license on FRAND terms might severely restrict the ability of potential entrants to obtain a license and as such, restrict competition. The conflict thus boils down to accommodating those two conflicting views while taking into account that whatever the outcome, a severe impact on businesses practices and negotiations' conduct might follow.

Indeed, on the one side, favouring the right to access to courts bears the risk of putting licensees at a significant negotiations' disadvantage. The patent owner, knowing it has injunction in its arsenal, might leverage it to obtain supra-competitive licensing terms. The underlying strategy lies in the logic that an infringing technology implementer will have greater difficulty coping with an issued injunction than any type of monetary award[65].

On the other side, securing the freedom to conduct business by restricting the availability of injunctions might equally reduce the likelihood of the parties reaching FRAND license agreements. The future licensees knowing in such a situation that they could anyway exploit the patented invention without having to secure authorisation, their incentive to negotiate in good faith for a license would be significantly reduced. The disadvantageous position in which SEP owners would then be placed may impede innovation incentives in the long run. Spending

65 J.G. SIDAK, "The Meaning of FRAND, part II: Injunctions" (2015) 11, *Journal of Competition Law & Economics*, pp. 201-269

time and money developing a new technology indeed seems pointless if no protection follows. Thus, as is often the case in the IP-competition conflicts, choosing to favour one or the other party may ultimately have a negative impact on innovation and consequently, on consumers. It is against this background that the *Huawei* case was decided.

1.2.1.1. Huawei v ZTE

1.2.1.1.1. Facts and legal analysis

Huawei, a Chinese telecommunications operator, had committed to license its SEP relating to the LTE mobile telephony standard on FRAND terms. ZTE, a Chinese company, marketed products infringing the patent but had declined to pay royalties or render an account of past use. Huawei therefore sought an injunction before the referring court to prohibit ZTE from using its patent. The latter argued that Huawei was abusing its dominant position in a market for technology essential to the LTE standard. The issue of abuse was referred to the ECJ for a preliminary ruling.

While ZTE's bad faith prevented qualifying Huawei's conduct as abusive[66], important guidance was provided by the Court to determine in which cases such an abuse could occur. Rather than endorsing the *Samsung* and *Motorola* exploitation-based abuse analysis, the Court suggested that the abusive behaviour must be to exclude "products manufactured by competitors" and possibly to "reserve to itself the manufacture of the products in question"[67]. Crucially, it provided a framework confirming that an SEP holder might in certain circumstances seek injunctive relief against a standard implementer to enforce its patent without breaching article 102 TFEU. Departing drastically from the one developed by the Commission in *Samsung* and *Motorola* under which a licensee merely had to show a "willingness" to negotiate, the Court places obligations on both the SEP-owner and the licensee.

[66] S.-P. BRANKIN, S. CISNAL DE UGARTE, L. KIMMEL, *supra* note 64
[67] *Huawei*, *supra* note 7, paragraph 52

1.2.1.1.2. The role of fundamental rights and freedoms in shaping the Court's decision

AG Wathelet adopted an interesting approach based on a balancing of CFR rights of both the licensor and the licensee[68]. Combined with a good understanding of the economic foundations of the case[69], his choice to define the conflict in pure legal terms[70] by assessing the role of the different fundamental rights and freedoms at stake allowed him to strike a careful balance of the interests to take into consideration in the specific circumstances. In his view, the conflict boiled down to weighing on the one hand, the right to IP and the right of the SEP-holder to access to courts and on the other, the freedom to conduct business of the willing licensee[71]. In particular, he insisted on the "importance" of the fundamental right of access to courts as a way to overcome the SEP holders' under-protection he condemned a few paragraphs before[72].

By referring to the freedom to conduct business rather than simply relying on antitrust provisions, AG Wathelet interestingly chose to found the competition law concerns in fundamental rights of ZTE[73]. First, it demonstrates a will to introduce the Charter in an antitrust reasoning. This approach fits in the gradual recognition of the importance of the Charter. Second, the successive listing of both the right to conduct a business and the necessity to safeguard competition illustrates that the AG wants to insist on both the private and public values involved. While the rights to IP and access to courts are both private interests benefiting the SEP holder, acknowledging a private fundamental right to the SEP user would confer him an additional ground on which to base his claim.

While the ECJ acknowledged the approach defined in fundamental rights terms, it did it more conservatively. In the Court's view, the situation must be defined as requiring a balance to be drawn between free competition on the one hand, and protection of IP and effective judicial protection on the other[74]. Its analysis of the different rights at stake thus did not extend as far as that of the AG in two main respects. First, while listing effective judicial protection as part of the rights to protect, the Court did not reiterate the particular importance of this right as had been done by the AG but rather, prefers including it as part of the SEP's owner rights under the

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68 J. DREXL, *supra* note 40, p. 210
69 *Ibid*, p. 217
70 T. RIIS, *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society*, Edward Elgar Publishing, 2016, p. 194
71 Opinion of AG Wathelet, *supra* note 8, paragraph 59
72 *Ibid*, paragraph 66
73 T. RIIS, *supra* note 70, p. 194
74 *Huawei*, supra note 7, paragraph 42

protection of IP. Second, the Court did not seem to accept the equation between freedom to conduct a business and free competition. Any reference to article 16 CFR is indeed missing and the Court preferred relying on antitrust provisions for carrying out the balancing exercise. As such, the Court did not only refute the AG's approach, but also that of the Commission in previous SEP-cases such as *Samsung* where the conflict had been defined as requiring accommodation of the right to IP, the right of access to a tribunal, and the freedom to conduct a business[75].

Reasons for avoiding any reference to this right might be diverse. It is likely that the Court considers it sufficient to refer to competition law provisions, of the same normative value as the Charter, to carry the balance out. Alternatively, the Court might consider that freedom of competition is not embodied in the freedom to conduct business[76]. Without any indication as to why the Court did not mention the user's fundamental right to conduct a business, the possibility for an SEP user to invoke this Charter right as a defence against an IP infringement claim remains to be determined[77].

We nevertheless consider that defining the conflict in fundamental rights terms has allowed the Court to strike an appropriate balance between the different interests at issue. By highlighting that the dichotomy of competition law and IP requires balancing two stipulations of equal-value, the Court implies that there cannot be a situation of absolute supremacy of one over the other. While the Court had already recognised that IPR could not simply be set aside through competition law, the exceptional circumstances test traditionally applied was used as a tool to justify antitrust superiority. By bringing the IPR up by reference to the Charter, the Court suggests that the analysis must always start by considering that the rights at stake are of the same value. This should in turn lead to fairer solutions and must be celebrated.

1.2.2. Trademark: *L'Oréal v Bellure*

The *L'Oréal v Bellure* case depicts how using one's trademark must remain fair so as not to amount to a distortion of competition. The situation of a competitor having imitated L'Oréal

[75] *Samsung*, *supra* note 62, paragraph 72
[76] B. LUNDQVIST, "The Interface between Competition Law and Standard Essential Patents – Some Early Comments on the *Huawei* case" (2015) In P. *Arnt Nielsen, P. Koerver Schmidt, & K. Dyppel Weber (Eds.),* Erhvervsretlige emner, pp. 183-194
[77] J. DREXL, *supra* note 40, p. 217

fragrances and sold them by reference to the original products raised questions as to the infringement of L'Oréal's trademarks and the legality of such practice under the comparative advertising regime. The applicable legal framework and issues will be set out (1.2.2.1.) before analysing the case at stake (1.2.2.2.).

1.2.2.1. The interaction between trademark protection and comparative advertising

1.2.2.1.1. Setting the scene: a complex legislative framework

Understanding the intricacies of the trademark-competition conflict as regards use of one's sign requires displaying the relevant provisions of the Directives on Trademarks[78] and Comparative Advertising[79].

Article 5 of the Trademark Directive states that a registered trademark owner may prevent third parties from using any sign (a) identical with the trademark in relation to goods or services which are identical with those for which the trademark is registered or (b) similar where there exists a likelihood of confusion on the part of the public. Broader protection is offered to the owner of a mark enjoying a reputation, as the use of an identical or similar mark in a way taking unfair advantage of, or being detrimental to, the distinctive character or the repute of the mark is prohibited[80]. A third party takes in particular unfair advantage where it exploits the coat-tails of the mark with reputation by transferring the image of the mark or of its characteristics to its goods[81].

Nevertheless, limitations exist as to the effect of the trademark[82] and the holder's rights must in particular be accommodated with the provisions governing the recourse to comparative advertising. This form of advertising consists in comparing the product or service of one company with that of others. Such advertisement generally aims at highlighting the advantages

[78] On the dates of the proceedings, Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks [1989] OJ L40/1. The relevant provisions remain unchanged in the subsequent versions (Directive 2008/95/EC of 22 October 2008, OJ L299/25*;* Directive (EU) 2015/2436 of 16 December 2015, OJ L336/1) (hereinafter "the Trademark Directive").

[79] On the dates of the proceedings, Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17. The relevant provisions remain unchanged in the subsequent version (Directive 2006/114/EC of 12 December 2006, OJ L376/21) (hereinafter, "the Comparative Advertising Directive").

[80] Trademark Directive, article 5(2)

[81] *L'Oréal*, *supra* note 9, paragraph 41

[82] Trademark Directive, article 6

of the goods and services offered by the advertiser as compared to those of a competitor. While not governed by traditional competition law provisions, comparative advertising is acknowledged by competition authorities as an important tool in promoting competition[83]. Indeed, if fair and not misleading, comparative advertising increases consumers' information about alternative products[84] and thus stimulates competition between suppliers of goods and services to the consumer's advantage[85]. Because of the importance of regulating this practice such as to avoid any distortion of competition within the single market, the Comparative Advertising Directive lays down the conditions under which this form of advertisement is authorised. In particular, the advertisement must not be misleading, create confusion between the two competitors or their goods, services or trademarks, discredit or denigrate the products at issue, or take unfair advantage of the reputation of the competitor's trademark.

In order to allow comparative advertising while sufficiently protecting trademarks, the general rule is that truthfully comparing competing products in advertising, and in doing so, identifying the competitor's goods by trademark, does not constitute trademark infringement or unfair competition[86]. However, comparative advertising will be prohibited if it may confuse consumers as to what they are buying. In *O2 Holdings Limited*[87], rendered a few months before *L'Oréal*, the ECJ confirmed that trademark law was applicable to comparative advertising, and that an infringement could not be found where the use of the trademark by the competitor does not give rise to a likelihood of confusion from the public[88].

1.2.2.1.2. Determining the interests at stake

Reconciling the protection accorded to IP owners by the Trademark Directive without distorting competition as prescribed by the Comparative Advertising Directive must be done by acknowledging both the interests of trademark owners and competitors, while taking consumer protection as the ultimate goal.

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83 F. BARIGOZZI, M. PEITZ, "Comparative Advertising and Competition Policy" (2004) *SSRN Electronic Journal*
84 *Ibid*
85 Directive 2006/114/EC, *supra* note 79, recital 6
86 S. SULEMAN, "Comparative Advertising, Disparagement and Trademark Infringement: An Interface" (2011) *SSRN Electronic Journal*
87 Judgement of 21 March 2018, *O2 Holdings Limited and O2 (UK) v Hutchison 3G Limited*, C-533/16, EU:C:2008:339
88 Comparative Advertising Directive, article 4

By aiming at guaranteeing the indication of origin of a good or service, trademarks enhance the efficient functioning of a competitive marketplace[89]. They act as an indicator of quality for the public and allow consumers to find goods from the same source as products they have enjoyed previously. Insufficient trademark protection is detrimental to consumers at large, because of the poorer quality of information and the risk of confusion between two products that would follow. Additionally, the perspective of insufficient protection would diminish investors' incentives to spend high costs developing their mark and registering it. Innovation as a whole would be impacted.

Trademark protection must however also be reconciled with other fundamental rights and freedoms such as competitors' freedom of speech. Clear and targeted advertisement constitutes one of the most efficient tools to communicate efficiently about competitors' products and consequently benefits the public as a whole. In particular, comparative advertisement, provided it is accurate, allows to highlight the merits of a product and can therefore "stimulate competition between suppliers of goods and services to the consumer's advantage"[90].

Therefore, two important objectives are pursued by the interaction of the two Directives at issue. First, use of a competitor's trademark must not come at the expense of accurate information provided to the public. Second, a competitor must not be allowed to unfairly take advantage of a trademark enjoying reputation, given the efforts spent by the owner to acquire such status. *L'Oréal* provides additional information as to how those interests may be safeguarded simultaneously.

1.2.2.2. Facts and legal analysis

Bellure was selling "smell-alikes" of some of L'Oréal's prestigious fragrances for which the latter group held registered trademarks including names and depictions of containers and packaging, but not for the smells. It was not at issue that neither the public nor professionals could be misled as to the origin of the products. In order to ensure consumers understood the products offered were copies of *L'Oréal* fragrances, two routes were employed. First, the packaging and name of the perfume offered were clear copies of the famous perfumes (e.g. one fragrance was called "La Valeur" and a treasure chest was printed on the package containing a

[89] S. SULEMAN, *supra* note 86
[90] Directive 2006/114/EC, *supra* note 79, recital 6

pyramid-shaped bottle[91], imitating the “Trésor” perfume). Second, Bellure produced a price-comparison list displaying the price of its products in comparison to the corresponding L’Oréal fragrance.

“Trésor” by L’Oréal

“La Valeur” by Bellure

“Miracle” by L’Oréal

“Pink Wonder” by Bellure

Figure 1: *L’Oréal fragrances and their copies by Bellure*[92]

[91] A. KUR, L. BENTLY, A. OHLY, “Sweet Smells and a Sour Taste – The ECJ’s L’Oreal Decision”, *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-12*

[92] Source: IPPT20090618, ECJ, *L’Oréal v Bellure*, p. 1, retrieved 6 May 2020 <https://www.ippt.eu/files/2009/IPPT20090618_ECJ_L-Oreal_v_Bellure.pdf?fbclid=IwAR0iUj6xzbeDWHbnzlHz0TW1bcNYHPOcq7sRVyN8L2gFH9NY92Bef-5k9bE>

L'Oréal argued that both the use of comparison lists and the imitation of their perfumes constituted an infringement of its trademarks. Five questions were referred to the ECJ. Questions 1, 2 and 5 concerned the scope of article 5(1)(a) of the Trademark Directive. Essentially, the Court was asked to determine whether a third party takes unfair advantage of a mark with reputation by using it in a comparative advertisement without any likelihood of confusion or risk of detriment arising. Questions 3 and 4 enquired whether, according to article 3(a)(1) of the Comparative Advertising Directive, indicating through a comparison list that a product has a major characteristic similar to that of a product marketed under a mark with reputation amounts to taking unfair advantage of this reputation.

As preliminary observations, it must first be observed that the legality of the manufacture and offering of products similar to those of L'Oréal by Bellure was not at issue in the case[93], given that no IPR in the UK prevented Bellure from imitating them. Secondly, the replica packaging was found not to resemble L'Oréal's to the extent of risking of amounting to misrepresentation to the public[94]. The question before the ECJ was therefore only whether Bellure was entitled to inform the public that he was offering copies of L'Oréal's products, or whether it had to be left to consumers to find it out.

Regarding the question relating to the use of another mark's reputation, a broad interpretation of the meaning of "unfair advantage" was adopted. For the Court, taking advantage of another mark's reputation by seeking "to ride on the coat-tails" of this mark "in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort"[95] spent by the mark's proprietor, suffices to cause infringement. No likelihood of confusion or other detriment must be characterised for such a finding[96]. As such, a prohibition on "free-riding" or "parasitism" *per se*[97] seems to be favoured.

As regards the use of L'Oréal's trademarks on the comparison list, the ECJ highlighted that the finding of an infringement under article 5(1)(a) should be reserved to cases where "a third party's use of the sign affects or is liable to affect the functions of the trademark"[98]. While a

93 A. KUR, L. BENTLY, A. OHLY, *supra* note 91
94 C.J. CRAIG, "Perfume by Any Other Name May Smell as Sweet… But Who Can Say?: A Comment on L'Oreal v. Bellure" Case Comment, (2010) 22 IPJ pp. 319-328
95 *L'Oréal*, *supra* note 9, paragraph 49
96 *Ibid*, paragraph 50
97 D. GANGJEE, R. BURRELL, "Because You're Worth It: L'Oréal and the Prohibition on Free Riding" (2010) 73 Mod. L. Rev. pp. 282-288
98 *L'Oréal*, *supra* note 9, paragraph 58

purely descriptive use would therefore be excluded from the scope of this provision, any unlawful use, affecting "the essential function of the mark", but also "other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or *advertising*" would amount to an infringement of the owner's right[99].

Finally, in response to the issue relating to comparative advertising, the ECJ recalled that using a mark in this form of advertisement might infringe an owner's right when all the requirements stated in the Comparative Advertising Directive are not satisfied. In the present case, by taking unfair advantage of the reputation of the trademark and presenting the goods or services as imitations or replicas of the products bearing a protected trademark, the advertisement was found to breach two of the aforementioned Directive requirements.

In our opinion, the decision to broadly favour the trademark owner insufficiently takes account of the different interests at issue in the case. Rather than to be based on a pure legal analysis aimed at weighing the rights at stake, similar to the one carried out in *Huawei*, the Court's approach rather seems to be guided by moral considerations.

1.2.2.3. Comment: an insufficient consideration of the fundamental rights and freedoms at issue

1.2.2.3.1. A reasoning based on morality rather than legality

The decision to broaden the scope of the trademark owner's protection by prohibiting "free-riding" *per se* sits uneasily with the economic and legal principles governing the field. Economically first, free-riding is usually condemned when the positive externality enjoyed by the third party is not compensated by the benefit-generating activity operator receiving adequate incentives[100]. Applying this theory to the case at hand would mean that L'Oréal should receive an advantage in exchange for the gain Bellure makes by using the latter's trademark. However, this conclusion disregards the fact that the level of protection afforded by the law should not be more than what is required to incentivize the benefit-producing activity. Therefore, not every positive externality needs to be compensated – to cite Mark Lemley's example[101], the benefit

99 C.J. CRAIG, *supra note* 94
100 *Ibid*
101 M. LEMLEY, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex. L. Rev 1032, pp. 1048-1049

we might enjoy from our neighbour's garden represents a social gain whose value does not need to be captured by the market[102] – provided that the advantages the owner of an established brand secures maintain sufficient incentives for him to continue producing[103]. Favouring a broad prohibition against taking advantage of another's reputation or market presence can thus hardly be justified on economic grounds[104].

Legally then, the Court seems to consider that competition rules may only prevail in cases of competition by substitution rather than competition by imitation. Yet, seeking to capture competitors' clients constitutes the basis of competition[105]. In addition, Bellure's sales received some demand given that a group of consumers was willing to pay for cheaper substitutes. By equating free riding with the simple copying, imitation or referencing of one's product, which in reality enhances competition[106], the Court renders the word "unfair" meaningless. Above all, by depriving the public of a source of accurate information, the Court's solution cannot even be justified on consumers' interests as they do not receive any benefit from it.

Therefore, in the absence of any concrete demonstration as to why Bellure's conduct was unfair, the Court's analysis seems to rest mainly on moral grounds[107]. In addition to failing justifying why the practice at stake shall be prohibited in the absence of any confusion or harm to the trademark's reputation, the language adopted by the Court is moralizing and suggests that taking advantage of another's efforts is by nature wrong[108]. Semantically, the term "free-riding" already conveys the idea that it is unfair. Yet, as highlighted above, no legal argument justifies such a prohibition *per se*, and as Breakey has pointed out, IPRs necessarily have to be limited in light of other people's rights[109]. The focus on ethical reasons for reaching this solution unfortunately goes at the expense of a correct balancing of the rights at issue.

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102 C.J. CRAIG, *supra* note 94
103 *Ibid*
104 D. BARNES, "Trade-mark Externalities" (2007) 10 Yale J. Law & Tech. 1
105 See e.g. *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1980] 2 NSWLR 851
106 D. GANGJEE, R. BURRELL, "A Brief Note on L'*Oreal* and the Prohibition on Free Riding" (2009) *SSRN Electronic Journal*
107 *Ibid*
108 C.J. CRAIG, *supra* note 94
109 D. GANGJEE, R. BURRELL, *supra* note 106

1.2.2.3.2. At the expense of a fair balancing of rights

While the combination of the Trademark and the Comparative Advertising Directives aims at ensuring the fairest possible outcome as regards the trademark owner, competitors, and consumers, the ECJ analysis seems to set aside any fundamental rights' or freedoms' consideration arising in the *L'Oréal* case. Any reference to rights such as freedom of expression or information is indeed missing in the judgment, amounting to uncertainty about the very fact that these considerations have even entered the judges' minds[110]. Yet, as highlighted above, various fundamental rights and freedoms were at issue in the case and Jacob LJ expressed in this regard concern about the impact of the judgement on freedom of information, consumer choice and alongside that, freedom to trade when the case returned to the English Court of Appeal [111].

In our opinion, although the CFR did not yet have binding value by the date of the proceedings, account of the fundamental rights at issue and determination of their respective weight would have been necessary in order to strike a fair balance and legitimate the high level of trademark holders' protection. By seriously limiting the use of one's trademark, the Court suggests that a trademark owner protection is superior to the public interest[112]. While such a finding might, according to the circumstances, be justified, the absence of discussion about the impact on social welfare makes the solution less legitimate[113]. In addition, failure to provide any justification as to why the distinction between "fair" and "unfair" free-riding is not relevant in the present case, the Court obviously failed to realise the far-reaching consequences for competitors whose freedom of expression is as a result severely curtailed. The *rationale* for limiting freedom of speech by prohibiting communication about a legal marketing is hard to grasp.

In fine, the negative consequences resulting from the lack of balancing exercise extend to the consumers. Yet, given that trademark reputation can only be gained through the role played by the public in creating and unmaking them, identifying the proprietary's interest solely with the trademark owner thus fails to grasp the consumers' role as co-authors in the creation of a brand[114].

110 A. KUR, L. BENTLY, A. OHLY, *supra* note 91
111 *L'Oréal SA v Bellure NV* [2010] EWCA Civ 535
112 C.J. CRAIG, *supra* note 94
113 *Ibid*
114 D. GANGJEE, R. BURRELL, *supra* note 106

Critics about this failure to weigh the different interests have been numerous. If some have predicted that the ECJ would seize in the keyword cases[115] the opportunity to rethink its definition of unfair advantage, the Court still applied the *L'Oréal* approach according to which every use of a trademark with a reputation as an advertising keyword amounts to unfair advantage[116]. Thus, this insufficiently-balanced solution in our opinion remains in force for the time being.

115 In particular, judgement of 22 September 2011, *Interflora Inc. and others v Marks & Spencer plc and Flowers Direct Online Ltd*, C-323/09, EU:C:2011:604

116 A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, Edward Elgar Publishing, 2014

2. THE COPYRIGHT AREA: AN EXAMPLE OF THE DIFFICULT FUNDAMENTAL RIGHTS AND FREEDOMS ACCOMODATION

The case-law's evolution in the copyright sector aptly allows to grasp the nearly insurmountable tension in guaranteeing sufficient protection to IPR holders while preserving the single market. Because of the coexistence of public and private interests in resolving the conflict, fundamental rights and freedoms' influence is quite visible in shaping the Court's decisions. An overview of the main issues and how the legislator and the Court have attempted to overcome them will be conducted (2.1.) before analysing in-depth the fundamental rights balancing exercise carried out by the Court (2.2.).

2.1. Overview of the context and case-law evolution

The challenges that would pose the application of copyright regimes – inherently national in scope – to the single market completion have rapidly been appreciated by the ECJ and the legislator. Already early on, harmonising legislation has been enacted in an attempt to mitigate the dangerous effects of the so-called territoriality principle. Exposing the main issues and the first solutions to alleviate them (2.1.1.) will allow understanding the increasingly protective ECJ's solutions vis-à-vis the single market (2.1.2.).

2.1.1. Setting the scene: legal context and main challenges

2.1.1.1. Legislative attempts to overcome the inevitable tension between copyright law and free movement provisions

As a result of a broad application of the principle of territoriality within the copyright law field, copyright is normally acquired and protected on a country-by-country basis[117] and rightsholders may grant licenses of national scope. In particular, audiovisual content such as popular sports coverage and films is usually licensed by rightsholders to pay-TV broadcasters on an exclusive and territorial basis. However, the application of this principle has been criticised for the

117 European Parliament, Regulating online TV and radio broadcasting, European Parliamentary Research Service, 2019

enforcement costs securing multiple licenses might entail and as a corollary, the reduction in consumers' possibility to view programs originating from another Member State. In light of these criticisms, the Copyright[118] and the SatCab[119] Directives were enacted to attempt mitigating the negative effects of the territoriality principle on the single market.

The Copyright Directive regulates the application of the exhaustion principle, whose application in the copyright field is challenging. Indeed, while determining the position of tangible objects such as vinyl records, CDs, DVDs, etc., can easily be done, it is considerably more difficult to apply the principle to digital content which can hardly be localised. To overcome this difficulty, the Directive distinguishes between the distribution right and the right of communication to the public. On the one hand, the distribution right entitles the author of a work to require his consent for any distribution of tangible copies of said work[120]. The exhaustion right applies to the distribution of works incorporated in tangible products. On the other hand, the communication to the public right refers to the possibility of making on-demand services available in such a way that the public may access it and request its transmission individually with respect to time and place[121]. The exhaustion principle does not extend to this right of communication to the public. Therefore, an important distinction still remains between tangible and intangible works, given that a rightholder may not oppose to the circulation of its film incorporated in a DVD, but may do so would his film be broadcasted through an intangible medium.

The SatCab Directive introduces the "country of origin" principle for communications to the public by satellite. According to this principle, any audiovisual service originating from a provider established in one State can freely circulate within any other State in the EU. The opposing principle, that of the "country of destination", entails that it is up to the country where the services are delivered to determine which rules are applicable and which bodies are competent for monitoring and enforcement. Application of the "country of origin" principle thus only requires complying with the rules of one State to broadcast the online work in the entire single market. By favouring it, the SatCab Directive aims at facilitating the cross-border

118 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] L167/10, as amended by Directive 2019/790 of 17 April 2019, OJ 2019 L130/92 (hereinafter, "Copyright Directive")

119 Directive 93/83/EEC of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15, as amended by Directive 2019/789 of 17 April 2019, OJ L130/82 (hereinafter, "SatCab Directive")

120 Commission, *Press Release – Communication on Copyright and Related Rights in the Information Society*, IP/96/1042, 1996

121 *Ibid*

transmission of communications by satellite. Nevertheless, the scope of this limit remains narrow. First, it only applies to communications to the public by satellite, meaning that any other form of transmission, such as online communication, will remain governed by the country of destination principle. Second, even in the case of satellite transmissions, this principle is regularly overruled by licensing practices.

Therefore, while the legislation has attempted to limit the application of the principle of territoriality in copyright law, the latter still essentially dominates the sector. The difficulty of mitigating its application lies in the delicate balance to be struck between the different rights at stake.

2.1.1.2. Realising the single market vs safeguarding IPR holders' interests

Resolving the conflict in the copyright arena is complex given the large number of parties along the contractual chain. At the top, rightsholders wish to have their IPR protected by receiving adequate remuneration for their efforts. At the other end, consumers might suffer from national licensing because of the impossibility to access content-related online services depending on the country in which they are in. In between, broadcasters and providers of online-content services are equally affected by territorial licensing because of the burden to obtain rights for every Member State they wish to display the work in. Safeguarding fairly each party's rights thus requires analysing the value of the fundamental rights and freedoms affected.

First, the protection of IPR as enshrined in article 17(2) CFR benefits from a licensing on a national scope. Rightsholders being able to receive payment from each different license secured, they enjoy over all high revenues. Territorial licensing can also be used as a tool to benefit from the different average price levels for products or services according to the Member State in which they are offered. Engaging in such a price discrimination strategy maximises profits[122]. Finally, securing rights at national level is a way to avoid competition with services or goods outside the country.

122 P.B. HUGENHOLTZ, Copyright Territoriality in the European Union, *Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament*, 2010

Second, the freedom to contract, whose protection is provided for in the Copyright Directive[123], justifies leaving rightsholders and broadcasters free to conduct negotiations in order to secure the licenses they consider appropriate.

Third, freedom to provide services entails abolition of national borders in order for content to circulate freely within the EU. In principle, consumers should be guaranteed access to audiovisual services, whether transmitted by satellite or offered online, whatever Member State they are in. Safeguarding this freedom should equally alleviate broadcasters and providers of online content's expenses, as they would not anymore be required to clear relevant rights in all Member States for which those services are made available[124].

Fourth, freedom of competition also suffers from the single market partitioning entailed as a result of the application of copyright law. Being prohibited from accessing the entire EU territory prevents companies to orient their activities so as to benefit from the lower tariffs of a neighbouring State. Yet, this practice also increases consumer welfare due to the effects of price differentiation.

Fifth, account must also be taken of the right to freedom of expression, whose full effectiveness might benefit from cross-border provision of broadcasting and information society services[125].

Therefore, safeguarding a fair balance of rights and interests in the copyright field is a complex exercise as is illustrated by the Court's case-law evolution regarding the legality of territorial licenses.

123 SatCab Directive, recital 16
124 P.B. HUGENHOLTZ, *supra* note 122
125 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1988 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L 320/54, recital 2

2.1.2. Territorial licensing in the TV sector: case-law evolution

2.1.2.1. Coditel[126] *and Murphy*[127]

2.1.2.1.1. Coditel I and II

The dispute at issue opposed Coditel, a cable TV company, against Ciné Vog Films, a film distributor. The latter had been assigned exclusive rights to exhibit "Le Boucher" in Belgium. The broadcasting rights as regards German territory were assigned to a German television broadcasting station. Coditel managed to pick up the signal in Germany directly and started distributing the film to its subscribers in Belgium. Ciné Vog sued Coditel for copyright infringement.

The Court in *Coditel I* assessed the compatibility of the territoriality limited assignments or licenses with article 49 TFEU. After highlighting that the specific nature of films' copyright justified departing from the assessment carried out in tangible works' cases[128], the Court emphasised why a copyright holder as Ciné Vog deserved extra protection. Specifically because films are made available to the public by "performances which may be indefinitely repeated"[129], the rightholder has a legitimate interest in calculating fees according to the actual or probable number of performances[130]. Authorising a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time also forms part of the logical exploitation of those rights. Therefore, the geographical limits agreed as part of the assignment aim at protecting adequately the author and are thus justified.

In *Coditel II*, the Court determined whether the exercise of copyright was anticompetitive. Basing its reasoning here again on the specific characteristics of the cinematographic industry, the ECJ noted that in itself, an exclusive exhibition license does not prevent, restrict or distort competition. However, the exercise of the rights may in certain economic or legal circumstances[131] restrict film distribution to an appreciable degree or distort competition on the cinematographic market. This would for example be the case if artificial barriers were created

126 Judgement of 18 March 1980, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, C-62/79, EU:C:1980:84 (hereinafter, "*Coditel I*"); Judgement of 6 October 1982, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others,* C-262/81, EU:C:1982:334 (hereinafter, "*Coditel II*").
127 Judgment of 4 October 2011, *Football Association Premier League Ltd and others v QC Leisure and others*, Joined Cases C-403/08 and C-429/08, ECLI:EU:C:2011:631 (hereinafter, "*Murphy*")
128 *Coditel I*, supra note 126, paragraph 12
129 *Ibid*, paragraph 12
130 *Ibid*, paragraph 13
131 *Coditel II*, supra note 126, paragraph 17

or if excessive fees could be charged. Ultimately, the Court left it to national courts to decide on this point.

2.1.2.1.2. Murphy

Premier League v Murphy interestingly depicts the tension between *Consten-Grundig*, following which absolute territorial protection falls within the scope of article 101(1), and *Coditel II*, pursuant to which the anticompetitive nature of such agreements depends on the context of which they are part. Football Association Premier League (FAPL) organises the filming of football matches in the English Premier League. Under its system of territorial exclusive licenses, licensees were both required to encrypt the broadcasts, so that each subscriber had to pay for a decoder card to watch the matches, and prohibited from supplying decoder cards for use outside their own territory. Parallel importers nevertheless transported some devices destined for the Greek market to the UK. Thus benefiting from the cheaper Greek subscriptions, some UK restaurants and pubs started broadcasting Live Premier League matches in their establishment. Premier League sued both QC Leisure, who was selling decoder cards, and Murphy, pub landlord who was using one of those, for having infringed its copyright. It relied on English legislation prohibiting foreign decoding devices from being imported into, sold and used on national territory for commercial purposes.

The first part of the assessment was conducted in light of article 56 TFEU. The free movement of services provisions were indeed applicable over those regulating free movement of goods: despite the tangible nature of decoders, the national legislation at issue dealt with them only as "instrument[s] enabling subscribers to obtain the encrypted broadcasting services"[132]. By preventing persons residing outside the State of broadcast from gaining access to satellite transmission services, the national legislation was found to confer legal protection on the restrictions integrated in the agreements and thus restricted freedom to provide services[133].

Turning to a potential justification, the Court first pointed out that although sporting events were not intellectual creations classifiable as works within the meaning of the Copyright Directive[134], their "unique and original character" might transform them into subject-matter

132 *Murphy, supra* note 127, paragraph 82
133 *Ibid*, paragraph 88
134 *Ibid*, paragraph 98

worthy of protection[135]. A restriction on the fundamental freedoms at stake can thus only be admitted where it seeks to safeguard the rights constituting this subject-matter[136]. In the present case, while the latter lies in the right to exploit commercially the marketing or the making available of the protected IP by the grant of licenses in return for payment of remuneration[137], it only guarantees rightsholders to request "appropriate remuneration"[138]. Payment obtained in return of a guarantee of absolute territorial exclusivity, because of the artificial price difference it entails, is "irreconcilable with the fundamental aim of the Treaty, which is completion of the single market"[139]. Consequently, the absolute territorial restriction could not be justified.

The analysis then shifted to the compatibility of the agreement with article 101 TFEU. The Court repeated the *Coditel II rationale* according to which a territorially exclusive license is not automatically anticompetitive[140]. It added that article 1(2)(b) of the Satellite Broadcasting Directive in principle allows a rightholder to grant a licensee an exclusive right to broadcast the subject-matter by satellite for a certain period of time, for one or more Member States[141]. Despite recalling these principles in line with the preceding case-law, the Court nevertheless considered that licensing agreements aiming at prohibiting or limiting cross-border provision of broadcasting services had as their object the restriction of competition[142]. In the present case, the contracts' clauses preventing broadcasters from supplying decoding devices enabling access to the protected subject-matter with a view to their use outside the territory covered by the licensing agreement were deemed problematic[143]. The absolute territorial exclusivity granted in the area covered by the license amounted to a restriction of competition which could not be justified.

Therefore, contractual provisions preventing viewers in one Member State from importing satellite decoder devices from another Member State in order to watch the services of a foreign broadcaster are no longer justified under EU free movement of services or competition rules

135 *Ibid*, paragraph 100
136 *Ibid*, paragraph 106
137 *Ibid*, paragraph 107
138 *Ibid*, paragraph 108
139 *Ibid*, paragraph 115
140 *Ibid*, paragraph 137
141 *Ibid*, paragraph 138
142 *Ibid*, paragraph 140
143 *Ibid*, paragraph 141

provisions[144]. For some authors[145], this solution was justified given that the SatCab Directive expressly provides for application of the country of origin principle. It would therefore seem logical that a program broadcasted in the country of origin can further be shown in the other Member States. Yet, the pay-TV investigation which followed cast doubt on whether this solution was limited to satellite diffusion.

2.1.2.2. Paramount decision[146] and Canal+ appeal[147]

The pay-TV saga started with the opening in 2014 of the Commission's investigation into licensing agreements between six Hollywood studios and Sky UK, an EU broadcaster. Interestingly, the Competition Commissioner, Jaoquin Almunia, had confirmed in a press conference by then that sports rightsholders had already taken steps following *Murphy*, or were in the process of doing so, to adjust their contracts so as not to grant absolute territorial protection to their broadcasters[148]. Therefore, the investigation's concerns were limited to the film sector.

Two clauses in the licensing agreements particularly attracted the attention of the Commission: (i) Sky was required "not to knowingly authorise reception of broadcast by a viewer outside the UK and Ireland"[149] and (ii) Paramount could not "authorise the availability of any third-party descrambling device that would allow viewing of [its] content"[150]. A Statement of Objections was addressed to each studio and Sky UK according to which their licensing contracts contained clauses restricting passive sales for their pay-TV services from consumers located outside the licensed territory. To avoid the imposition of any fine, Paramount in essence committed not to

144 S. MAVROGHENIS, P. FAJARDO, "The Canal+ Judgement: Your Favourite Domestic Channels, in Luxembourg (Take 2) – Absolute Territorial Protection" (2019) 10 *Journal of European Competition Law & Practice*, pp.228-231

145 E.g. D. DOUKAS, "The Sky is not the (Only) Limit – Sports Broadcasting without Frontiers and the European Court of Justice", (2012) 37 *European Law Review*, pp. 605-626; P. IBANEZ COLOMO, "Copyright Licensing and the EU Digital Single Market Strategy", *in* R. Blair, D. Sokol (eds.), *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech*, 2017, Cambridge University Press, p. 339

146 Case AT.40023, *Cross-border access to pay-TV*, Commitments Decision, 26/07/2016 (hereinafter, "*Paramount* decision").

147 Judgement of the General Court of 12 December 2018, *Groupe Canal + SA v Commission*, T-873/16, EU:T:2018:904 (hereinafter, "*Canal+*")

148 MLex, "Soccer leagues have removed suspect broadcast licenses, Almunia says, 13 January 2014

149 *Paramount* decision, *supra* note 146, paragraph 27

150 *Ibid*, paragraph 27

enforce in existing contracts or introduce in future contracts clauses aiming at restricting passive sales in the EEA[151].

Canal+, as exclusive licensee of Paramount in France and third-party to the case, appealed the commitments' decision[152]. It argued that the IPRs justify the absolute territorial exclusivity conferred by the contested agreement. Recalling the principles set out in *Murphy* in this regard, the General Court ("GC") held that the relevant clauses aimed at eliminating cross-border competition went beyond what was necessary. As to the argument that they promoted cultural production and diversity, the GC answered that such a claim should be assessed under article 101(3) and thus falls outside the scope of a commitment decision[153]. It nevertheless added *obiter dicta* that the absolute territorial protection manifestly goes beyond what is indispensable for the improvement of the production, distribution or the promotion of technical or economic progress[154] and that the argument would thus anyway be rejected.

By rejecting Canal+ appeal, the GC repeats the *Murphy* reasoning and extends it to online transmissions of copyrighted content. The argument according to which the solution in *Murphy* was justified on the ground that the broadcast was done by satellite thus hardly longer holds. If the case is not yet over, as an appeal is pending before the ECJ[155], it confirms for now the strict stance adopted towards territorial licensing agreements and raises doubts as to how to reconcile the different judgements.

2.1.2.3. From Coditel to Canal+: an impossible reconciliation?

As highlighted above, the dichotomy between *Coditel II* and *Murphy* was initially justified by the application of the country of origin/destination principle. Indeed, because of the application of the country of origin principle in *Murphy*, the agreements hampered the licensees' ability to broadcast work cross-borders. Absent the restrictive clause, this cross-border provision would have been possible. In *Coditel* however, the transmission was done through cable diffusion of television, area where the country of destination applies. A broadcaster needs to acquire the relevant rights in each State in order to legally broadcast the work throughout the EU territory.

151 *Ibid*, paragraphs 55(a) et (b), 56(a) et (b)
152 *Canal+*, supra note 147
153 *Ibid*, paragraph 59
154 *Ibid*, paragraph 68
155 Under reference C-132/19 P

Therefore, even absent the agreements, a work broadcasted in one State could not be shown in the rest of the EU because the holder's right would not be exhausted solely through first diffusion.

Admitting that territorial licensing agreements can escape the prohibition of article 101 when the country of destination principle applies thus aptly helped reconcile those two judgements. Yet, this explanation no longer stands following *Canal+*. Indeed, the GC upheld the illegality of the territorial licensing agreements even though the transmission was done via online transmission, area where the country of destination principle applies – as in *Coditel*. Consequently, the disputed agreements were not the cause of the impossible cross-border transmission given that the rightholder could anyway have relied on its copyright to prevent the licensee to broadcast its work in another Member State.

Thus, the transmission method does not seem to justify the different solution in the cases at stake. Rather, it appears that *Murphy* indeed marked a turning point towards greater protection of the free provision of services. Following the *Canal+* judgement, any type of licensing agreements restricting cross-border provision of copyright audiovisual content falls within the scope of article 101(1), regardless of the means of distribution. Such a strict stance does not seem to sufficiently balance the different fundamental rights at issue.

2.2. <u>Balancing the fundamental rights in the copyright cases</u>

The application of the balancing exercise carried out in the copyright cases, despite being provided for through different instruments (2.2.1), seems yet to be applied so as to favour an ever-broader cross-provision of services at the potential expense of consumers and competitors (2.2.2). The discussion will end with a brief presentation of the most recent legislative instruments (2.2.3.).

2.2.1. Balancing rights in the pay-TV sector

The high level of protection[156] prescribed by the legislator on IPR holders must be accommodated with the need to ensure a fair balance "between the categories of rightsholders,

156 Copyright Directive, recital 4

as well as between the different categories of rightsholders and users of protected subject-matter"[157]. In the context of the pay-TV saga, two important limits come into play.

A first set of limit is inherent in the copyright legislation[158]. On the one hand, the legislator has introduced exceptions and limitations to the exclusive economic rights[159]. On the other, rightsholders are guaranteed "appropriate remuneration"[160] rather than the highest possible. This limit ensures the simultaneous fulfilment of the objective of promoting the single market, of particular importance in the area given that the Copyright Directive has been adopted under the single market competence[161].

A second set of limit arises from the application of competition law provisions to the conflict. Article 101 TFEU will typically catch within its scope agreements between rightsholders and broadcasters aiming at partitioning the market, such as those at issue in *Murphy* or *Paramount*.

In a second phase, the judiciary finds itself confronted with the difficult task of combining and applying those principles. The recent shift towards an extensive protection of the single market results in a weakened IPR safeguard. While fitting in the increasing desire to abolish national frontiers, the justification for advocating an ever-broader cross-border services provision seems relatively weak.

2.2.2. An unjustified ever-broader cross-border services provision

2.2.2.1. A questionable "by object" qualification

The soundness of the economic analysis required to determine the anticompetitive nature of the agreement[162] in *Canal+* is debatable. Qualifying an agreement as anticompetitive by object requires assessing its content in light of the economic and legal context of which it is part[163]. If such an analysis reveals that the agreement is in fact a plausible means to attain a pro-competitive objective, or if assessment of the counterfactual reveals that no competition would

157 Copyright Directive, recital 31
158 B.L. JÜTTE, *Reconstructing European Copyright Law for the Digital Single Market*, Nomos, 2017, pp. 150-155
159 See the Copyright Directive, article 5
160 Copyright Directive, recital 61
161 Article 114 TFEU
162 R. WHISH, D. BAILEY, Competition Law, 8th ed., Oxford University Press, 2015, p. 120
163 Judgement of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, C-228/18 (not yet published)

anyway have existed absent it, the agreement will not be considered as restrictive of competition by object[164].

Arrangements impending market integration are assessed particularly stringently[165]. As a rule, agreements aimed at partitioning markets are restrictive by object because they negate the positive effects of the single market[166]. Still, *Coditel II* illustrates that the Court does not ignore the specific circumstances of each case and carefully weighs the different rights at issue. Indeed, the discussion of the counterfactual revealed that even absent the territorial licensing arrangement, a licensor could have invoked its copyright to prevent the cross-border transmission of its services. As such, no competition would have anyway existed. Similarly, in *Murphy*, as the counterfactual revealed that absent the agreement, competition could have taken place, the "by-object" qualification was justified.

On the other hand, the analysis in *Canal+* ignores the specific circumstances of the case and fails to adequately weigh-in the different interests at stake. Absent the agreements, reliance on their copyright would have allowed rightsholders to prevent the broadcasting of their work in other Member States. Therefore, competition would be excluded in any case. The GC did not enter into such considerations but rather mechanically equated exclusive territorial licenses to other object restrictions, thereby ignoring completely the differences between cross-border satellite transmissions and cross-border internet transmissions. Such a conclusion is unfortunate given that the very purpose of the exclusivity was to preserve the "essential function" of the copyright[167]. Mere restriction of licensees' passive sales was thus enough to justify the qualification.

This conclusion is not definitive as an appeal is currently pending before the ECJ. Overturning the GC's solution would be welcome not only given the flawed analysis, but also in order to safeguard more adequately holders' rights which seem particularly at risk after this change in direction.

164 N. PETIT, Droit européen de la concurrence, Montchrestien, 2013, p. 216
165 P. IBANEZ COLOMO, P., "Article 101 TFEU and Market Integration" (2015) 12, *Journal of Competition Law & Economics*, pp. 749-779
166 *Consten-Grundig*
167 A. LAMADRID DE PABLO, "More on AG Wahl and restrictions by object : issues raised by the Commission pay-TV investigation", *Chillin'Competition*, retrieved 6 May 2020, < https://chillingcompetition.com/2014/05/>

2.2.2.2. *Focusing on consumers' interests at the expense of a correct market analysis*

Guaranteeing freedom to provide services and free competition serves the fundamental aim of ensuring consumers' broadest access possible to programs. Yet, consumers are still deprived of the possibility of accessing "many online content services from anywhere in Europe"[168]. However, it appears that the disappearance of territorial restrictions would not necessarily spark cross-border competition. Indeed, a particular form of competition is taking place on the pay-TV market: operators compete to acquire the rights to premium content on an exclusive basis for a specific period of time[169]. In other words, they do not compete within the market, but rather, for the market. By trying to implement a particular policy vision aimed at favouring competition across national borders, the Commission is altering the market structure[170].

Furthermore, it ignores the natural barriers preventing cross-border demand to arise. On the one hand, the language barrier is particularly important in the pay-TV sector given consumers' natural preference for viewing programs in their native language. On the other, the application of the country of origin principle naturally limits content providers from requesting EU-wide licenses, given that they could see their cross-border offer prevented by the application of the copyright.

Therefore, failure to correctly take due account of the specific characteristics of the market leads to a controversial solution where consumers are afforded opportunities they may not even seek. Such short-term success is arguably outweighed by the negative long-run effects on the diversity of the market overall.

2.2.2.3. *A reduced IPR holders' protection at the expense of innovation and consumers protection?*

By prohibiting the possibility to insert territorially restrictive clauses in *Canal+*, the GC greatly interferes with both the rightsholders and the content providers' contractual freedom. Logically, large-scale licenses will emerge from this intervention at EU level. Yet, given their necessarily

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168 Commission, Public Consultation on the review of the EU copyright rules, 2013, p. 7

169 P. IBANEZ COLOMO, "The Commission Investigation into pay-TV Services: Open Questions" (2014) 5 *Journal of European Competition Law & Practice*

170 *Ibid*

higher cost, many EU producers will lack the means to finance it[171]. The opening up of cross-border markets is done at the expense of smaller providers of content. Yet, a diversity of operators is generally deemed beneficial to the market overall.

Above all, rightsholders risk to suffer most from the diminished protection of their rights. For them[172], restrictive clauses such as those at issue are essential to obtain appropriate remuneration in the context of the specific competition dynamics. They reflect the allocation of risks at issue and in cases such as *Paramount*, do in fact no more but reveal the existing copyright system organisation. The pay-TV sector is an industry where important investments are made and broadcasters might not be interested in developing cross-borders services without the guarantee that they will be the only one offering the product[173]. As a corollary, faced with the risk of seeing their return on investment significantly curtailed and their capital outlays for IP activities reduced, rightsholders' incentives to propose new content will greatly be diminished[174].

These different risks might *in fine* impact consumers. In addition to the questionable demand highlighted above, reducing rightsholders' innovation incentives will likely result in a poorer quality and diversity of programs. In the long-run, content production may be impaired. On this basis, Canal+ sought the application of article 101(3) TFEU, considering that the cultural diversity promoted through the effect of such restrictive clauses outweighed any anticompetitive effect. While not extensively examining this claim given that the procedure at stake was a commitment, the GC nevertheless specified that, in any case, the restrictions went beyond what was necessary for the production and distribution of audiovisual works requiring protection of IPR[175]. In our opinion, given the different elements highlighted above – nationally-oriented demand, competition prevented through copyright – there would have been good reasons to carry out a more detailed assessment on whether the alleged procompetitive effects outweighed the (presumed) anticompetitive effects of by object infringements[176].

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171 *Canal+, supra* note 147, paragraph 32

172 *Ibid*, paragraph 31

173 Commission, Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules, 2014

174 CMS Tax Law, "It Comes with the Territory: an Update on the Recent Developments on Territoriality in European Broadcasting" (2019), retrieved 6 May 2020 <https://cms.law/en/gbr/news-information/it-comes-with-the-territory-an-update-on-recent-developments-on-territoriality-in-european-broadcasting>

175 *Canal+*, *supra* note 147, paragraph 67

176 S. MAVROGHENIS, P. FAJARDO, *supra* note 144

2.2.3. Where do we stand now?

A major reform of the rules governing copyright was launched in 2014. In our opinion, the new resulting principles demonstrate an adequate compromise between safeguarding rightsholders' interests while increasing consumers' protection.

An extension of the country of origin principle to cover all online ancillary services of broadcasters, as was proposed in 2016, would have been a formal endorsement of the restrictive *Murphy* and *Canal+* approaches regarding absolute territorial licenses. While the majority of publicly-owned broadcasters supported this proposal, both rightsholders and commercial broadcasters were opposed to the narrowing of their exclusive right[177]. Among the arguments advanced featured the risk to the reduced investment in film, sport and other TV programs this would entail at the EU level. Extensive lobbying resulted in a significant watering down of the original proposal. In particular, the expansion of the country of origin principle was significantly curtailed and will only apply to ancillary services concerned with the broadcast of news and current affairs programmes (excluding sports programmes).

Consumers' protection is nevertheless increased following the introduction of the Portability Regulation[178]. By allowing consumers to access portable online content wherever they are "temporarily" located in other Member States, the Regulation aptly overcomes the restrictive geoblocking effects.

The new legislative instruments thus form part of a logic of completion of the single market while ensuring adequate IPR protection. This solution appears to us more balanced than that following *Canal+*. Given that an appeal is pending, it remains to be seen whether the ECJ will opt-in the more balanced solution.

177 Commission, Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules, 2014

178 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168/1

CONCLUSION

Since the adoption of the CFR, the increasing references to fundamental rights and freedoms in the Court's judgements suggest a desire to correctly grasp the value of the different interests at stake. Defining the conflict in fundamental rights and freedoms terms paves the way for a judicial standard based on a balancing exercise of those rights. Interestingly, judgements at the IP-competition law junction are increasingly permeated by this new legal approach which allows, if duly applied, for fairer outcomes.

The fundamental rights and freedoms extraction exercise requires precisely analysing the specific circumstances of each case. Such scrutiny in the IP-competition conflict cases reveals how the distinctive characteristics of each market, depending on the IPR at issue, influence the balancing exercise. The indispensable access to the SEP for any competitor wishing to operate on the particular relevant technology market has shaped the Court's analysis in *Huawei* in highlighting the need to sufficiently reward the holder's interests while not raising insurmountable market entry barriers. As regards comparative advertising in the trademark area, the consumers' role in building a brand reputation and defining a new market has however not sufficiently been acknowledged in *L'Oréal*. Finally, the broad application of the territoriality principle in the copyright field leads to a fragmented market which gives rise to challenges to the single market that the Court's intervention seeks to mitigate.

Overall, two main conclusions can be drawn. First, while taking account of the fundamental rights and freedoms at stake is highly desirable, the Court's balancing exercise is neither yet consistent nor always sufficiently precise. Identifying and systematically applying a precise method, based on article 52 CFR's test of adequacy, necessity and proportionality of any rights' limitation, would enhance legal certainty and provide a basis on which to justify the different solutions.

Second, the Court should refrain from striking an artificial balance aimed at bringing to the fore the interests it considers generally crucial in a sector. Failure to assess the specific circumstances of the case inevitably leads to an unfair solution. This observation is true in the copyright field. While consumers' interests should unquestionably be protected, the extent of this safeguard should always depend on the reality of the market. Failure to carry out such an analysis not only weakens the solution, but also prejudices other parties' interests.

It therefore seems that this fundamental rights and freedoms balancing standard has the potential to bring certainty as to the fairness of the solution reached. Nevertheless, a careful listing and balancing of both the rights at stake and their specific weight in the specific circumstances of the case is essential. While the progressive introduction of the fundamental rights and freedoms in the IP-competition cases is welcome, the applicable test still needs further refinement to ensure a high level of legal certainty and the fairest possible solutions.

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