

The Human Right to **Intellectual Property** in the EU Charter

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IP as a Protected Value

- Human rights instruments protect IP as a protected value
- The system behind is composed of several domestic and international instruments
- Since the EU Charter (2009), IP laws are increasingly directly influenced by these constitutional safe-guards (read or even developed 'in the light of')
- In particular, CJEU is very active (for better or worse)

International context [1]

- **European Convention of Human Rights (ECHR) 1952**
 - Art 1 Protocol 1 ECHR: '(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. (..)'
- **Universal Declaration on Human Rights (UDHR) 1948**
 - Article 27 UDHR: '(1.) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'
- **National Constitutions (nCs) depends**
 - property clause model (e.g. Germany) vs UDHR model, or their mix (e.g. Slovakia)
 - See Geiger (2015)

International context [2]

- **European Convention of Human Rights (ECHR)**

- 'It is not a right to be put into the possession of things one does not already have' (Harris et al 2009) > 'stick to your promises' and 'justify interference with them'
- IP falls under P1-1 (Smith Kline v Netherlands ('90) > SIA AKKA/LAA v. Latvia ('16))
- 'margin of appreciation' is fairly broad

- **UDHR + International Covenant on Economic, Social and Cultural Rights (ICESCR)**

- Article 27(2) mirrored in Article 15(1)(c) ICESCR
- 'encompass modest economic exploitation and personality guarantees' (Helfer 2011)
- General Comment No 17 of the Committee on Economic, Social and Cultural Rights (shouldn't be equated with our current IP system, 'as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions').
- UN Special Rapporteur, *Farida Shaheed*, (mandates no particular approach to copyright pol.)
- 'It is up to the state to decide how it will materialize this obligation. Copyright law is just one of the possible means. In any case, any provided protection is not the aim in itself, but only means to achieve the societal goal of progress of science and art.' (Slovak Constitutional Court, re: Art 27(2), US II. 647/14)

Art 17(2) of the EU Charter

- Treaty of Lisbon (1 Dec 2009): **the EU Charter** became part of the Union law
- It **applies** whenever the Union law is 'implemented' (Art 51(1)) vs ECHR (always)
 - **YES**: implementations of Directives + application of Regulations
 - **NO**: non-harmonized domestic law, unless in clash with Union law (FMOGS, anti-trust, etc.)
- Other provisions: F/R to 'conduct business' (Art 16); effective remedy (Art. 47)

Article 17

Right to property

(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected.

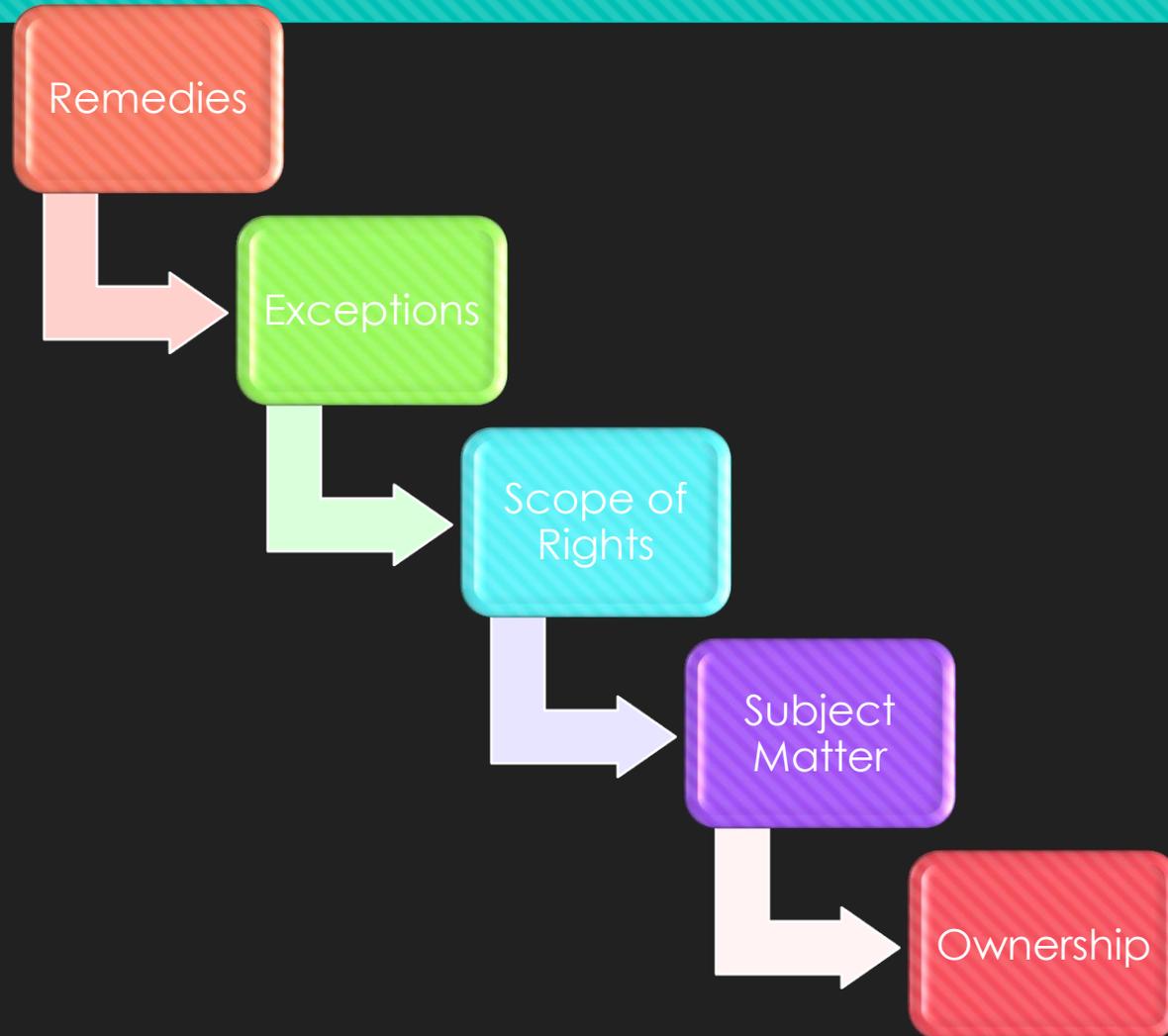
Art 17(2): in search of meaning

- Article 17(2) was meant to replicate ECHR-guarantees
- But what does the phrase, 'intellectual property shall be protected', mean?
- **Literature:**
 - The clause should be 'nothing more than simple clarification of Article 17(1) with consequence that there could be absolutely no justification to expand protection on this ground' (Geiger 2013)
 - 'Art 17(2) will not, therefore support a claim to be entitled to intellectual property protection where none is currently enjoyed' (Griffiths and McDonagh 2013)
 - 'it cannot reasonably be suggested that Art 17(2) requires the introduction of any specific form of enforcement mechanism' (Griffiths and McDonagh 2013)
- Art 17(2) nowadays assumes roles that are not present under Article 1 of the First Protocol (Mylly 2015)
- CJEU advances new positive obligations to protect IP (Husovec 2016)

Art 17(2) applied by CJEU [1]

- Conflicts show the true face of law
- CJEU used to resolve conflicts involving IP even before the EU Charter
 - Free movement case-law: FMoGS v IP (justifying limit, defensive role)
- IP was protected under 'general principles' (since *Metronome Musik* C-200/96 [1998])
- **Social-function bound** (*Metronome Music*, para 21; *Luksan* C-277/10, para 68)
- **Not absolute protection** (*Metronome Music*, para 21; *Sabam* C-70/10, para 45)
- After the EU Charter, it increased framing of disputes as **IP vs other fundamental rights**
- It also led to a different type of scrutiny than in FMoGS case-law (*Husovec* 2016)

Art 17(2) applied by CJEU [2]



Art 17(2) & domestic level

- Many countries continue to use their **own referential framework** (as far as they can, but internalize case-law)
 - Germany: Art 14 GG (e.g. BVerfG, 1 BvR 1585/13)
 - Slovakia: Art 20/43 of the Constitution (e.g. CC, US II. 647/14)
 - United Kingdom: [Art 17 Chart + P1-1 (e.g. Cartier) + ?]
- But often arrive at **similar principles**:
 - No absolute protection
 - Grant of rights serves a social function
 - Countervailing right of the public to access the cultural heritage (in some countries)
 - Subject to limitations in the name of other interests
- What can differ greatly is the exact **methodology** they use
 - ECtHR > CJEU > domestic courts

Highly recommended reading

- Geiger, Mylly and Griffiths contributions in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015)
- L Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 (1) *Harvard International Law Journal* 1
- C Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property' in PLC Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2015)
- M Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 *Cambridge Yearbook of European Legal Studies* pp. 239–269

**Thank you for your
attention!**

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