

Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles

David S. Welkowitz*

I. Introduction

When one contemplates the universe of human rights violations, intellectual property rights probably are not first, or even tenth, on the list of things that come to mind. Human rights violations usually call to mind such things as violence against a civilian populace by government authorized (or government incited) forces, suppression of unpopular views, violations of fundamental due process rights, especially regarding criminal trials, and so on. If one contemplates economic issues at all under the rubric of human rights, it probably will be in the form of a population living in poverty, educational deprivations, and the like, again normally perpetrated (or neglected) in some manner by persons acting on behalf of or at the behest of a government. Private harms of the sort normally at issue in intellectual property situations ordinarily are not the stuff of human rights issues.¹ Thus, you may be surprised to learn that

* Professor of Law, Whittier Law School. A.B. 1975, Princeton University; J.D. 1978, New York University. **[NOTE: Please do not circulate this draft outside of the IPSC as this is still very much a work in progress!]**

¹ Some intellectual property problems clearly do involve governmental agencies, whose approval may be required before certain intellectual property rights come into existence. In the United States, patents must be issued by the Patent and Trademark Office (PTO) before patent rights exist and PTO review is required before trademark registrations are issued. Trademark

human rights agreements, such as the Universal Declaration of Human Rights, contain express provisions favoring the existence of intellectual property rights.² You may be equally surprised to learn that the European Court of Human Rights (“EHCR”), the designated arbiter of claims brought against countries for violations of the European Convention on Human Rights (the “Convention”), has heard a number of cases involving intellectual property rights, including cases brought not by individuals, but by corporate entities.³ In our globalized economy intellectual property rights holders have begun to invoke human rights laws and treaties to protect their interests. These uses of human rights agreements raise a number of interesting and potentially troubling questions, especially for the future of human rights enforcement. The purpose of this paper is to examine some of those questions.

rights in the United States can exist without governmental approval, though certain trademark rights accrue only upon registration. In other countries, trademark rights exist only after registration with the government. *See, e.g.*, Intell. Prop. Code (France) 712-1.

² Article 27(2) of the Universal Declaration of Human Rights provides:

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.

See <http://www.un.org/en/documents/udhr> (last visited July 20, 2011).

³ *E.g.*, *Balan v. Moldova*, Application No. 19247/03, ¶34 (Eur. Ct. Hum. Rts. Jan. 29, 2008); *Anheuser-Busch, Inc. v. Portugal*, Application No. 73049/01 (Eur. Ct. Hum. Rts., January 11, 2007) (Grand Chamber).

This paper focuses on one human rights treaty, the Convention, and the possible uses of its provisions to secure and expand intellectual property rights (“IP rights”). Although the Convention does not contain any provision specifically referencing IP rights, it does contain several provisions that could be used to expand IP rights. Furthermore, the existence of a substantial body of interpretive case law from the ECHR affords us a more detailed perspective on the manner in which the Convention could be used to further IP rights. Finally, the group of countries adhering to the Convention, though all part of Europe, represent a somewhat diverse collection of governments, from the U.K. to Germany, to the Czech Republic, to the former constituent states of the Soviet Union, to countries like Turkey. Although not completely representative of a range of possible human rights viewpoints, it is sufficiently diverse to provide a useful window into the problem.⁴

In a 2008 article, Professor Lawrence Helfer outlined possible frameworks that the ECHR might use to review intellectual property disputes under one provision of the Convention: Article 1 of the First Protocol.⁵ I do not propose to challenge either Prof. Helfer’s premises or his concerns that certain approaches to the problem by the ECHR could have untoward

⁴ See Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, at 4, Legal Studies Research Paper No. 08/135 (Nov. 2008), available at <http://ssrn.com/abstract=1295652> (noting the diversity of the European Union).

⁵ Lawrence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 Harv. Int’l L.J. 1 (2008).

consequences for the stability of IP rights and for human rights enforcement.⁶ However, I do intend to suggest several ways that the ECHR could become enmeshed in IP rights disputes, not only under Article 1, but under other provisions of the Convention, such as Article 8 (dealing with rights of privacy) and Article 10 (dealing with free speech and free press). I will suggest that the ECHR's case law makes it increasingly likely that IP rights holders and potential rights holders will invoke the Convention to secure and expand IP rights. I do so not from a conviction that the ECHR *should* be involved in such matters, or that the court should expand IP rights, but because I believe that the ECHR's involvement is inevitable and that its precedent makes IP rights expansion not unlikely. Thus, to the extent that human rights advocates believe that such involvement by the court will have negative consequences, this paper can serve as a wake up call to the possible world that lies ahead.

The paper begins with a brief examination of the Convention, followed by a discussion of relevant provisions and some recent cases in the ECHR that raised the issue of using human rights provisions in an intellectual property context. The paper concludes with observations about the implications of using the Convention in these contexts. Specifically, it raises the following issues: (1) In what ways could the Convention be interpreted to expand particular intellectual property rights? (2) Will the use of the Convention in these situations have unforeseen effects on intellectual property rights as they are now understood? (3) Who are the likely beneficiaries of the use of the Convention in intellectual property cases? (4) What effect

⁶ See, e.g., *id.* at 51-52.

could the use of the Convention have on attempts to create a more global intellectual property law? and (5) Could such uses weaken human rights protections in more traditional situations?

II. The European Convention on Human Rights: Background and Relevant Provisions

A. *Background*

The European Convention on Human Rights rose from the rubble of World War II, and the human rights abuses during the period from the end of World War I to the end of World War II. In May, 1949, ten countries signed the Treaty of London, establishing the Council of Europe.⁷ A year and a half later, in November, 1950, the Council signed what is formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms—the European Human Rights Convention.⁸ The Convention has been amended by fourteen protocols since its inception, adding to the list of rights protected. The Convention is administered by the Council of Europe.⁹

⁷ See <http://www.coe.int/aboutCoe/index.asp?page=datesCles&l=en> (last visited July 20, 2011).

⁸ The text of the Convention can be found at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited July 25, 2011). The United Nations already had promulgated the Universal Declaration of Human Rights, in 1948.

⁹ The Council has a web site providing a portal for its activities. See www.coe.int (last visited

The Convention now has 47 signatories, half of which have been added since the beginning of 1990.¹⁰ All of the members of the European Union are also members of the Council of Europe and adhere to the Convention.¹¹ The potential reach of the Convention is thus far broader than the European Union. Although the Council of Europe does not have enforcement mechanisms as robust as those of the EU, this does not leave the Convention impotent. First and foremost, there is the Council's own judicial body, the European Court of Human Rights ("ECHR"), based in Strasbourg, France.¹² The Strasbourg Court¹³ hears cases

July 20, 2011).

¹⁰ Many of the new members, including Russia, were former Soviet Bloc countries, or were part of the former Soviet Union.

¹¹ Great Britain has incorporated the Convention into its Human Rights Act 1998—at least regarding actions of public authorities. *See, e.g.,* Campbell v. MGN Ltd., [2004] E.M.L.R. 15 (H.L. 2004); U.K. Stat. 1998 ch. 42.

¹² The Court was created in 1959. Prior to November 1, 1998, human rights complaints were handled in the first instance by the Commission on Human Rights, which was created in 1954. *See* http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf (Last visited July 21, 2011). It was not until Protocol #11 was adopted in 1998 that a full time court was established and that member states

brought by individuals against countries alleged to have violated the Convention, and issues written decisions which include a rationale. Although the ECHR has no direct enforcement vehicle, members of the Council of Europe (whose members are contracting parties to the Convention) have agreed to abide by the Court's decisions. And, to a great extent, it appears that they do so, at least in Western Europe.¹⁴

The Convention also influences European law through implementation of the Convention into the domestic law of various countries. Great Britain's 1998 Human Rights Act did so, and its courts have looked to the decisions of the ECHR for interpretive guidance.¹⁵ Although the EU were required to allow individual complaints to be brought against them (previously the country had to consent to such suits) as opposed to complaints by one member country against another.

¹³ For convenience and to distinguish it from the European Court of Justice, I will sometimes refer to the European Court of Human Rights as the Strasbourg Court.

¹⁴ *See, e.g.,* Von Hannover v. Germany, Application no. 59320/00 (Judgment - Just Satisfaction - Friendly Settlement) (Eur. Ct. Hum. Rts. July 28, 2005) (Germany agrees to pay €115,000 in compensation and expenses). Moreover, to the extent that countries wish to join the EU, their willingness to abide by the ECHR's interpretation of the Convention no doubt will be relevant to the admission decision.

¹⁵ *Campbell v. MGN Ltd.*, [2004] E.M.L.R. 15, at 254-55 (H.L. 2004).

has not adopted the Convention as EU law, its principles have been incorporated into the jurisprudence of the European Court of Justice (“ECJ”).¹⁶ Both of these mechanisms tend to make the Convention a part of the legal regimes of member countries.¹⁷

B. *Pertinent Provisions of the Convention for IP Rights*

Undoubtedly, the ECHR has a certain influence on the laws of member states. But this still leaves the question: what is the connection between the Convention and intellectual property? To answer this question, we need to identify pertinent provisions of the Convention and discuss the methodology used by the ECHR to decide cases brought under those provisions.

Because we are discussing intellectual *property*, it might seem sensible to start with a provision dealing with property rights. The Convention contains such a provision, namely Article 1 of the First Protocol, which provides as follows:

Protection of Property:

¹⁶ See, e.g., Andrew Williams, *Human Rights and the European Court of Justice: Past and Present Tendencies*, Legal Studies Research Paper No. 2011-06, at 5, 9-41, available at <http://ssrn.com/abstract=1803138>.

¹⁷ *But cf.* Murray v. Express Newspapers plc, [2007] EWHC 1908, at ¶¶ 60-62 (Ch.D. 2007) (British courts are bound to follow House of Lords decisions in cases of conflict with European Court of Human Rights decisions).

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 1 looks a bit like the Takings Clause of the Fifth Amendment to the United States Constitution. That is, it appears to protect against a governmental confiscation of property. It may seem a stretch to apply this provision to intangible intellectual property rights; however, it is notable that the United States Supreme Court has applied the Takings Clause to intellectual property.¹⁸ Article 1 was the focus of Professor Helfer's discussion of the ECHR's approach to

¹⁸ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets treated as property under the Takings Clause). *But cf.* *Zoltek Corp. v. United States*, 442 F.3d 1345, 1349-53 (Fed. Cir. 2006) (patentee could not use Takings Clause as basis for claim against government for using patented invention).

IP disputes.¹⁹ The ECHR has indicated that Article 1 is applicable to IP rights.²⁰ However, although Article 1 will play an important role in the analysis to be presented here, I prefer to begin the discussion with two provisions that are less directly related to property rights, but whose interpretation may have a significant impact on property rights and on the application of Article 1 to IP cases. Those two provisions are Article 8 and Article 10 of the Convention, which provide, respectively, as follows:

Article 8—Right to Respect for Private and Family Life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

¹⁹ Helfer, *supra* note ____.

²⁰ Balan v. Moldova, Application No. 19247/03, ¶34 (Eur. Ct. Hum. Rts. Jan. 29, 2008); Anheuser-Busch, Inc. v. Portugal, Application No. 73049/01 ¶ 10 (Eur. Ct. Hum. Rts., Oct. 11, 2005) (Chamber opinion); Anheuser-Busch, Inc. v. Portugal, Application No. 73049/01 (Eur. Ct. Hum. Rts., January 11, 2007) (Grand Chamber) (the “Grand Chamber opinion”).

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

At first glance, it might not appear that these articles have any direct connection with intellectual property. Article 10, the rough analogue to the First Amendment in the United States, clearly could limit intellectual property rights. But it seems unlikely to be a source for

creating them. Article 8, particularly subsection 2, appears to afford protection from unwarranted *governmental* intrusion. However, as will be seen, Article 8 is a broader and more affirmative right than it may appear on its face, possibly giving rise to intellectual property rights.²¹

These three provisions form the basis of the argument that the Convention may be used to expand intellectual property rights. Although free expression may appear to be a limiting provision, as discussed below the manner in which this concept is interpreted may make it less of a barrier to intellectual property rights than one might believe.

III. IP Rights Under Articles 8 and 10

A. *Starting Points: Privacy Rights, and the Foundations of Privatization; Von Hannover v. Germany*

Although it is not the only, or the first, case to raise some of these issues, one decision from the ECHR in particular brought privacy issues to the forefront, and provides a convenient

²¹ See *infra* Part ____.

starting point for the discussion. That case, *Von Hannover v. Germany*,²² was a suit by Princess Caroline of Monaco, complaining that photographers were invading her privacy by taking (and publishing) pictures of her and her family in various non-official public and private settings.

In *Von Hannover*, Princess Caroline of Monaco, who lives most of the time in Paris, complained about a number of photographs published by three German magazines.²³ The photographs included several of her with her children, some of her in public places, one in a restaurant (with a boyfriend), and some taken of her while she was on vacation.²⁴ She sued the publications in the German courts, claiming violations of her right of privacy and, perhaps notably, violations of her personality rights under the German Basic Law, and her rights to control her image under the German Copyright Act.²⁵ The trial court and first level appellate

²² *Von Hannover v. Germany*, Application no. 59320/00 (Eur. Ct. Hum. Rts. June 24, 2004).

²³ The pictures were taken while the Princess was in France, where she maintains an apartment. *Von Hannover v. Germany*, Application No. 59320/00 at ¶8 (Eur. Ct. Hum. Rts. June 24, 2004). However, they were published by German periodicals. *Id.* ¶10.

²⁴ *Id.* ¶¶11-17.

²⁵ *Id.* ¶18. It is also interesting that her suit sought relief against the publications under French law. *Id.* ¶19.

court ruled that German law did not grant relief because of Princess Caroline’s status as a kind of public figure.²⁶ On further appeal, the court ruled that the photos of her in the restaurant – as a “secluded place” – were a violation of her right of privacy, but that the others were not.²⁷ From this ruling Princess Caroline appealed to the Federal Constitutional Court, whose ruling the ECHR quoted at some length.

The German Constitutional court issued what was considered a landmark decision, ruling that, although publication of some of the pictures in question violated Princess Caroline’s right to privacy, several others did not. In its ruling, the German Constitutional court balanced her right to privacy under German law against the right of free expression found in the German Basic Law. In its opinion, the court specifically held that entertainment is worthy of protection under the concept of free expression.²⁸ It also held that the press was entitled to a certain “margin of manoeuvre” to decide what is in the public interest to print.²⁹ Applying these principles, the court found that some of the pictures, taken while she was with her children and in secluded areas,

²⁶ *Id.* ¶¶19, 21. The German court found her to be a figure “*par excellence*”. *Id.* ¶¶19, 21, 23. The courts enjoined republication of the photographs in France, but under French law.

²⁷ *Id.* ¶---

²⁸ *Id.* ¶---

²⁹ *Id.* at 10, paragraph (aa) (quoting from the German court opinion).

were overly intrusive. Others, however, even some in semi-private locations, were deemed legitimate because of her status as a public figure. After further rounds of proceedings in the German courts, the earlier results were reaffirmed.³⁰ Dissatisfied with the German courts' resolution, Princess Caroline took her case to the European Court of Human Rights. That court ruled in her favor.

Much like the German Federal Constitutional Court, the ECHR considered the matter to require balancing the right to privacy, found in Article 8 of the Convention, and the right to free expression, found in Article 10. Notably, although the ECHR quoted extensively from the opinions of the German courts (the lower courts as well as the Federal Constitutional Court), it gave little if any deference to the balance between privacy and free expression drawn by the German courts, using rights under German law analogous to those provided by the Convention. The German courts emphasized Caroline's status as a public figure. Moreover, the German courts held that free press rights encompass entertainment as well as "hard" news. In their view, this afforded the press more leeway in its reporting. By contrast, the ECHR accorded little credence to the public figure status of the Princess, noting that she had few public duties as a princess, and that the pictures were not reflective of those duties.³¹ Instead, the court found that the pictures simply satisfied the public's curiosity about the lifestyle of a princess, which the

³⁰ *Id.* ¶¶19-38.

³¹ *Id.* ¶¶62, 64.

court believed was an insufficient basis to override her right to privacy.³² Thus, the court found in favor of Princess Caroline and against the state of Germany (the ECHR issues judgments against states).³³

As is well known, in the United States the right of publicity, which is now widely recognized as a property right, had its origins in the tort concept of the right of privacy.³⁴ And it may be, as discussed below, that the ECHR's privacy decisions will ripen into a property right. However, *von Hannover* also provides a foundation that bridges the gap between human rights as a protection against unwarranted governmental intrusion and human rights as a vehicle to remedy harms perpetrated by private actors. The intrusion of which Princess Caroline complained was not in any way the product of state action directed against her. It was an entirely private intrusion. Although her suit in the ECHR was against the German government the gravamen of her lawsuit was a dispute between private parties—her lawsuit in the German courts was against various publications. Essentially, her claim in the ECHR was that German law did not afford her sufficient privacy rights against *private* intrusions, and therefore the German government was not protecting her privacy as required by Article 8 of the Convention.

³² *Id.* ¶¶65-66, 72-74.

³³ *Id.* ¶80. The ECHR was asked to issue a judgment for approximately €142,800, but reserved the question of damages for later decision. *Id.* ¶85.

³⁴ *E.g.*, Cal. Civil Code § 3344.1(b); Ariz. Rev. Stat. § 12-761(G) (soldier's right of publicity); 765 Ill. Stat. § 1075/15; Ind. Code § 32-36-1-7; Okla. Stat. Ann. § 1448(B).

By ruling in favor of Princess Caroline, the ECHR effectively created an affirmative right from Article 8, rather than simply a negative right. In other words, Article 8 did not just protect Princess Caroline from governmental intrusions (a negative right); it required the government to shield her from the intrusions of others, even to the extent of providing an appropriate civil action in its courts (an affirmative right).³⁵ The imposition of an affirmative obligation on the country to effectuate the right is a marked contrast to the Bill of Rights jurisprudence in the United States, which requires some form of state action in order for its provisions to be invoked. It is also a critical bridge between a system focusing on state actions and a system that contemplates the creation of new obligations without the necessity of state action. In other words, if the effectuation of the rights granted by the Convention requires a country to enact legislation (or create common law) that grants a cause of action to one private party injured by another private party, then the ECHR will grant a judgment in favor of the claimant in the absence of such legislation. To put the matter into IP rights language, if the effectuation of any of the provisions of the Convention requires the creation or expansion of IP rights, then the ECHR will issue judgments that effectively require such creation or expansion.³⁶

Equally important, there does not appear to be any textual reason why such an affirmative obligation would not be imposed with regard to the effectuation of any of the rights granted

³⁵ *Von Hannover*, ¶57.

³⁶ The ECHR cannot directly order states to enact legislation. However, an arm of the Council of Europe oversees compliance with the court's judgments and will inquire about legislation needed to effectuate the court's ruling.

under Article 10 or Article 1, First Protocol. The first sentence of Article 8, which grants the right of privacy, does not invoke any notion of state action. It simply says that everyone is entitled to privacy. Similarly, Article 10 begins by stating that “Everyone has the right to freedom of expression,” and Article 1 states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.” There is no textual invocation of any state action or any indication that the right only insures against instances of state interference.

Secondarily, the ECHR’s treatment of the free expression argument in *Von Hannover* demonstrates that speech in a commercial context may not be given particularly strong protection.³⁷ Since many intellectual property cases implicate free speech concerns, this development would favor the rights of intellectual property owners over the rights of unauthorized users. On the other hand, an affirmative obligation to promote freedom of expression could be invoked to create IP rights that further such expression.

The *Von Hannover* decision may not appear to be an intellectual property case at all; it could be viewed as an ordinary tort case. Even without the right of publicity overtones, however, the case would be of interest to intellectual property lawyers, for several reasons. The

³⁷ *Id.* ¶¶59, 63-64. In addition to its statements in *von Hannover*, the ECHR’s attitude toward commercial speech can be found in some of its unfair competition cases. *See generally* Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 Hum. Rts. L. Rev. 53 (2006).

decision made clear that the right of free expression does not trump other rights under the Convention. When two rights are potentially at odds, as in *Von Hannover*, the court must balance them, giving due regard for the ECHR's view of the general societal values at stake. Although, as discussed further below, the ECHR often gives member state decisions a certain degree of deference—called a “margin of appreciation”—in the case of *Von Hannover*, the court showed very little inclination to defer to the German courts' own balancing of the rights, even though the balance struck by the German courts was not patently unreasonable.³⁸ Moreover, the right to know about (and perhaps make use of) facts about a celebrity's life was expressly deemed to have relatively little weight in the free expression balance.³⁹

B. Creating Celebrity Rights Under Article 8

Despite the fact that Article 8 appears to rest more on dignity interests than commercial interests, one can postulate something akin to a true right of publicity arising from this provision. Article 8, as interpreted in *Von Hannover*, provides a suitable foundation. The ECHR may expand the right of privacy to protect a celebrity against unwanted merchandising on the grounds

³⁸ The margin of appreciation can also reflect the ECHR's view of the existence of a European consensus on the issue. *See Mosley v. United Kingdom*, Application No. 48009/08, ¶124 (Eur. Ct. Hum. Rts., May 10, 2011) (granting a greater margin of appreciation to the state's refusal to act where there was no European consensus on whether the press must give advance notice of intent to publish a story about a prominent figure).

³⁹ *Von Hannover*, ¶65. *Accord Mosley v. United Kingdom*, Application No. 48009/08, ¶114 (Eur. Ct. Hum. Rts. May 10, 2011).

that it dishonors the celebrity's name. In many countries in Europe the right of privacy is intertwined with both dignity interests and rights of commercial exploitation.⁴⁰ The ECHR could hold that these personality rights inform the interpretation of Article 8 and require a broader right of privacy, one that allows the individual wide ranging control over various forms of commercialization of his or her image.⁴¹

⁴⁰ In *Von Hannover*, Princess Caroline brought a claim in the German courts under a provision of German copyright law, as well as privacy laws. See generally Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 Tul. L. Rev. 673, 681-86 (2002); Elisabeth Logeais, JeanBaptiste Schroeder, *The French Right of Image: an Ambiguous Concept Protecting the Human Persona*, 18 Loy. L.A. Ent. L.J. 511, 516-17 (1998); Stephen R. Barnett, "The Right to One's Own Image": *Publicity and Privacy Rights in the United States and Spain*, 47 Am. J. Comp. L. 555 (1999); Susanne Bergmann, *Publicity Rights in the United States and in Germany: a Comparative Analysis*, 19 Loy. L.A. Ent. L.J. 479, 479-80, 500-503 (1999).

⁴¹ In *Burghartz v. Switzerland*, Application No. 16213/90 (ECHR February 22, 1994), the court held that Article 8 gives a person an interest in his name, such that the state cannot arbitrarily deny him the right to choose how his surname will be designated. (A married man wanted to use his wife's family name, but precede it with his own.) *Id.* ¶ 24 ("As a means of personal identification and of linking to a family, a person's name none the less concerns his or her private and family life"). Although this case does not establish that a pecuniary interest in

The simplest extension would be to a use that falsely implies that the celebrity endorses a particular product or service.⁴² Such a false endorsement certainly would be viewed as an indignity by many celebrities.⁴³ Other unauthorized uses might also be deemed undignified and therefore invasive of a broad notion of privacy. *Von Hannover*'s requirement that the country give a civil private right of action to protect the claim creates the basis for a private civil action.

The argument in favor of a strong publicity right, particularly one grounded in Article 8, is not without some contrary precedent. For example, in *Vorsina v. Russia*,⁴⁴ decided just months before *Von Hannover*, the ECHR refused the application of the granddaughters of a man whose portrait was used on bottles of beer. The court found that by giving the portrait in question to a local museum, the family "had agreed, in principle, that the portrait may be seen by

one's name is a privacy right, it is not a large leap to say that a deceptive use of one's name (e.g., a false endorsement) would implicate a privacy right.

⁴² The U.K. already has some precedent in this area. *See Irvine v. Talksport Ltd.*, [2002] EWHC 367 (Ch. 2002).

⁴³ *See Waits v. Frito-Lay, Inc.*, 976 F.2d 1093, 1103 (9th Cir. 1992) (noting jury award of "\$200,000 for injury to his peace, happiness and feelings").

⁴⁴ Application No. 66801/01 (Eur. Ct. Hum. Rts. Feb. 5, 2004).

others.”⁴⁵ The court also found that the brewery’s use did not dishonor the family.⁴⁶ This case involved a man who had been dead for several decades. That fact may have been important in the court’s decision (though it was not expressly mentioned in the court’s analysis). The court may have been uncertain about how to handle such inherited claims, and how to allocate “ownership” of the right after more than one generation. Moreover, the court’s finding that the use was not undignified indicates that a less dignified use (and the court did not define what that would be) might have led to a different result. On the other hand, its statement that the family had allowed the portrait to be seen publicly points to privacy, as opposed to simple dignity, as a basis for Article 8 claims.

Moreover, there is at least the potential for Article 10, the free speech/free press provision, to enter the picture. In another case, *Karhuvaara v. Finland*,⁴⁷ the ECHR did recognize that Article 10 (the free press provision) has some force in right of privacy matters. The court held that Finland violated Article 10 by criminally punishing a newspaper for

⁴⁵ *Id.* ¶ __.

⁴⁶ *Id.* It was not clear that the court was denying a claim under Article 8; it began this section by saying “assuming that Article 8 “ applies. The court did not consider Article 1 of the First Protocol.

⁴⁷ No. 53678/00 (Eur. Ct. Hum. Rts. Nov. 16, 2004).

publishing a story about a criminal trial, and identifying the defendant by name and by the fact that he was the husband of a member of Parliament.⁴⁸ But the applicability of this judgment to private civil actions must be tempered by the court's references to the requirement of proportionality of the punishment⁴⁹ and the heavy fines imposed by the government.⁵⁰ Moreover, the case involved a political figure, not a mere celebrity.⁵¹ Thus, it can easily be distinguished from *von Hannover*.

Another attempt to expand the right of privacy was turned aside by the ECHR when it refused to impose an obligation on the media to notify the subject in advance of a news report.⁵² Such advance notice would permit the subject to seek a preliminary injunction against publication; the ECHR recognized that this posed potential problems with Article 10's free press guarantee and that there was no consensus among European countries on the need for such advance notice.

⁴⁸ *Id.* ¶1.

⁴⁹ *Id.* ¶53.

⁵⁰ *Id.*

⁵¹ *Id.* ¶52.

⁵² *Mosley v. United Kingdom*, Application No. 48009/08 (Eur. Ct. Hum. Rts., May 10, 2011).

In the United States, the right of privacy has morphed into a right of publicity, which is more like a property right and less like a dignity interest—it is assignable and, in most states, inheritable. The right described here under Article 8 is more like the U.S. right of privacy, in that the attention is unwanted. It is not a question of who obtains the commercial value of the celebrity’s identity, but a matter of precluding the use entirely. In a later section of this paper, I postulate a more property-like right of publicity under the Convention, but one which is attached primarily to Article 1, First Protocol, and secondarily to Article 8.

IV. The Extension of IP Rights Through Article 10 of the Convention

It can be—and has been—argued that the application of human rights standards is a positive development for intellectual property, in that it “humanizes” intellectual property rights, and forces courts to consider limitations based on the rights of those other than intellectual property rights holders.⁵³ However, in view of the ECHR’s approach to free press, the degree to

⁵³ See generally Christophe Gieger, “Constitutionalizing” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 I.I.C. 371 (2006); A. Kampelman Sanders, *Unfair Competition Law and the European Court of Human Rights: The Case of Hertel v. Switzerland and Beyond*, 10 Ford. Intell. Prop. Media & Ent. J. 305 (1999).

which the application of the Convention would humanize European intellectual property law is likely to vary widely, depending on the country in question.

But Article 10 could be used as more than a limitation. In theory, it might be the basis for extending IP rights as well. As a reminder, the pertinent language of Article 10 is as follows (with some emphasis supplied):

Everyone has the right to freedom of expression. *This right shall include freedom to hold opinions and to receive and impart information and ideas* without interference by public authority and regardless of frontiers.

Building on the idea that the Convention creates affirmative as well as negative obligations, Article 10 could support an expansion of copyright. If, as is sometimes postulated in the U.S., copyright is an engine of free expression, one could argue for a robust copyright regime as a means of allowing one to “impart information and ideas.”⁵⁴ No doubt this right would have to reflect a balance of the rights of others to free expression, and perhaps even some notion of proportionality, which is a common feature of ECHR jurisprudence.

V. Extending IP Rights Through Article 1

Having laid an appropriate base, we can now return to Article 1, First Protocol, as a more formidable foundation for the creation and/or extension of IP rights. Through a series of cases,

⁵⁴ Cf. Lea Shaver and Caterina Spanga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 Wis. Int'l L.J. 637 (2010) (discussing use of the International Covenant on Economic, Social and Cultural Rights as a basis for copyright-like protection).

the ECHR has established a methodology for analyzing problems under Article 1. The first task is to lay out that methodology.

A. *The ECHR's Article 1 Methodology*

As the ECHR has noted on more than one occasion, this Article has two paragraphs which express three separate, but related principles.⁵⁵ The first sentence of the first paragraph states a general principle, that one has a right to enjoy one's possessions without interference. The second principle is stated in the second sentence, that one may not be *deprived* of one's possessions, except under specified conditions. The third principle is contained in the second paragraph: the state can control the *use* of one's property, provided it complies with the conditions of the provision, namely, that the control be consistent with the public interest.⁵⁶ The second and third principles are regarded as specific instances of the first principle.⁵⁷ Consequently, the first principle stands by itself—a violation of Article 1 can occur even if there

⁵⁵ *E.g.*, *Sporrong v. Sweden*, Application No. 7151/75; 7152/75, at ¶ 61 (ECHR 1982).

⁵⁶ This requirement appears to preclude controls that are intended to favor one person or a small group of people. Support for this argument also comes from a principle added by the court, that is, one of balance between the rights of the individual and the rights of the society.

⁵⁷ *E.g.* *Maurice v. France*, Application No. 11810/03 at ¶78 (ECHR 2005) (Grand Chamber).

is no total deprivation,⁵⁸ and, apparently, even in the absence of an attempt by the state to control the use of the property.⁵⁹ On the other hand, not all “interferences” with property under the first principle will constitute violations of Article 1. That principle requires the state to strike a balance between protecting the individual and protecting “the general interest of the community.”⁶⁰

⁵⁸ See *Sporrong v. Sweden*, Application No. 7151/75; 7152/75, at ¶¶ 67-74 (ECHR 1982).

⁵⁹ *Id.* ¶ 65 (finding the second paragraph inapplicable). This would support the idea that affirmative state action is not a prerequisite to the application of this Article.

⁶⁰ *Id.* ¶ 69. In *Sporrong*, the city of Stockholm had been issued permits to take applicants’ land, permits that were extended for many years but never executed. This was found to violate the first principle because the delays reduced the land’s value (constituting an interference with its enjoyment) and the inflexibility of the process provided no means to ameliorate the injury as the process dragged on. *Id.* ¶ _____. This was a close decision; the vote on this issue was 10-9. Eight dissenters felt that the second paragraph of Article 1 was applicable—i.e., the permits constituted control of the use of the property. But they believed that the control was within the bounds of the “general interest” and therefore not in violation of Article 1. *Sporrong*, Joint Dissenting Opinion of Judges Zekia, Cremona, Thór Vilkyálmsson, Lagergren, Sir Vincent Evans, MacDonald, Bernhardt and Gersing with regard to Article 1 (of Protocol No. 1 (P1-1)). The ninth dissenter indicated that the majority was recognizing too absolute a right in property and was insufficiently crediting the public interest. Partly Dissenting Opinion of Judge Walsh at

Furthermore, the state's ability to control the use of property under the second paragraph of Article 1, even if the regulation is in the general interest, also is limited by a principle of proportionality. The ECHR has stated that there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised,"⁶¹ which amounts to striking a balance between the interest of the state and that of the individual.⁶² That is, the state may not place an undue burden on an individual, even to further a goal that is in the general interest.⁶³ Compensation for the interference with the individual's property interest is a

¶ 1.

⁶¹ *Agosi v. United Kingdom*, Application No. 9118/80, at ¶ 52. (ECHR 1986); *see Iatridis v. Greece* at ¶62 (because the interference violated Greek law, no need to determine whether "a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"); *Bosphorus Hava Yollari Turtzm Ve Tıcaret Anonım Ştrkett v. Ireland*, Application No. 45036/98 (Eur. Ct. Hum. Rts. June 30, 2005) (Grand Chamber) .

⁶² *Agosi*, at ¶—.

⁶³ [Cite **Maurice v. France**]

factor in that proportionality.⁶⁴ When reviewing whether the state's action is in the general interest, the ECHR normally grants the state "a wide margin of appreciation."⁶⁵ However, the principle of proportionality still limits the state's authority to control property, and, by extension, its ability to permit others to interfere with the owner's enjoyment of the property.

The cases enunciating these principles involved direct state action against an individual's property interest. However, the same principles could be applied to an affirmative right that requires the state to afford protection against private interference with property.⁶⁶ A country's property law (or tort law as it relates to harm to property) reflects, albeit perhaps indirectly, the country's level of control over the use of property. A prohibition on theft, for example, reflects the country's goal that certain types of interference with property ownership by private parties will not be countenanced. A country's tolerance for unauthorized uses of other forms of property by individuals similarly reflects the country's decisions concerning legitimate uses of property. These decisions could be weighed using the same principle of proportionality as in cases of direct governmental interference with property. The public/private distinction need not change the basic framework used by the ECHR in property rights cases. Thus, the questions in each example posited below will include whether there is a possession at all, what conduct would

⁶⁴ **Anheuser Busch, Inc. v. Portugal**, Application no. 73049/01 (Eur. Ct. Hum. Rts. Jan. 11, 2007) (Grand Chamber).

⁶⁵

⁶⁶ See text and cases cited at notes ___ *supra*.

constitute an interference with the possession, and whether the state may allow that interference in accordance with the general interest, in the absence of any compensation for the interference.

B. “Possessions,” “Interference,” and Private Rights

The ECHR discussed the concept of a “possession” in an Article 1 case, where it stated that

the concept of “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision.⁶⁷

Intangible property, including intellectual property, qualifies as a possession.⁶⁸ Even interests that do not rise to the level of true intangible property can be possessions.⁶⁹

But it is not sufficient to postulate property rights, or “possessions.” The Convention protects against an “interference” with the enjoyment of one’s possessions, and one must ask

⁶⁷ Iatridis v. Greece, Application No. 31107/96, at ¶54 (Eur. Ct. Hum. Rts. 1999).

⁶⁸ Balan v. Moldova, Application No. 19247/03 (Eur. Ct. Hum. Rts. January 29, 2008)

⁶⁹ Anheuser-Busch Corp. v. Portugal, Application No. 73049/01 (Eur. Ct. Hum. Rts., Grand Chamber, January 11, 2007) (application to register trademark deemed a possession within Article 1).

how one can fit a case against a *country* (a prerequisite to a suit in the ECHR) within the usual private framework of intellectual property rights. As discussed above, this obstacle may be overcome by *Von Hannover*'s insistence, at least under Article 8's privacy provision, that a country take affirmative steps to protect the right in question, even providing a private cause of action as necessary. If that affirmative obligation were to be extended to property rights, then Article 1, First Protocol, could become the foundation of many intellectual property rights.

Although Article 1 and Article 8 protect different interests, it would not be surprising to see the ECHR create an affirmative right of property enjoyment from a combination of the two. A close examination of these Articles reveals several similarities in structure. Both Articles begin with a general statement of rights that do not mention interference by the state. Those rights are of a kind that are often protected by tort law—invasion of privacy or conversion of property. The Articles each follow with a subsection permitting a certain level of state interference with the general right in order to further important state interests. The combination of treating various intangibles of value as possessions, and the obligation of member countries to provide a private right of action to prevent interference with a possession, leads to the possible array of additional rights.

Although it does not direct the member state to create a private right of action, the case of *JA Pye (Oxford) Ltd. v. United Kingdom*⁷⁰ illustrates how a private dispute can implicate Article 1 of the First Protocol. In *Pye*, the applicant company was the registered owner of a piece of

⁷⁰ Application No. 44302/02 (ECHR 2005)

land in Great Britain, which it leased for a specified period to its neighbors⁷¹ for grazing. At the end of the lease period, the company refused to extend the grazing rights period, but the neighbors continued to use the land.⁷² After using the land without authorization for twelve years the neighbors applied to register a claim to the land under the British statutes governing adverse possession.⁷³ This was granted, and it divested Pye of its claim to the land. The British courts (with some apparent reluctance)⁷⁴ upheld the neighbors' claim under the relevant British statutes. However, Pye appealed to the ECHR, which ruled in its favor under Article 1, First Protocol. The court specifically rejected the British government's argument that, because this was a private dispute not involving governmental action, Article 1 was not applicable.⁷⁵ It further

⁷¹ The neighbors were an individual family.

⁷² For a time, the parties exchanged correspondence concerning the neighbors' desire to continue using the land. However, this contact ceased after a few years. *Id.* at ¶____.

⁷³ *Id.* at ¶____.

⁷⁴ The reluctance stemmed from the fact that Pye's ownership was registered and thus public record. The courts believed that the primary interest served by adverse possession—certainty of title—was only marginally advanced by allowing adverse possession against a *registered* owner. *Id.* at ¶____.

⁷⁵ *Id.* at ¶50-52, 56.

found that the application of the adverse possession statute to a registered owner imposed disproportionate burden relative to the governmental interest involved.⁷⁶

C. The Potential of Article 1 Revealed: Anheuser-Busch v. Portugal

Perhaps ironically, the potential power of Article 1 for IP rights was revealed in a decision that rejected a corporate attempt to invoke Article 1 in support of an IP right. Anheuser-Busch then appealed to the Grand Chamber of the court. The Grand Chamber also held that there was no violation of Article 1, First Protocol, but on somewhat different grounds. Contrary to the decision of the Chamber, the Grand Chamber decided that an application for a trademark registration *is* a “possession” within the meaning of Article 1.⁷⁷ However, the judges then

⁷⁶ *Id.* at ¶¶68-75. *See also* Kanala v. Slovakia, Application No. 57239/00 (ECHR 2007) (allowing applicant’s property interest to be sold at foreclosure for far less than appraised value imposed disproportionate burden); Hutten-Czapska v. Poland, Application No. 35014/97 at ¶¶202, 224 (ECHR 2006) (Grand Chamber) (Poland’s rent control statute, which required landlord to, *inter alia*, rent at a loss, imposed disproportionate burden on the landlord, in violation of Article 1).

⁷⁷ Anheuser-Busch, Inc. v. Portugal, *Application No. 73049/01* (Eur. Ct. Hum. Rts., January 11, 2007) (Grand Chamber) (the “Grand Chamber opinion”). Two judges concurred, but disagreed with the Grand Chamber’s rationale. They argued that, although intellectual property (including a trademark registration) is generally within the protection of Article 1, an application is not. Joint Concurring Opinion of Judges Steiner and Hajiyev. Two other judges dissented.

decided that there had not been an “interference” with Anheuser-Busch’s right to peaceful enjoyment of its possession. The court viewed Anheuser-Busch’s complaint as an attack on the correctness, as a matter of domestic law, of the Portuguese Supreme Court’s decision concerning the relative priority of rights between Anheuser-Busch and its Czech adversary. Thus, the court ruled that it could only review the decision to the extent of determining that the Portuguese court’s decision was not arbitrary “or otherwise manifestly unreasonable.”⁷⁸ Pointing out that Anheuser-Busch had had ample opportunity to present its claim to the Portuguese courts, and noting that the questions of law involved (the effect of any preexisting rights of the Czech company and the effect of the 1986 bilateral agreement) were not clear on the face of the laws themselves, the ECHR stated that it was for the Portuguese courts to decide these issues and that the ECHR would not disturb the decision.⁷⁹ Two judges dissented from this decision, arguing that, once it was

(Joint Dissenting Opinion of Judges Caflisch and Cabral Barreto).

⁷⁸ Grand Chamber opinion ¶83.

⁷⁹ *Id.* ¶¶84-86. The Portuguese government made an analogous argument to the Chamber below, to the effect that action by the ECHR would amount to an appeal on an issue of domestic law.

decided that an application was a possession, the retroactive application of the 1986 agreement would constitute an interference.⁸⁰

From the standpoint of intellectual property rights, the ruling that a trademark application, which is even more ephemeral than a registration, constitutes a “possession” is very important. As discussed below, the near equation of pecuniary value with possession is potentially very expansive in the area of intellectual property. However, the Grand Chamber’s disposition of the remainder of the case made an analysis of whether there was an actionable “interference” unnecessary.

D. Extending Human Rights to Intellectual Property: Examples

1. *A Robust Right of Publicity?*

The *Von Hannover* case demonstrated that celebrities can expect protection by Convention member countries for their personal interests (at least those interests covered by the Convention), by the allowance of a private civil action against other private actors who would invade the celebrity’s realm. *Von Hannover* was what a United States observer would categorize as a right of privacy suit. United States law, particularly state law, often provides additional

⁸⁰ Joint Dissenting Opinion of Judges Caflisch and Cabral Barreto.

protection to celebrities through the category known as right of publicity.⁸¹ Rather than protecting celebrities from invasions of their private space, the right of publicity allows celebrities to control many commercial uses of their names, likenesses, or “personas.” Not all of these uses would be invasive or undignified. Based on the *Von Hannover* and *Anheuser-Busch* decisions, might the ECHR extend the right of privacy from *Von Hannover* (under Article 8) to cover the type of commercial uses associated with the American right of publicity (under Article 1)?

a. An Article 1 Based Right of Publicity

Alternatively, the ECHR could hold that the rights of privacy and control of merchandising provided in various European countries rise to the level of a “possession,” and are protected by Article 1. Clearly, the ability to use a celebrity’s name or likeness in the promotion of products is a valuable commodity. It appears that the celebrity can license uses of his or her image to others, analogous to the licensing of the use of a trademark.⁸² In *Anheuser-Busch* the

⁸¹ E.g., Cal. Civ. Code § 3344 (West 200-); Florida Stat. Ann. § 540.08; Ind. Code §§ 32-36-1-1 - 32-36-1-20.

⁸² Here it is worth noting that in *Von Hannover*, Princess Caroline’s suit in the German courts included a claim under a provision of German law which is part of the Act on Artistic Creations—a relation of copyright. Copyrights, like trademarks, would be considered possessions under Article 1.

court stated that a trademark *application* was a possession because it had value. It is not a significant extension to find that merchandising rights in a name or image are “possessions” of the celebrity. In that case, the state’s unwillingness to allow a celebrity to police the right (which could either dilute its licensing value or destroy it altogether) could constitute an “interference” with the celebrity’s enjoyment of that possession. Moreover, the ECHR is somewhat unlikely to view allowing such an interference as within the general interest under Article 1, nor is it likely to view the deprivation of control of the celebrity’s image as proportional to the protected interest. In *Von Hannover* the court gave little deference to the German courts’ assertion that Princess Caroline, as a public figure, was newsworthy and therefore invasions of her privacy were allowed. In the case of endorsements and merchandising, the purely commercial aspects of the activity probably would be deemed even less worthy of protection by the ECHR.⁸³ Although *Anheuser-Busch* did not involve a private right of action under Article 1, one could infer from *Von Hannover* that such a right may be mandated as a necessary means of protecting the individual’s possessory interest.⁸⁴

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84 In this regard, it is interesting that the California statute protecting rights of publicity post-mortem describes the right as a property right. Cal. Civ. Code §3344.1(b). The statute protecting rights of publicity for living persons does not contain this provision. Cal. Civ. Code § 3344.

If such a right of publicity is recognized, it is likely to be more extensive than the analogous right recognized in the U.S. Our courts are somewhat solicitous of free speech arguments when something other than simple “merchandising” is at issue.⁸⁵ However, in *Von Hannover*, the ECHR obviously believed that there was little free speech interest in satisfying the public’s desire for information about a celebrity. Consequently, the ECHR is likely to find little free speech interest in profiting from the use of another’s image, even where the use, for example, constitutes an artistic interpretation of the celebrity’s image.⁸⁶ Furthermore, the broad

⁸⁵ E.g., *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924-25, 931-36 (6th Cir. 2003) (lithograph of Tiger Woods at the Masters tournament protected by First Amendment); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-89 (9th Cir. 2001) (magazine story with latered picture of Dustin Hoffman as “Tootsie” subject to First Amendment protection); *Winter v. DC Comics*, 30 Cal. 4th 881, 69 P.3d 473, 477-80 (2003) (comic book portraying Johnny and Edgar Winter as grotesque characters protected by First Amendment). *But cf.* *Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797 (2001) (non-transformative lithograph of Three Stooges not protected by First Amendment); *Doe v. TCI Cablevision*, 100 S.W.3d 363 (Mo. 2003) (comic book character named after hockey player violated player’s right of publicity and not protected by First Amendment).

⁸⁶ *Cf.* *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003) (lithograph of Tiger Woods at the Masters protected by First Amendment).

notion of “newsworthiness” applied in some U.S. cases⁸⁷ probably would not be an effective defense in the ECHR.⁸⁸

In sum, because it can be grounded equally in two separate provisions of the Convention, the right of publicity may be the strongest example of an intellectual property right flowing from the Convention.

2. *Possible Trademark and Related Rights Developments from Human Rights*

Another extension of human rights into intellectual property could be in trademark law, the subject of *Anheuser-Busch*. That case made clear that trademarks, and even applications to

⁸⁷ See, e.g., *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 727 N.E.2d 549, 706 N.Y.S.2d 52 (2000) (photograph not completely unrelated to article although not of the person named in column); *CBC Distrib. & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) (fantasy baseball league can use public statistics and names of players).

⁸⁸ See, e.g., *Campbell v. MGN Ltd.*, [2004] E.M.L.R. 15 (H.L. 2004) (granting relief under the U.K. Human Rights Act to model for pictures taken of her outside a drug rehabilitation facility, and citing ECHR precedent).

register trademarks, are “possessions” under Article 1 of the First Protocol.⁸⁹ *Anheuser-Busch* involved an outright revocation of the trademark registration, but no violation of Article 1 was found. That result, however, had more to do with the procedural posture of the case than any substantive decision that revoking a registration is not an actionable interference with property rights.⁹⁰ Although the second sentence of Article 1 refers to people being “deprived” of

⁸⁹ That trademark rights are considered important rights under the Convention also is illustrated by the decision of the European Commission of Human Rights in the case of *Nijs v. Netherlands*, Application No. 15497/89 (Eur. Comm. Hum. Rts. 1992). The applicants, a pharmacist, a doctor, and a manufacturer of generic pharmaceuticals, claimed that a limitation on the manner in which doctors could prescribe drugs violated their rights under Articles 8 and 10, and Article 1 of the First Protocol. The doctor wanted to prescribe in the form “ ‘BRAND NAME’ or equivalent other product according to agreed list.” However, this was found by the local courts to violate the trademark rights of the brand name manufacturer under Benelux law. The Commission rejected the Article 10 claim, stating that, although the regulation was an interference with free expression, it was within the government’s right of control as “necessary in a democratic society,” in order to protect another’s trademark rights. *Id.* The Commission noted that the prescription could be written just in the generic name of the drug. *Id.* The claims under Article 8 and Article 1, First Protocol were rejected because of a failure to exhaust domestic remedies.

⁹⁰ As noted, earlier, the ECHR seemed to view the case as though *Anheuser-Busch* claimed that Portugal unfairly applied its law retroactively to *Anheuser-Busch*. *Anheuser-Busch v.*

possessions—implying a complete taking—the case law discussed above indicates that less than complete takings will constitute violations if they disproportionately burden the individual.

With this in mind, consider the example of trademark dilution. Trademark dilution is a form of infringement that does not require a showing of likelihood of confusion. Thus, it gives a trademark owner rights in a trademark that often resemble copyright more than traditional trademark rights (which are grounded more in issues of consumer deception). Dilution protects the distinctiveness, or uniqueness, of a trademark. Thus, an unauthorized use of a mark, even on a non-competing good, makes the mark less unique as a source identifier. The owner of a registered mark could argue that under Article 1 another's use of its mark that dilutes the distinctiveness of the mark constitutes an interference with the enjoyment (or use) of its property by lessening the trademark's marketing power. If a mark is diluted, the trademark owner's property interest (i.e., the "possession") is diminished, perhaps even destroyed. The possibility of complete destruction of the trademark's value could be most acute if the second use was one that tended to genericize the mark—for example, using "Kleenex" as a generic word for tissue.⁹¹

Portugal, Application No. 73049/01 (Eur. Ct. Hum. Rts., January 11, 2007). It is noteworthy that prior ECHR cases *did* find violations of Article 1 where member countries' laws were applied retroactively to deprive people of claims against the government (or even against private actors).

⁹¹ If this sort of use is deemed to be an interference with the enjoyment of property rights, then in some cases there may have to be a balancing between the rights of the trademark owner under Article 1, First Protocol, and the rights of free expression of the second user under Article 10. If the second user publishes a dictionary or a novel that uses the mark in a generic fashion, it

Dilution raises multiple issues under Article 1. The first problem may be defining at what point a *potentially* diluting use becomes an actual interference or deprivation. Clearly, a trademark owner would want to stop diluting uses before they cause measurable harm to the trademark.⁹² This issue might be overcome by assuming that the state's trademark scheme in general (which, we shall assume, does not provide protection from dilution) is a means of controlling the use of the trademark. The mark owner then could argue that the state's willingness to allow unauthorized diluting uses of the mark deprives mark owners of a possessory right.

The second problem is determining whether the interference violates the principle of proportionality. The state may have valid reasons to allow at least a certain amount of dilution to occur. A desire to permit free expression would allow various potentially tarnishing uses. Certain descriptive or nominative uses of marks may be essential, or at least useful, in every day discourse.⁹³ The state may judge the likelihood of serious injury to the mark to be low, especially

would at least implicate Article 10 rights. Whether the Article 10 rights would outweigh the Article 1 rights is not clear.

⁹² Cf. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003) (U.S. dilution statute, as then worded, held to require actual dilution); *id.* at 434-35 (Kennedy, J., concurring) (expressing concern about the trademark owner's ability to stop incipient dilution under actual dilution standard).

⁹³ See, e.g., 15 U.S.C. § 1125(c)(3)(A) (excluding certain descriptive and nominative uses

if the law gives strong protection against uses of the mark that are likely to cause confusion.

These reasons probably would be given significant deference, or margin of appreciation, in the analysis. But that still leaves the question of proportionality. That the state's actions potentially affect large numbers of people does not appear to preclude a violation.⁹⁴ Because of the potential for significant diminishment of the trademark's marketing power, the ECHR may find that allowing more than *de minimis* dilution imposes too great a burden on an individual trademark owner.

Assuming that there would be a violation, the next step is to determine whether to require a cause of action for the trademark owner directly against the offending party, even if the state's trademark law does not expressly authorize a dilution claim. Unlike the situation in *Anheuser-Busch*, the state would not be causing the problem directly; the problem would be due to uses by private parties. Although *Anheuser-Busch* did not involve a *private* interference with a possession, constructing an argument in favor of an affirmative right against a private party is not from liability for dilution under U.S. law). Descriptive uses would be uses not as a trademark, but as a means of describing the product—like “soft and dry” towels (assuming that “Soft & Dry” is a trademark for someone's goods). Nominative uses are uses that point to the trademark owner's goods or services—such as a news report about “NIKE” shoes being made in third world countries—but they are not used by the second user as a trademark for his or her own goods.

⁹⁴ **retroactivity cases. Cf. Hutten-Csapska v. Poland, Application No. 35014/97 (ECHR 2006) (Grand Chamber) (rent control as violation notwithstanding widespread effect).**

difficult. A state tort or property regime that permits others to destroy one's possessions⁹⁵ could constitute a deprivation of the right to the enjoyment of one's possessions. *Von Hannover* did not limit its implication of affirmative rights to Article 8. Presumably, Convention member states have an affirmative obligation to protect possessions from interferences that are not in the general interest, even if that means providing private civil causes of action to do so.⁹⁶ Although Article 1 gives leeway to the state to regulate property interests, the Strasbourg court's Article 1 jurisprudence suggests that such leeway is limited. Whether the general interest of the state's populace permits limiting the trademark right to fending off confusing uses is unknown. However, the interests of those who may be diluting a mark will most often be commercial interests. This may "dilute" the value of protecting those interests to the Strasbourg Court.⁹⁷

In practical terms, requiring member states to protect trademarks against dilution would not be a seismic event. As a result of the European Union's Trademark Harmonization

⁹⁵ An extreme example would be a legal regime that turned a blind eye to physical appropriations of one group's tangible possessions by a competing group.

⁹⁶ It may be noted that, in the absence of a protective regime, such interferences would be pursuant to law, or the lack thereof, but they could violate the concept of proportionality that is part of the ECHR's property rights jurisprudence.

⁹⁷ To some degree, consumers may have an interest in allowing certain forms of dilution—it may promote competition, or it may add some terms to the lexicon. <Cite Ty >

Directive, almost all of its 27 members protect trademarks against dilution.⁹⁸ Other non-EU European countries protect trademarks against dilution as well.⁹⁹ However, once such a right is recognized as a “possession” under the Convention, it leads to further issues. For example, suppose that the European Commission decided to narrow the scope of its non-confusion based trademark protections so that only marks deemed “famous among the general consuming public of the European Union” were protected.¹⁰⁰ Such an amendment would deny protection to marks

⁹⁸ Many of these laws were enacted pursuant to the European Union’s Trademark Harmonization Directive. *See* David S. Welkowitz, TRADEMARK DILUTION: FEDERAL, STATE, AND INTERNATIONAL LAW, 2011 Cumulative Supplement at 620-28 (BNA 2011). The EU’s Community Trade Mark Regulation also provides for such protection. *Id.* at 629.

⁹⁹ Welkowitz, TRADEMARK DILUTION (SUPPLEMENT), *supra* note __, at 630-38.

¹⁰⁰ At present, the Trademark Harmonization Directive protects marks “with a reputation” from certain non-confusing uses. Trademark Harmonization Directive, Art. 4(4)(a) and 5(2); Community Trade Mark Reg. Art. 8(5) and 9(1)(c). The European Court of Justice has not equated this limitation with a requirement of “fame,” let alone fame measured by the general consuming public of the EU. My hypothetical is based on the Trademark Dilution Revision Act of 2006 (“TDRA”). Prior to this amendment, U.S. law protected “famous” trademarks from dilution. However, “famous” was defined in a way that arguably allowed marks famous only in a specific product market (what the ECJ might call the “relevant public”) to be eligible for protection. The TDRA restricted dilution protection to marks whose fame extended to the

previously eligible. If a trademark registration¹⁰¹ is a “possession” and a country removes an important protection from that possession, would that constitute an interference, subject to Article 1? The *Anheuser-Busch* case does not answer that question. Much would depend on the level of deference given to countries to regulate possessions in the public interest, an issue not addressed by *Anheuser-Busch*.

C. Effects on Fair Use

The preceding sections discussed the possible creation of intellectual property rights from Convention provisions. But the Convention also may affect the availability of defenses to intellectual property rights, or, to view it another way, the principles that allow unauthorized uses of another’s intellectual property.

One such doctrine is the principle of “fair use.” Applied in both copyright and trademark (although the doctrine is not the same for both areas), fair use allows a variety of socially desirable, though unauthorized uses of copyrighted works and trademarks. Application of the Convention to intellectual property could result in both an expansion and a contraction of the category of uses deemed “fair use.”

“general consuming public of the United States.” 15 U.S. C. § 1125(c)(2).

¹⁰¹The Directive only applies to registered marks.

Article 10 of the Convention, which grants rights of free expression, including freedom of the press, is the most obvious source of an expansion of fair use. As indicated earlier, to the extent that members of the Council of Europe have been granting very strong intellectual property rights without regard to (or with little regard to) the rights of free expression, Article 10 and the balancing approach of *Von Hannover* provide the means to inject such concerns into intellectual property cases.

Conceivably, Article 6, which guarantees a fair trial also would be a source of more expansive fair use rights. To the extent that anyone claims rights in, for example, published case law or statutory law, or other materials necessary for use in a trial, Article 6 could provide a means of overcoming any objection made by the rights holder to its use in that context. Moreover, Article 6 apparently prevents the arbitrary application of laws, including intellectual property laws, by judicial bodies.¹⁰² This should at least require judicial authorities to maintain some internal consistency in the way that they apply exceptions to intellectual property rights.

On the other hand, Article 8 could be used to limit fair use. Parodies of copyrighted works, particularly those that point to specific individuals or companies, could be said to violate a right of privacy. Although a court would be required to balance the Article 8 right against the Article 10 right of free expression, the ECHR's apparent disdain for "merely commercial" works

¹⁰² **Von Hannover v. Germany (disagreeing with the balance performed by the German courts in favor of free press interests).**

may tip the balance against at least some such uses.¹⁰³ This problem is exacerbated if one adds Article 1, First Protocol into the mix. If intellectual property rights constitute “possessions” then derivative works (or parodies, in the trademark realm) that take away from the value of the protected work or mark could be deemed an interference with (or deprivation of) the possession. There are two Convention-based counter arguments here: the free expression guaranty of Article 10 and the provision of Article 1 allowing countries to regulate the use of property “in accordance with the general interest.” However, the exact scope of these forces is not clear. The ECHR’s proportionality principle with regard to Article 1 limits the state’s ability to regulate in the general interest. And, as the ECHR noted in *Anheuser Busch*, where the intellectual property owner is a foreign entity, it may be entitled to greater protection for its property,¹⁰⁴ possibly triggering a right to compensation for the use of its possession.

D. Moral Rights

There is a further extension of intellectual property rights that one could contemplate flowing from the Convention. The Berne Convention on copyright requires protection of “moral rights” of authors.¹⁰⁵ Protection of moral rights permits authors—even those who no longer own

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¹⁰⁴ **Anheuser-Busch, Inc. v. Portugal.**

¹⁰⁵ Berne Convention for the Protection of Literary and Artistic Works, Art. 6*bis*. United

the intellectual property rights to their works—to prevent certain uses of those works. Many European countries already protect the moral rights of authors.¹⁰⁶ Conceivably, Article 10 of the Convention could be used to *limit* moral rights. However, this seems unlikely, especially if the moral rights of authors are analogized to a kind of dignity interest similar to the interest protected by Article 8.¹⁰⁷

On the other side of the coin, Article 1, First Protocol, could provide the means to expand moral rights. For this to be the case, one must assume that the residual rights of an author would be considered a possession. A simplistic view might be if a trademark application can be considered a “possession” why not an author’s residual right in a work? In fact, there may be an answer to that seemingly rhetorical question. An author’s moral rights are independent of her ownership of the copyright in the work. Moral rights give the author the right to require attribution, to prevent alteration or destruction of the use, or to prevent uses that would bring

States copyright laws protect moral rights, but only to a limited degree. *See* 17 U.S.C. § 106A.

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¹⁰⁷ This does not mean that Article 8 would be a direct source of moral rights. Though not inconceivable, it is unlikely that an alteration of an author’s work would rise to the level of an invasion of the author’s privacy. Nevertheless, when considering the proper scope of free expression, one would expect the ECHR to consider the countervailing dignity interest of the author.

dishonor to the author.¹⁰⁸ These are not inherently pecuniary rights. They appear not to be intended to give the author extra money for the work by imposing an obligation to pay for its use.¹⁰⁹ However, assuming that moral rights are possessions, an unauthorized alteration of the work could be considered an interference with that right, and therefore a violation of the right to enjoy one's possessions.

Because moral rights are part of an international convention inferring such rights from the Convention, like trademark dilution, may not represent a significant inroad in the world of intellectual property. However, given the variation in moral rights among different countries, even those who adhere to the Berne Convention, it is possible that the ECHR would decide to protect those rights to an extent not provided by all countries (as in *von Hannover*). Moreover, the ECHR could review the legitimacy of certain limitations on moral rights. This independent

¹⁰⁸ See, e.g., <**Berne Convention**>, Art. 6bis (giving authors, *inter alia*, the right to prevent actions “in relation to the said work, which would be prejudicial to [the author’s] honor or reputation”).

¹⁰⁹ On the other hand, some countries permit a waiver of moral rights, which may effectively give pecuniary value to the right. See *Waiver of Moral Rights in Visual Artworks*, Final Report of the Register of Copyrights, at 26-52 (March 1, 1996) (discussing waiver policies of fourteen countries and the European Union); 17 U.S.C. § 106A(e). The availability of a waiver means that the author could extract extra money in exchange for authorizing what would otherwise be a violation of the author’s moral rights.

analysis could cause problems in connection with a waiver of moral rights, an area where countries do have different rules. On the one hand, the ECHR may find that upholding a waiver given under somewhat coercive circumstances is a violation of the right. On the other hand, the ECHR could rule that a failure to allow an author to recoup the pecuniary value of waiving the right is also a violation.

E. Rights to Traditional Knowledge

One other area in which the Convention could be used to expand intellectual property rights is traditional knowledge.¹¹⁰ As chronicled by other scholars, various forms of traditional knowledge and folklore, including songs, dances, and knowledge of the medicinal properties of various plants, have value in the modern world.¹¹¹ This knowledge often is not considered to be

¹¹⁰ A number of articles have discussed the possibility of using various human rights conventions to protect traditional knowledge. For a recent example, see Rebecca Gross, *The “I” in Indigenous: Enforcing Individual Rights Guarantees in an Indigenous Group Rights Context*, 27 N.Y. Int’l L.J. 65 (2010).

¹¹¹ <E.g., Gary K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai’i: A Soft Law Proposal*, 29 U. Haw. L. Rev. 581 (2007).> The rather simple argument I am presenting here deliberately sidesteps the many complications and nuances of the debate about protecting traditional knowledge. It is not my purpose in this paper to take sides in this debate. The arguments here are based only on what *could* occur, and are not

the individual property of any one person, but, rather, is “owned” by the group for the benefit of the group. In some instances, outsiders have sought to exploit this knowledge and tradition and to acquire intellectual property rights in that knowledge and tradition. Article 1, First Protocol provides a possible means of preventing such acquisitions by granting rights to the group from which the knowledge and tradition originates. First, such knowledge and tradition, having value, could be considered a possession. The problem, of course, is who owns the possession?¹¹² Here, Article 34 provides a possible answer. Article 34 is the provision that allows individual suits in the ECHR against member countries. But Article 34 does not limit standing to “individuals,” be they natural persons or corporations. Instead, it permits suit by any “non-governmental organisation or group of individuals claiming to be a victim of a violation” of the Convention.

normative judgments about such results.

¹¹² Exactly who “owns,” or at least has the right to represent the interest of groups claiming interests in traditional knowledge is the subject of some debate. I will assume that there is some principled way to identify the “group” and some equally principled way to identify a proper representative for the group. I am also assuming that, even if the group does not recognize “ownership” in the same manner contemplated by Article 1, the ECHR would recognize that having a legitimate interest in excluding others from using the knowledge is the equivalent of “possessing” it, making the knowledge a possession within the meaning of Article 1. An analogy to this is found in the notion under United States law that patents do not confer a right to use the invention, but a right to exclude others from using it.

Thus, in order to invoke the protection of the Convention, a group need not have any particular structure. This would permit a group claiming rights to traditional knowledge to have standing in the ECHR to sue for interference with their possessory interests in the traditional knowledge. A state that gave intellectual property rights in this knowledge to the outsiders could be required to recognize the rights of the indigenous owners under Article 1, or at least give compensation for the interference. This, of course, assumes that the exploitation of such knowledge by others constitutes an interference, or that the state could not allow such exploitation as being in the general interest (as permitted by Article 1).¹¹³

Interestingly, the Article 1 approach could allow the problem of traditional knowledge to be analyzed outside of the strict confines of traditional intellectual property law.¹¹⁴ This could permit a more flexible approach to the problem. In particular, the ECHR's proportionality requirement under Article 1 could permit a certain degree of flexibility in balancing the competing claims of various groups to this knowledge.

¹¹³ For example, if the traditional knowledge had medicinal value and the group refused to license it, this might trigger the general interest provision. See Shuba Ghosh, *The Traditional Terms of the Traditional Knowledge Debate*, 11 *Cardozo J. Int'l and Comp. L.* ____ (2001). However, it is also possible that, under the proportionality concept, the ECHR would require the state to give some compensation to the group.

¹¹⁴ Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 *Conn. L. Rev.* 1, ____ (1997).

VI. Some Cautionary Observations Regarding the Use of the Convention in Intellectual Property Cases

A. *Who Are the Primary Beneficiaries of Expanded Rights Under the Convention?*

One possibly troubling aspect of the use of the Convention to expand intellectual property rights is the nature and status of the protected parties. Using human rights provisions to expand intellectual property rights may expand the rights of a relatively narrow segment of the population, and perhaps a segment that is best able to protect itself by other means. Consider the complaining parties in each of the two principal cases discussed above. In *Von Hannover*, it was Princess Caroline of Monaco. Though she is scarcely an example of the downtrodden individual, the issue is not whether the Convention should apply to wealthy and/or prominent citizens.¹¹⁵ Prominent people are equally entitled to the protections of their human rights. In many situations, they could find themselves on the wrong side of a repressive government, and they even may be important financiers or leaders of a humanitarian movement opposed to the government. Rather, the issue is whether using human rights to expand intellectual property rights grants such citizens *greater* protection than ordinary citizens. The *Von Hannover* case clearly expanded the rights of celebrities like Princess Caroline, in their capacities as celebrities,

¹¹⁵ Article 14 of the Convention prohibits discrimination on grounds, inter alia, of “status.”

without significantly benefitting ordinary citizens – it is far less common for photographers to follow around ordinary citizens. The desire of ordinary citizens to find out about the lives of these celebrities, even those who reign over them, was dismissed by the Court of Human Rights as being of very little value. On the other hand, as discussed above, it is a simple step from *Von Hannover* and *Anheuser-Busch* to a broader right of publicity. A commercial right of publicity – a right to control “commercial” uses of one’s name or image – may appear to be a fair public policy choice. However, such rights will tend to favor a single segment of society, at least monetarily.¹¹⁶ Moreover, it is not clear that such a policy choice, fair and wise or not, is important (or even particularly useful) to the proper functioning of a humane and democratic society.¹¹⁷

¹¹⁶ Arguably, giving celebrities a commercial right of publicity gives them an incentive to license merchandise to be purchased by the rest of the populace. But this is by no means an inevitable result. Celebrities may be interested simply in preventing any commercial uses of their names or images. *Waits v. Frito-Lay, Inc.*, 976 F.2d 1093, 1103 (9th Cir. 1992) (noting jury award of “\$200,000 for injury to [plaintiff]’s peace, happiness and feelings”).

¹¹⁷ Certainly, one could assert that protecting all people, celebrities or not, from harassment by overzealous media representatives is important in a decent society. But *Von Hannover* and *Anheuser-Busch*’s implications stretch beyond protection from harassment to the affirmative protection of commercial interests. Such interests benefit primarily the celebrities.

Anheuser-Busch supports this point is well. The complaining party was a corporation, not an individual. (And Anheuser-Busch can hardly claim to be a small business.) As with celebrities, corporations should not be excluded from human rights protection.¹¹⁸ Newspapers, for example, are often owned by corporations, and may be subject to violations of Article 10.¹¹⁹ And many businesses may be harmed as a means of attacking their owners, their countries of origin, or their potential for opposition to those in power. Nevertheless, *Anheuser-Busch* puts the protection of corporations in a different light. There is no evidence that Anheuser-Busch was singled out for any improper reason. Its complaint sought to protect what it deemed its “property” rights for their own sake. Certainly society has an interest in protecting trademarks, but no such generalized interest was at stake in that case (and there was a countervailing state interest in protecting geographic appellations—Portugal, for example, is the source of Port wine).

The expansion of property rights into the realm of intellectual property thus raises several concerns. One concern is that corporations may see the Strasbourg court as a new means of

¹¹⁸ Article 34 of the Convention allows any “person” whose rights may have been violated to apply to the European Court of Human Rights for relief. The term “person” is not defined, but the cases do not show any reluctance to apply the Convention to corporations.

¹¹⁹ See *Karhuvaara v. Finland*, Application No. 53678/00, at ¶__ (Eur. Ct. Hum. Rts. Nov. 16, 2004).

expanding intellectual property rights, with the result that the members of the Council of Europe will be unable to make adjustments to their laws to control those property rights. Corporations have ample means and incentives to bring claims to the Strasbourg court in an attempt to create expansive European intellectual property rights. Such rights may trump the limits placed on those rights even by regional organizations such as the European Union.¹²⁰ All property rights involve certain political decisions and intellectual property rights are no exception. In the case of intellectual property, countries may be making decisions reflecting a balance among many factors, including the country's desire to incentivize production of intellectual property, the felt need for a public domain for use as a platform on which others can build or express themselves, a sense of moral rights of those who create, and the general public's interest in not being overcharged for the production of intellectual property or for the moral rights of creators. However, it is not clear that the proportionality test under Article 1, or the balancing test used in *von Hannover* reasonably reproduces the legislative balancing of a country. Courts can act only on the information presented in a particular case involving specific litigants. Although those litigants may submit information that transcends their individual circumstances, ultimately the court's decision is based on an evaluation of the rights of the litigants before it. Even though one of the litigants before the ECHR invariably will be a country, the harm to an individual litigant is likely to loom large, the damages owed by the country to that litigant will appear small, and the

¹²⁰ This issue is discussed more fully in sections C. and D. below.

countervailing interests of absent individuals may get lost in the process.¹²¹ Moreover, assuming (and this admittedly is a loaded assumption) that the legislative balancing is a result of a reasonable democratic enterprise in which the interests of many groups are somewhat fairly weighed, a court should not lightly overturn that process.¹²²

¹²¹ For a U.S. perspective on this issue, *see* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863-64 (1986) (Brennan, J., dissenting). Although he wrote in dissent, and in a different context, Justice Brennan's words resonate in this context as well:

The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence. ... The danger of the Court's balancing approach is, of course, that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.

If one substitutes "the member state's perception of the general interest" for "judicial independence," the basis for the comparison is clear.

¹²²The result reached may not be "necessary" for a democratic society, but it may appropriately reflect a democratic process.

Second, the value of intellectual property rights makes it likely that intellectual property owners will go to great lengths to assert their rights. Though not the exclusive province of corporations, corporate ownership of intellectual property rights appears to predominate over individual ownership. Thus, intellectual property rights may favor corporate rightsholders over other individuals.¹²³ The ECHR increasingly may find itself asked to decide commercial issues in the form of human rights cases, potentially crowding its calendar at the expense of other cases.

B. *Expanding Rights by Affirmative Obligation*

The *von Hannover* case signals a potential expansion of rights in another way, by imposing obligations beyond the negative requirement that a government may not interfere with fundamental freedoms. No one connected with the German government intruded upon Princess Caroline's privacy. Her complaint was about private parties' intrusions; it was a private tort action. Yet the ECHR ruled that the German government had an affirmative obligation to protect her privacy by preventing private parties from intruding and affording her a civil remedy for

¹²³ Of course, corporations own other forms of property as well. But in cases involving that type of property—real property being a prime example—protecting corporate rights can be a useful proxy for protecting individual owners since a large number of individuals own the same type of property.

those intrusions.¹²⁴ In the wake of *Von Hannover*, it has been argued that the British trademark office's refusal to register celebrity names as trademarks for celebrity merchandise – on the grounds that the public does not view them as trademarks – violates the Convention's equal protection guarantee found in Article 14.¹²⁵ Rather than limiting the scope of intellectual property rights, such arguments expand them.¹²⁶ This means that the ECHR could mandate a tort scheme if it deems it necessary to fulfill the requirements of the Convention. This raises

¹²⁴ The affirmative nature of this obligation was reaffirmed by the ECHR in subsequent cases. *Eg.*, *Mosley v. United Kingdom*, Application No. 48009/08, at ¶106 (Eur. Ct. Hum. Rts. May 10, 2011); *Karhuvaara v. Finland*, Application No. 53678/00, at ¶42 (Eur. Ct. Hum. Rts. Nov. 16, 2004).

¹²⁵ The argument is that Britain is discriminating against celebrities based on status.

¹²⁶ *Von Hannover* is not necessarily the harbinger of expanded rights. As noted earlier, in a prior case, *Vorsina v. Russia*, No. 66801/01 (Eur. Ct. Hum. Rts. Feb. 5, 2004), the ECHR found no violation where a brewer used a portrait of the complainant's grandfather on its beer label. The court noted that the family had given the portrait to a museum and that the grandfather had once been connected with the brewery. ¶—. It also found that the use did not dishonor the family. *Id.* ¶____. And *Mosley v. United Kingdom*, Application No. 48009/08 (Eur. Ct. Hum. Rts. May 10, 2011), refused to require the press to give subjects of published stories advance notice of the publication.

difficult problems of the extent to which such mandates could, perhaps unintentionally, upset legal regimes that go beyond the immediate right at issue. Moreover, it is one thing to mandate a remedy for a baseline violation; it is quite another to provide the details of that remedy and, indeed, a detailed regulatory regime.¹²⁷ Such mandates can have consequences far beyond the immediate confines of the case before the ECHR. One may question whether such an effort is more appropriately subject to resolution by legislation, or, in multinational circumstances, by treaty,

C. *The Appropriate Measure of Deference Owed to Member Country Decisions*

As the primary court empowered to interpret the Convention, the ECHR may act as a kind of pan-European Supreme Court of human rights, implementing the human rights “Constitution”—i.e., the Convention. Because it can review judgments of member state courts, the Strasbourg court in some ways acts analogously to an appellate court. As Portugal’s government pointed out in *Anheuser-Busch*, there is some risk of the court becoming a wide-ranging European Court of Appeal. This concern is not limited to intellectual property issues; it applies to all of the Convention’s provisions. And, to date, it does not appear to be a realized

¹²⁷This is not unheard of, at least in international trade law. The TRIPS agreement, for example, mandates a certain level of procedural protection, as well as substantive protection.

<TRIPS citations>

fear.¹²⁸ But, if intellectual property rights disproportionately favor a segment of society with the means and incentive to bring cases to the ECHR, it may not be an idle possibility. The Strasbourg court's decisions attempt to downplay this possibility by referring to the "margin of appreciation" allowed a member country when interpreting the command of the Convention. Many of the Convention's provisions, including Articles 8 and 10, and Article 1 of the First Protocol, contain provisions permitting signatories to limit the freedoms of the Convention. Article 1 of the First Protocol allows a country "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest." Article 8 allows regulations that are "in accordance with the law and... necessary in a democratic society." Article 10 states that freedom of expression "carries with it duties and responsibilities," and also permits regulations that are "necessary in a democratic society" (including ones to protect the reputations of people). This suggests that countries will be given a certain degree of flexibility when they legislate as long as it is within the bounds of legitimate "general" or "democratic" interests. However, the actual degree of deference given by the ECHR to the decisions of the country is not as broad.

The issue of appropriate deference owed to member country decisions is a complex one. Too much deference would invite abuses. But too little deference, especially in areas less likely

¹²⁸ The fact that the ECHR backed away from finding Portugal in violation of Article 1, and the manner in which it did so, may reflect that concern.

to be abused, could unnecessarily restrict government policy making that is consistent both with the country's history *and* with humane and democratic values.

One striking aspect of the court's opinion in *Von Hannover* is the lack of deference to the German Constitutional court's decision. Although the Strasbourg Court mentioned the "measure of acquiescence" due a member state's courts,¹²⁹ that was the last reference in the opinion to the principle. Indeed, the court took issue with the German court's interpretation of its own law.¹³⁰ No matter what one thinks of the level of privacy protection afforded by German law (probably no lower than and possibly greater than that afforded by U.S. law), it scarcely could be described as fundamentally out of step with other democratic countries. Indeed, the fact that two fundamental rights were at issue—privacy and free expression—might have been an argument for greater leeway in the necessary balancing between the rights. Nevertheless, the Strasbourg court drew its own balance, overruling that drawn by Germany's courts.

In *Anheuser-Busch*, although the ECHR decided that no violation of the Convention existed, its emphasis on the fact that the Czech company opposed the initial application leads one

¹²⁹ *Von Hannover*, ¶ __.

¹³⁰ *Id.* ¶72. ("The court has difficulty in agreeing with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act ..."). *But cf.* *Anheuser-Busch, Inc. v. Portugal*, Application No. 73049/01, ¶¶ 84-86 (Eur. Ct. Hum. Rts. January 11, 2007) (Grand Chamber) (deferring to Portugal's interpretation of its geographic indications law).

to question whether a retroactive application of the later agreement between the Portuguese and Czech governments would have been upheld without it.¹³¹ Moreover, even though the Article makes no mention of “just compensation,” unlike the Fifth Amendment in the United States Constitution, the possibility of compensation certainly was an issue, especially to the dissenters. This suggests the possible development of a takings jurisprudence along the lines of that in the United States. More critically, the opinion made very little of Article 1's own principle that a country may “control the use of property in accordance with the general interest.” From an American perspective, one might have expected a discussion of “regulatory” versus “physical” takings, and to which category a trademark cancellation might belong. From any perspective, one might have expected a discussion of the “general interest.”

Given the nature of the expected complainants (discussed in the previous section) and the possible complications of other multilateral obligations (discussed in the next section), it would be appropriate for the ECHR to consider seriously the issue of deference in these proceedings. Although a complete discussion of this issue is beyond the scope of this paper, one possible framework—admittedly a decidedly American one—might be suggested.

In the area of fundamental rights and equal protection, the United States Supreme Court has developed a policy of tailoring its level of deference—or level of scrutiny—to its perception of the likelihood that the government’s activity stems from a venal interference with individual

¹³¹ For example, suppose the registration had issued, but the agreement required Portugal to cancel such registrations.

rights. In the area of equal protection, economic regulations are reviewed under the most deferential standard: the “rational basis” test. This test rarely results in the overturning of the governmental action. Suspect classifications, such as race, are given strict scrutiny, a very non-deferential test that usually results in the government’s action being overturned. Other classifications receive a level of scrutiny somewhere between these two. This scheme can be criticized for a variety of reasons, including a lack of nuance, and preordained results. And when the Convention is at issue, a “rational basis” review may appear too lenient. But, without adopting the specifics of the U.S. scheme, the idea that some situations are less likely to be abusive than others and should receive greater deference may be worth investigating. Perhaps intellectual property issues, as the product of economic regulations, should be reviewed more deferentially than other decisions. In addition, where affirmative private rights are being created—that is, where the government is not the primary actor—some greater deference may be appropriate to allow the government to fit the Convention’s obligations into its general civil law scheme. Whether that level should be akin to a “searching rational basis” review is best left for another day.¹³²

D. *Complications for Other Multilateral Agreements*

¹³² The “searching” review may be exemplified by *Romer v. Evans*, 517 U.S. 620 (1996), where the Supreme Court struck down a Colorado ballot initiative aimed at limiting gay rights.

Having a multinational tribunal governed by the Convention creating intellectual property rights could create a variety of complications for other multinational agreements and organizations. Consider first the European Union, all of whose members are adherents to the Convention. As discussed above, some of the rights that could be inferred from the Convention already exist in the European Union. However, it was also noted that basing rights in the Convention could prevent the EU from altering the scope of those rights (at least where the alteration narrows those rights) in response to changing conditions. Even if little change in EU law is required, should the ECHR begin recognizing affirmative intellectual property rights this would complicate the legal and political landscape of the EU in other ways. Although it has evolved into more of a political entity, the EU's roots are economic—as a trading bloc. If the Strasbourg court becomes a pan-European constitutional arbiter of intellectual property law, it will complicate the position of the EU's member states. Presently, their courts can seek guidance from the European Court of Justice, (“ECJ”) as the ultimate source of guidance on EU law. Although the ECJ will use the Convention in its decisions, its interpretations may not correspond to those of the Strasbourg Court.¹³³ That creates a quandary for European courts. They are bound by treaty to accept the ECJ's interpretation of EU law.¹³⁴ But they also are

¹³³ **Cite to Elizabeth Defeis article.**

¹³⁴ Murray v. Express Newspapers plc, [2007] EWHC 1908, at ¶¶ 60-62 (Ch.D. 2007) (British courts are bound to follow House of Lords decisions in cases of conflict with European Court of Human Rights decisions).

bound by the terms of the Convention to accept the Strasbourg Court's judgments. That would make it difficult for EU members to have certainty about their laws, even after ECJ review.

There is no obvious answer to this problem.

A separate, but related problem involves the EU's Community Trade Mark (CTM) system. That system is a centralized system for the granting of rights good throughout the EU. It is not controlled by individual member states—the registration system is operated by the Office for the Harmonization of the Internal Market, or OHIM, and OHIM's decisions are reviewed by the EU's Court of First Instance and the ECJ—although infringement suits are brought in courts of the member states designated for that purpose. Conceivably, the Strasbourg court might review member state decisions implementing the CTM system, even though the EU itself is not part of the Council of Europe.¹³⁵ A further problem is negotiating multilateral treaties relating to intellectual property. One example of such arrangements is the TRIPS Agreement. Not only does it create various substantive and procedural requirements, but, because TRIPS is one part of the larger world trade agreement, it is linked to the World Trade Organization's dispute resolution system. It is possible that the WTO's mandates could conflict with those of the Strasbourg Court. Admittedly, this is unlikely under the present version of TRIPS, which sets minimum criteria for intellectual property protection. Decisions by the Strasbourg Court that *expand* intellectual property rights probably would not conflict with TRIPS. However, a

¹³⁵ Similar questions also could be raised concerning EU law relating to patents, industrial designs, and copyrights.

decision *limiting* intellectual property rights, or a decision whereby existing intellectual property rights were held to be interfered with by a change in the existing intellectual property regime mandated by TRIPS, could cause such a conflict.¹³⁶ In the future, trade negotiators may wish to expand TRIPS in ways that may interfere with existing rights. Whether those existing rights rise to the level of “possessions” is unclear. However, it could complicate such negotiations, as countries attempt to account for their possible obligations under the Convention.

E. *The “Cheapening” of Human Rights?*

The intellectual property applications of the Convention, particularly the balancing approach of the Strasbourg Court in *von Hannover*, may temper expansive notions of intellectual property rights with the need to consider other societal concerns as boundaries. However, there is a countervailing possibility. Intellectual property rights have long been strongly influenced by “natural law” elements. That is, intellectual property rights are often seen as the natural entitlement resulting from one’s intellectual labors.¹³⁷ Although in the United States a utilitarian

¹³⁶ In addition to Article 10 and Article 1 of the First Protocol, such a conflict might occur as a result of Article 14, the equal protection component of the Convention, based on some classification not found suspect under U.S. law.

¹³⁷

approach to intellectual property may be more prevalent,¹³⁸ there is evidence of a strong “natural entitlement” strain in our law as well. The landmark case of *International News Service v. Associated Press*¹³⁹ states this most forcefully as restricting a defendant who <“reaps where he has not sown.”>¹⁴⁰ It is also found in the federal trademark dilution statute, granting rights to owners of famous trademarks against uses that do not cause confusion.¹⁴¹ The scope of moral rights of authors in copyright law—where Europe has embraced strong protection far more avidly than the United States—is also evidence of a natural rights approach.¹⁴² The point is that intellectual property rights holders often seek to restrain what they might describe as “unfair”

¹³⁸ By “utilitarian” I am referring to the Patent and Copyright Clause’s first sentence: that these rights are granted “To promote Science and the useful arts.”

¹³⁹ 248 U.S. 215 (1918).

¹⁴⁰ *Id.* at ____.

¹⁴¹ Courts have stated that this protects only mark owners, not consumers. *TCPIP Holding Co., Inc. v. Haar Communications, Inc.*, 244 F.3d 88 (2d Cir. 2001). Other courts have posited that dilution can aid consumers by lowering search costs.

¹⁴² “Moral rights” give *authors* of copyrighted works rights of attribution <and rights against destruction or disparagement of their works or reputations?> even against the *owners* of the copyright.

uses of their property, not just those that threaten the utilitarian system supporting the rights – i.e., even when other parts of society may have an interest in restricting those rights, and when the incentive to produce new works is not seriously threatened.

Putting this in the context of the two cases above, a celebrity might argue the “unfairness” of permitting someone to profit from the image of (or a perceived connection to) the celebrity.¹⁴³ The user may respond by claiming a free speech interest under Article 10, or the government may claim a right under Article 1, First Protocol, to regulate property in the public interest. At this point, the *von Hannover* case requires a balancing between the interests at issue. The danger is that the balancing may be influenced by the seeming “unfairness” of the offender’s actions (which implicitly assumes the correctness of the complainant’s case), leading the court to undervalue the rights of the offender (such as rights of free expression), especially if they are not in a “traditional” form for those rights.¹⁴⁴ The result would be a precedent that would “cheapen” the value of the right opposing the intellectual property right, even outside the context of intellectual property.

¹⁴³ See, e.g., *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 457 S.E.2d 356 (1995) (sale of house identified as formerly owned by football player John Riggins).

¹⁴⁴ Cf. *Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th 387, 21 P.3d 797(2001) , where First Amendment rights were considered in the context of artwork; *Keller v. Electronic Arts, Inc.*, 94 U.S.P.Q.2d 1130 (N.D. Cal. 2010) (rights of publicity and First Amendment relating to use in a video game).

