Essence of Intellectual Property Rights under Art 17(2) of the EU Charter

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1. Introduction

Smoking kills. It is also very costly, which is why many governments try to change habits of their citizens, including by changing the packaging of the products they buy. Of course, tobacco firms are pushing against such laws. They see their rights, in particular rights to intellectual property, violated. They argue that such legislative changes take away the essence of their hard-earned IP rights and should not be permissible. They point out that the CJEU is allegedly redefining the ‘essence’ of fundamental rights and its function in the system of limitations and developing a set of core inviolable rights.

How justified are these arguments? The absolute theory of essence says that essence of rights cannot be interfered with or taken away, including by the legislator. The relative theory of essence, on the other hand, claims that an interference with essence is just a more serious interference which is still subject to the typical proportionality analysis. Therefore, adoption of either of these two theories has profound consequences. What might constitute the essence of intellectual property rights (IP rights)? When are legislators touching upon it? Is the CJEU really advancing a notion of essence that can prevent legislative changes, or at least make them very difficult? The answer to all these questions depends on our understanding of what constitutes the ‘essence’ of intellectual property rights, and what consequences this notion has under Article 17(2) of the EU Charter of Fundamental Rights.

The article proceeds as follows: First, it explains how intellectual property rights are protected in the EU Charter. Second, it puts this protection in the context of the absolute and relative theories of the role of the essence of rights. Third, it explores the case-law of the CJEU (and partly ECHR) to determine to which theory the CJEU subscribes. Fourth, and lastly, after concluding that the CJEU does not yet advance an absolute theory of the essence of rights in intellectual property law, it briefly explores sources of constitutional traditions on which the CJEU might draw, should it decide to do so in the future.

The article concludes that notion of ‘essence’ is hardly applied in the context of intellectual property rights. Any reference to essence in the case-law of the CJEU points only towards a higher level of scrutiny, but not towards an untouchable core of rights. The essence is only viewed as a tool to identify the core features of the legislative design of various intellectual property rights — their substance — which are then weighted against conflicting interests. However, the essence of legislative design is not the same as the essence of a fundamental right.

A brief analysis of the constitutional traditions of England, Germany and Slovakia shows that different models coexist on the national level. German and Slovak constitutional jurisprudence do recognize inviolable core rights, although the obligations differ slightly. The UK jurisprudence, on the other hand, equates its mechanisms with the Convention and the EU Charter, which, according to its domestic court’s reading, provides no inviolable core rights at this point.

Next to national constitutions, an important source of constitutional traditions is also the International Covenant on Economic, Social and Cultural Rights (ICESCR), which, in its Article 15(1)(c), includes an obligation to provide for a right of creators to benefit from their works. Although these ‘creator’s rights’ protect a wider range of interests, in

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particular also non-economic ones, they provide for a useful external source of inspiration for conceptualizing what ought to constitute the essence.

2. Article 17(2) and A1P1

Intellectual property rights are legal constructs which govern the use of information. They mostly come in the form of exclusive rights which are expected to be traded on the market in exchange for licensing revenue. Exclusivity and remuneration are thus two defining features of IP rights. At the moment, we have more than a dozen different intellectual property rights. The most prominent categories of rights include copyright, patent and trademark rights. With technological progress, IP rights keep growing in number because legislators are agitated by societal groups to create new forms of protection. The latest copyright reform in the EU, for instance, legislatates for a new right for press publishers. At the same time, legislators almost never revisit obsolete IP regimes, which results in a constant stacking and expansion of intellectual property rights in the legal system.

I. Why do They Exist?

It is very hard to answer a simple question: Why do all IP rights exist? Centuries of law-making have created a very fragmented landscape that cannot be explained with a single reason. There are many functions of IP rights within society, each specifically tailored to a particular IP regime. For instance, while both copyright and patent rights are often characterized as economic incentives for future creativity and innovation, copyright law includes a stronger moral component. Trademarks, on the other hand, rather serve the purpose of market transparency and reducing the consumer’s search costs.

Therefore, the term ‘intellectual property’ is an elusive category which harbors many different instruments with entirely different goals. What they have in common is that they are all, by and large, economic instruments of innovation policy. However, some more than others also have strong dignitary goals, which might be protected by non-economic fundamental rights of the EU Charter (e.g. Articles 1, 3(1), 7). Identifying the rationale behind these rights is important in order to understand what values they embody and thus the reasons for which the legislator attributes importance to them.

According to the CJEU, IP rights are created for the purpose of fulfilling certain social goals. These are often articulated in the recitals of secondary EU law. However, the “requirements of general interest which motivated the grant of the right” differ for various IP rights. Although some prominent commentators question repeated references to “social function” as outdated, with regard to intellectual property rights, the idea that these rights

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1 These include: copyright, performer’s rights, phonogram producer’s rights, broadcaster’s rights, sui generis database rights, patents, utility models, registered and non-registered designs, trademarks, geographical indications, plant varieties and semiconductors.

2 See Article 11 of the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market 2016/0280(COD).

3 See also Martin Leksan v Petrus van der, C-277/10, EU:C:2012:65, para 68; This is often discussed as a ‘social function of property’ – see C Geiger, ‘The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law’ in G Dinwoodie (eds), Intellectual Property Law: Methods and Perspectives (Edward Elgar 2013), pp. 153 - 176; C Geiger, ‘Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles’ in C Geiger (ed.), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2014); A Peukert, ‘Property as an End in Itself?’ (2011) 33 European Intellectual Property Review, 67 - 71; F Leinemann, Die Sozialbindung des Geistigen Eigentums (Nomos, 1998); E Pahud, Die Sozialbindung des Urheberrechts (Berne Verlag, 2000); C Sganga, Proprietizing European Copyright (Edward Elgar, 2017).

4 See Recital 1 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157 (“The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.”). These goals are by no means exhaustive.

5 Opinion of Advocate General Tesauro in Metronome Musik v Music Point Hokamp, C-200/96, EU:C:1998:172, para 33.

6 Steve Peers and Sascha Prechal, ‘Article 52 – Scope of guaranteed rights’ in in Jeff Kenner, Angela Ward, Steve Peers and Tamara K. Hervey (eds.), The EU Charter of Fundamental Rights: A Commentary (OUP, 2014), p. 1479.
are only means to an end is in fact less controversial that it might seem for other rights (see Section 3). In fact, some national constitutional texts and jurisprudence articulate this instrumentalist view of IP rights very firmly. Most famously, the United States Constitution grants the US Congress powers to enact IP laws only ‘[t]o promote the progress of science and useful arts’. 

When we look at the case-law of the CJEU, we can identify the following justification for some of the most important intellectual property rights:

- **For phonogram producers**, in *Metronome* the CJEU saw the rights “justified by the protection of the extremely high and risky investments which are required for the production of phonograms and are essential if authors are to go on creating new works”. 

- **For author’s and performer’s rights**, in *Phil Collins* the CJEU emphasized “the protection of the moral and economic rights” as the reason for their existence. Advocate General Szpunar in *Funke Medien* recently explained this in more detail:

  [c]opyright has two main objectives. The first is to protect the personal relationship between the author and his work as his intellectual creation and therefore, in a sense, an emanation of his personality. This primarily involves the area of moral rights. The second objective is to enable authors to exploit their works economically and thus earn an income from their creative endeavours.

  The substance of copyright, in his view, is “respect for the relationship linking them to their works and the possibility of exploiting those works economically”. In *Pelham*, he added that “[t]he main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their works, so that they are not dependent on patrons and are free to pursue their creative activity.”

- **For trademarks**, in *Hoffmann-La Roche* the CJEU explained that their essential function “is to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin”.

- **For patents**, in *Huawei* Advocate General Wathelet emphasized that:

  The essential objective of a patent is to ensure, in order to reward the creative effort of the inventor, that the owner of the patent has the exclusive right to use an invention with a view to manufacturing industrial products and selling them, either directly, or by granting licences to third parties, as well as the right to oppose infringements.

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7 See Alexander Peukert, ‘Intellectual Property as an End in Itself?’ (2011) 33 European Intellectual Property Review, pp. 67-71.

8 Article I, Section 8, Clause 8, of the US Constitution.

9 *Metronome Musik v Music Point Hokamp*, C-200/96, EU:C:1998:172, para 24.

10 *Collins and Patricia Im- und Export v Imtrat and EMI Electrola*, C-92/92, ECLI:EU:C:1993:847, para 20.

11 Opinion of the Advocate General Szpunar, *Funke Medien NRW*, C-469/17, ECLI:EU:C:2018:870, para 58.

12 Opinion of the Advocate General Szpunar, *Funke Medien NRW*, C-469/17, ECLI:EU:C:2018:870, para 38.

13 Opinion of the Advocate General Szpunar, *Pelham and Others*, C-476/17, ECLI:EU:C:2018:1002 para 83.

14 *Hoffmann-La Roche v Centroform*, C-102/77, ECLI:EU:C:1978:108, para 7.

15 Advocate General Opinion Wathelet, C-170/13, *Huawei Technologies Co. Ltd*, ECLI:EU:C:2014:2391, footnote 34, citing: *Centrofarm and de Peijper*, Case 15/74, EU:C:1974:114, para 9; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 107.
This brief survey of case-law shows that the economic function of intellectual property is key in explaining why it exists. However, some rights, such as copyright, are equally strongly underscored for their dignity function, in particular the link to one’s personality. This is important for construction of essence within Art 17(2), which is of purely economic character. Non-economic aspects of IP rights might find their protection under other fundamental rights enshrined in the EU Charter, such as right to human dignity (Article 1), right to integrity of a person (Article 3) and right to respect of private life (Article 7).

II. Supranational Sources of Protection

On the global level, international human rights law does not speak of intellectual property rights. The Universal Declaration of Human Rights, in its Article 27, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in its Article 15, include an obligation for states to give everyone a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. These so-called creator’s rights are interlinked but should not be equated with intellectual property rights. Although the goals of two systems might be often in sync, this is not necessarily always the case. Creators’ rights deal only with a subset of interests protected under typical intellectual property laws. While patents and copyrights are more closely linked with authors’ interests in their own ‘scientific, literary or artistic production’, this link is virtually non-existent for other types of IP rights (e.g. trademarks or sui generis database rights), or at least much weaker due to an emphasis on investment (e.g. rights of phonogram producers and broadcasters). The most encompassing protection system within human rights law is therefore, unsurprisingly, one of property protection.

Historically, the first individually enforceable supra-national protection of intellectual property rights in Europe was developed under the auspices of the European Convention of Human Rights (the Convention). Its Art 1 of Protocol 1 (A1P1), which entered into effect in 1954, became a backbone of European human rights protection of intellectual property rights. The provision prescribes protection for the peaceful enjoyment of possessions. It circumscribes the types of interferences that are permissible in the Member States of the Council of Europe. These interferences usually take the form of direct actions of public authorities, including courts, but they may also arise from legislation.16

Since 1990, the case-law has accepted that various intellectual property rights qualify as ‘possessions’. According to the ECtHR, this includes copyright,17 patents, 18 and trademarks,19 including mere applications for them.20 The crucial requirement is that national law recognizes these rights, as the Convention has no pre-conceived notions of what shall constitute ‘possessions’. Where national law – as interpreted by national courts – foresees no IP rights, even

16 ECtHR, Marckx judgment of 13 June 1979, Series A no. 31, para. 27: (“Article 25 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it”).
17 ECtHR, A.D. v. the Netherlands, Appl. no. 21962/93, 11 January 1994, CE:ECHR:1994:0111DECO002196293, para 3; ECtHR, Aral, Tekin and Aral v. Turkey, Appl. no. 24563/94, 14 January 1998, CE:ECHR:1998:0114DECO02456394, para 4; ECtHR, Dima v. Romania, Appl. no. 58472/00, 26 May 2005, CE:ECHR:2005:0526DECO05847200 (available only in French); ECtHR, Melnychuk v. Ukraine, Appl. no. 28743/03, 5 July 2005, CE:ECHR:2005:0705DECO02874303, para 3; ECtHR, Bőlán v. Moldova, Appl. no. 19247/03, 29 January 2008, CE:ECHR:2008:0129UD001924703, para 34; ECtHR, SC Editura Orizonturi SRL v. Romania, Appl. no. 15872/03, 13 May 2008, CE:ECHR:2008:0513UD001587203 (available only in French), para 70; ECtHR, SIA AKKA/LAA v. Latvia, Appl. no. 562/05, 12 July 2016, CE:ECHR:2016:0712UD000056205, para 41;
18 ECtHR, Smith Kline & French Lab. Ltd. v. the Netherlands (dec.), no. 12633/87, 4 October 1990, CE:ECHR:1990:1004DECO01263387; ECtHR, Lenzing AG v. the United Kingdom (dec.), no. 38817/97, 9 September 1998, CE:ECHR:1998:0909DECO03881797.
19 ECtHR, Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, 11 January 2007, CE:ECHR:2007:0111UD0007304901, para 72; ECtHR, Paeffgen Gmbh v. Germany (dec.), nos. 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007, CE:ECHR:2007:0918DECO02537904.
20 For overview see - I. Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ (2008) 49 Harvard International Law Journal 1–52; S Sebastian, ‘Geistiges Eigentum als europäisches Menschenrecht: Zur Bedeutung von Art. 1 des 1. Zusatzprotokolls zur EMRK für das Immaterialgüterrecht’ (2013) GRUR Int 524; Geiger, Christophe and Izyumenko, Elena, Intellectual Property before the European Court of Human Rights in: Christophe Geiger, Craig A. Nard and Xavier Seuba (eds.), “Intellectual Property and the Judiciary” (Edward Elgar Publishing, 2018), pp. 9–90.
though this might be questionable from the international public law perspective, the ECTHR does not intervene.\(^{21}\) Such complaints are then found to be outside *ratione materiae* of A1P1.\(^{22}\) As explained by Harris and others, A1P1 “is not a right to be put into the possession of things one does not already have, however strong the individual’s interest in this happening may be.”\(^{23}\) In other words, A1P1 essentially forces the governments to stick to its promises, or justify when they deviate from them, but never to proactively give new ones.\(^{24}\)

When promises to grant IP rights have already been made by the state, they can be interfered with only subject to safeguards of A1P1. These differ depending on whether the interference qualifies as a control of use or deprivation (see Section 2.2). While control of use is an interference that requires proportionate state actions, deprivation, whether *de iure* or *de facto*, largely also dictates compensation. These requirements represent a basic articulation of the rule of law, which allows legislators to experiment but also holds them to account if they completely disregard their own previous promises. Only once the possession is established in national law, the state might come under a (positive) obligation under A1P1 requiring it to take the measures necessary to protect property rights, including in relationships between individuals.\(^{25}\)

### III. The EU Charter

In the European Union, the constitutional protection of IP rights obtained a new impulse after the Lisbon Treaty entered into the force in 2009. Within the European Union’s Charter of the Fundamental Rights (the Charter), Article 17(2) singled out intellectual property rights as explicitly protected subject matter, without clarifying the terms used or scope of protection offered. According to the official explanatory note, intellectual property was explicitly mentioned because of “its growing importance and Community secondary legislation”.\(^{26}\) The explanatory note also confirms that the protection offered by Article 17(2) was modelled on A1P1.\(^{27}\) The vagueness of this provision prompted a considerable amount of scholarship trying to identify the contours of the protection under Article 17(2), its functions and future roles.\(^{28}\) Despite different views on the matter, the agreement seems to be that Article 17(2) does not come with any program of IP rights of its own, and leaves their design largely or entirely to the legislator.\(^{29}\)

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\(^{21}\) Christophe Geiger and Elena Izyumenko (fn 9), p. 21 ff; Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (OUP 2016), pp. 230, 240; Alexander Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), p. 138.

\(^{22}\) See Section 3.1.

\(^{23}\) D Harris and others, *Law of the European Convention on Human Rights*, 2nd Ed (OUP, 2009) 660.

\(^{24}\) M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 *Cambridge Yearbook of European Legal Studies*, pp. 239-269

\(^{25}\) Zolotas v. Greece (No. 2) [First Section], Appl. no. 66610/09, para 39 (summarizing the case-law); Broniowski v. Poland [Grand Chamber], Appl. no. 31443/96, para 143 (for horizontal relationships).

\(^{26}\) Explanations relating to the Charter of Fundamental Rights OJ C 303, 14.12.2007, p. 17–35 (“The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there. Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation.”)

\(^{27}\) Ibid.

\(^{28}\) C Geiger, ‘Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope’ (2009) 31 (3) European Intellectual Property Review 113; J Griffiths and I McDonagh, ‘Fundamental Rights and European IP law - the Case of Art 17(2) of the EU Charter’ in C Geiger (ed), *Constructing European Intellectual Property* – *The Protection of Intellectual Property in International Law* (OUP, 2014), p. 503; Martin

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In just a few years, the Court of Justice of the European Union has used Article 17(2) to moderate disputes between various fundamental rights, to interpret provisions of secondary EU law, or to advance harmonization goals by declaring national laws incompatible with the safeguards. In other words, the CJEU quickly emancipated Article 17(2) from A1P1, although still building upon its foundations and drawing on its methodology. The emancipation process was observed by a number of scholars. In a way, this was to be expected given that, unlike the ECtHR, the CJEU is at the same time interpreting secondary EU law which includes an increasing number of laws relating to intellectual property rights.

The relationship between the ECtHR and the CJEU is fairly complex. For the purposes of this article, it suffices to say that the ECtHR serves as a minimum standard of protection available within the EU Charter. The EU Charter may go beyond this standard. At the same time, interpretation of parallel provisions in the Convention provided by ECtHR is one of the crucial sources of interpretation, next to “the constitutional traditions common to the Member States”. We will return to the latter concept at the end of this article.

At the moment, the exact contours of Article 17(2) are being tested before the courts. As the standardized packaging litigation shows, its guarantees are being increasingly invoked by firms in high profile cases in order to challenge various pieces of legislation. Two important aspects are in dispute: (a) the extent of protection offered by Article 17(2) and (b) the nature of IP rights. The first question is about whether Article 17(2) offers more protection than A1P1 and goes to the core of the current articl. In the litigation about standardized packaging of tobacco products, plaintiffs invoked enhanced protection of their IP rights through Article 17(2) which should have prevented legislative change. Their argument was that the essence of the right is protected much more strongly under the EU Charter, than under A1P1. The second question – concerning a dispute about the very nature of IP rights – is beyond the scope of this article.

IV. Methodology of Conflict Resolution

The main tool of resolution of constitutional conflicts is the proportionality test. The overarching description of the mechanism is found in Article 52(1) of the EU Charter, according to which, “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms”. Any limitations “may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”. This principle is

Husovec, ‘The Fundamental Right to Property and the Protection of Investment: How Difficult Is It to Repeal New Intellectual Property Rights?’ in Christophe Geiger (ed.) Research Handbook of Intellectual Property and Investment Law (Edward Elgar, 2019) forthcoming.

30 Mylly cautioned that nowadays Article 17(2) assumes roles that are not present under Article 1 of the First Protocol - Mylly 2015 , pp 106, 119; Griffiths observed pro-harmonization bias in the case-law - J Griffiths, ‘Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 European Law Review 65; Husovec suggests that the latest case law of the Court shows a marked departure from the ECtHR origins, pointing to emergence of positive obligations under Art 17(2) that occasionally challenge even previously settled reading of the secondary Union law - M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 Cambridge Yearbook of European Legal Studies pp 241, 257.

31 See Opinion 2/13, ECLI:EU:C:2014:2454. Also: Gráinne de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20(2) Maastricht Journal of European and Comparative Law 168–184.

32 Article 53 of the EU Charter.

33 Article 52(3) of the EU Charter; see Steve Peers and Sascha Prechal, ‘Article 52 – Scope of guaranteed rights’ in in Jeff Kenner, Angela Ward, Steve Peers and Tamara K. Hervey (eds.), The EU Charter of Fundamental Rights: A Commentary (OUP, 2014), p. 1460.

34 Article 52(4) of the EU Charter.

35 The question is to what extent IP rights lend their holders not only negative rights to exclude others under some circumstances, but also some positive market expectations. This aspect was at the center of the standardized packaging litigation too, as it was disputed to what extent trademark rights imply access to the market using the registered signs.

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extensively used in IP case-law which keeps repeating the mantra of ‘fair balance’, although not always referring back to Article 52 of the EU Charter.

Historically, the CJEU has already emphasized the non-absolute nature of IP rights in 1998. In Metronome Music, it held that “the freedom to pursue a trade or profession, and likewise the right to property, form part of the general principles of Community law.” In the same breath, the Court also highlighted that “those principles are not absolute but must be viewed in relation to their social function.” Post-Lisbon Treaty, this holding was confirmed in a widely-cited paragraph in Scarlet Extended, in which the Court held that “[t]here is, however, nothing whatsoever in the wording of [Article 17(2)] or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected.” IP rights are therefore without doubt not absolute rights, and always need to be balanced with other rights and interests.

V. Theories of Essence

In the literature and case-law, the extent to which the reference to ‘the essence’ in the EU Charter implies a separate test to the proportionality requirement has been extensively debated. One can distinguish two main views about the interaction between essence and proportionality as limiting principles.

According to the first view – the relative theory – proportionality is the only analytical framework for any type of interferences, including those that touch the essence of rights. Every interference is thus subject to a proportionality exercise. Interference with essence only corresponds to a particularly severe type of interference which can, however still be justified. As explained by Christoffersen, this view adds nothing but rhetoric to the weighing and balancing of interests.

According to the second view – the absolute theory – on the other hand, interfering with the essence is to be distinguished from other interferences. Unlike an ordinary interference, interference with the essence of a right is absolutely prohibited under all circumstances. Therefore, no proportionality exercise can be undertaken. It constitutes a special case within the group of all interferences. This does not exclude that there can be overlaps among the rights or their cores, such as when the right to property overlaps with the right to effective remedy.

The concept of the essence of rights has its origin in Article 19(2) of the German Constitution from 1949. It has also appeared in the jurisprudence of the European Court of Human Rights (ECtHR). Although the Convention does not explicitly refer to it, the Court has made a number of references to it over the years. In Matthews v. the United Kingdom, the court considered that the non-availability and denial of the exercise of a fundamental right to vote to

36 Metronome Musik v Music Point Hokamp, C-200/96, EU:C:1998:172.
37 Opinion of Advocate General Tesaro in Metronome Musik v Music Point Hokamp, C-200/96, EU:C:1998:172, para 21 and footnote 19.
38 Metronome Musik v Music Point Hokamp, C-200/96, EU:C:1998:172, para 21.
39 Judgment in Scarlet Extended, C-70/10, 24 November 2011, EU:C:2011:771, para 43.
40 Steve Peers and Sascha Prechel, ‘Article 52 – Scope of guaranteed rights’ in in Jeff Kenner, Angela Ward, Steve Peers and Tamara K. Hervey (eds.), The EU Charter of Fundamental Rights: A Commentary (OUP, 2014), p. 1476 (viewing both as part of the balancing exercise), p. 1480 (noting that the case-law usually makes no attempt to separate the tests/elements and that they are hard to separate in practice).
41 J Christoffersen, ‘Human Rights and Balancing: The Principle of Proportionality’ in: Ch Geiger, Research Handbook on Human Rights and Intellectual Property (Edward Elgar, 2015), pp. 25-27.
42 Belgian Linguistic case (merits) (23 July 1968, Series A, nr. 6); For an in-depth study, see E Klein, Wesensgehalt von Menschenrechten (Delbrück, 2005).
43 ECHR, Golder v the United Kingdom, App no. 4471/70; ECHR, Prins Hans-Adam II of Liechtenstein v Germany, App no. 42527/98; ECHR, Campbell and Cosans v the United Kingdom, App no. 7511/76.

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constitute a breach of the essence of that right. Similarly, the essence of the right is also mentioned in the UN Human Rights Committee’s General Comment 27 with respect to the International Covenant on Civil and Political Rights. It is also present in the national constitutional traditions of some EU Member States.

Although the CJEU recognized the fundamental rights to property as early as the 1970s, the explicit reference to their essence only appears much later. In Nold, the Court speaks of a right’s “substance” which must be left untouched. In Karlsson and Kadi, the Court speaks of “very substance” when emphasizing the need to avoid undermining it. Post-Lisbon, in Trabesi, the General Court equates both concepts with ‘essence’ under Article 52 of the EU Charter. Very recently, according to some scholars, the CJEU hints at a separate test following the absolute theory of essence. In their view, in a series of recent decisions — Sky Österreich (2013), Digital Rights Ireland (2014), and most importantly, Schrems (2015) — the Court analytically distinguishes core interferences, and other ordinary interferences that are subject to the proportionality exercise. Brkan and Ojanen argue in favor of this reading. However, during the same period, in other cases, the CJEU refrain from such separation and signals the opposite. The general situation in the case-law is therefore inconclusive, at best. As will be shown, the situation in intellectual property, if viewed in context, is even less suggestive of any absolutist theory of essence.

The absolutist reading of core rights would translate to the following application scheme. First, the Court reviews whether an interference is ‘provided by the law’. If the answer is positive, it reviews whether the interference touches the core of a particular fundamental right. If this is the case, the analysis ends here and the interference is declared inadmissible. If it does not touch the core, the Court proceeds to the proportionality analysis. These ‘ordinary’ interferences can then be declared justified or not, depending on their objectives, necessity and adequacy.

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44 ECHR, Matthews v. the United Kingdom, Appl. No. 24833/94, judgment of 18 February 1999, para 63-65.
45 See G van der Schyff, ‘Cutting the Core of Conflicting Rights: the Question of Inalienable Cores in Comparative Perspective’ in E. Brems (ed.) Conflicts with Fundamental Rights (Intersentia 2008), p. 131-147; M Brkan, ‘The concept of essence of fundamental rights in the EU legal order: Peeling the onion to its core’ (2018) 14(2) European Constitutional Law Review, pp 332-368.
46 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, ECLI:EU:C:1974:51; Liselotte Hauer v Land Rheinland-Pfalz, Case 44/79, ECLI:EU:C:1979:290.
47 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, ECLI:EU:C:1974:51, para 14 (‘within the community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.’).
48 Kjell Karlsson and Others, C-292/97, para 45; Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, para 355.
49 T-187/11, para 81.
50 C-283/11 – Sky Österreich, para 48 ff.
51 C-293/12 – Digital Rights, paras 39, 45 ff.
52 C-362/14 - Maximilian Schrems, para 94 ff.
53 H Jarass, Charta der Grundrechte der EU, 3. Auflage (Beck, 2016), Article 17, paras 28-29.
54 H Jarass, Charta der Grundrechte der EU, 3. Auflage (Beck, 2016), Article 17, paras 28-29.
55 T Ojanen, ’Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter: ECI 6 October 2015, Case C-362/14, Maximilian Schrems v Data Protection Commissioner’ (2016) 1(2) European Constitutional Law Review, pp. 318-329; M Brkan, ‘The concept of essence of fundamental rights in the EU legal order: Peeling the onion to its core’ (2018) 14(2) European Constitutional Law Review, pp 332-368; H Jarass, Charta der Grundrechte der EU, 3. Auflage (Beck, 2016), Article 17, paras 28-29;
56 Pillbox 38, C-477/14, ECLI:EU:C:2016:324, para 160: ‘accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others’ (emphasis mine).
All of this is assessed against the factual background. The context thus matters for both tests, although in different ways.

In the following sections, I will outline the jurisprudential status quo regarding the essence of intellectual property rights before the ECtHR and CJEU (Section 2) and then explore how a potential construction of essence of intellectual property rights could look under the EU Charter (Section 3). This will be followed by a brief conclusion summarizing the findings.

3. Jurisprudence of the ECtHR and CJEU

Today's IP case-law of the CJEU is dominated by fundamental rights rhetoric. The number of cases which rely on the fundamental rights, including the right to intellectual property, have risen substantially since the Lisbon Treaty entered into force. Even beforehand, intellectual property rights, as protected interests under general principles, were intermittently present in the case-law concerning free movement of goods and services or competition law.

Analytically, we can categorize the case-law as follows: (1) situations outside ratione materiae, i.e. outside of the remit of a fundamental right to intellectual property and (2) conflicts with an interference that might be legitimate or illegitimate. To examine the role of 'essence', I separately highlight cases which apply or interpret the notion of the essence of the fundamental right to intellectual property.

I. Situations Outside ratione materiae

Intellectual property rights are fundamental rights defined by the legislator. This means that the legislator also defines what falls under its ambit. It does so by two choices: (1) what bears the label of ‘intellectual property’ and (2) what scope is given to them in the legislation.

Although there might be little dispute about terminology concerning the main intellectual property rights, the qualification of some rights — such as trade secrets — as intellectual property might be questionable. It is not self-evident that they constitute a form of ‘intellectual property’. Their treatment in the case-law is mixed at best. The legislative design and definitions influence the extent to which protection would be offered in practice. Naturally, even if protection is not offered by Article 17(2), it might be offered by Article 17(1). Furthermore, the CJEU could decide to create its own autonomous notion of ‘intellectual property’. However, doing so would prompt questions about the definitional factors to be used.

57 CJEU, Judgment in Mc Fadden, C-484/14, 15 September 2016, EU:C:2016:689; CJEU, Judgment in GS Media, C-160/15, 8 September 2016, EU:C:2016:644; CJEU, Judgment in Deckmyn, C-201/13, 3 September 2014, EU:C:2014:2132; CJEU, Judgment in UPC Telekabel Wien, C-314/12, 27 March 2014, EU:C:2014:192; CJEU, Judgment in SABAM v. Netlog, C-360/10, 16 February 2012, EU:C:2012:85; CJEU, Judgment in Luksan, C-277/10, 9 February 2012, EU:C:2012:65; CJEU, Judgment in Painer, C-145/10, 1 December 2011, EU:C:2011:798; CJEU, Judgment in Scarlet Extended, C-70/10, 24 November 2011, EU:C:2011:771; CJEU, Judgment in Coty Germany, C-580/13, 16 July 2015, EU:C:2015:485; CJEU, Judgment in XXXLutz Marken v. OHIM, T542/10, 18 October 2011, EU:T:2011:669; Funke Medien NRW, C-469/17, ECLI:EU:C:2018:870 (pending); Pelham and Others, C-476/17 (pending); Spiegel Online, Case C-516/17 (pending).

58 See for the overview: M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 Cambridge Yearbook of European Legal Studies 239–269.

59 The CJEU so far did not have a chance to fully expand on the legislator’s role in defining the rights.

60 See Lionel Bentley, “Trade secrets: ‘intellectual property’ but not ‘property’?” in Howe & Griffiths (eds.), Concepts of Property in Intellectual Property Law (Cambridge University Press, 2013) (arguing that they are predominantly being accepted as ‘intellectual property’, but not ‘property’). The only hint at possible protection by Art 17(2) is interserooh Scrap and Metals Trading GmbH v Sondarabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM) (C-1/11) EU:C:2012:194; [2012], para 43; CJEU case-law broadly accepts that they are protected under general principles of EU law (e.g. Case C-450/06 Varec, ECLI:EU:C:2008:91, para 49), however, it is less clear under which of the rights. See also Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights COM(2017) 708 final.
As regards the legislated scope, the statutory design might prevent interferences from arising. For instance, in *Netherlands v European Parliament*,61 the CJEU found that imposing exclusive rights on bio-technological inventions through the patent system does not interfere with human dignity.62 Due to the way in which the patent system operates, the CJEU saw no need for individual balancing of human dignity and property rights. The CJEU concludes that from the design of the Directive it is clear that “as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded”.63 The Court explained that an element of the human body may be part of a product which is patentable but that it may not, in its natural environment, be patented itself.64 Hence the very design of the patent law mitigates the conflict. The ability to obtain patents for technical inventions grounded in human body thus, in the Court’s view, does not mean a possibility to appropriate them. This conclusion arguably rests on the actual design of the patent system which filters such effects through a set of criteria, such as novelty, inventive step, industrial application and a set of patentability exclusions.65 As the Court puts it, “the protection envisaged by the Directive covers only the result of inventive, scientific or technical work, and extends to biological data existing in their natural state in human beings only where necessary for the achievement and exploitation of a particular industrial application.”66 This highlights the fact that the actual legislative design of rights predetermines not only the scope of the conflict, but even if there ever is one. This issue is also crucial for the debate about positive and negative rights allegedly implied in trademark law – an issue which is beyond the scope of this article (see Section 4.2.1).

Outside of *ratione materiae*, there are cases where legitimate expectation is missing, although some form of interests exist. In the spirit of A1P1,67 it is clear that, according to the CJEU case-law,

> the protection of the right to property afforded by Article 17 of the Charter does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but applies to rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit.68

The judgement in *Sky Österreich* shows that even legislation permitting competitors to re-use short extracts from each other’s licensed broadcasts for the purpose of short news coverage might not qualify as interference with ‘property’. Here, the CJEU concluded that “[a]n economic operator (..) which (..) has acquired exclusive broadcasting rights by means of a contract (..) cannot, in the light of European Union law, rely on an acquired legal position, protected by Article 17(1) of the Charter”.69 However, the Court then granted the broadcasters protection under the somewhat weaker right to conduct a business enshrined in Art 16.70 These types of qualification problems can arise

61 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523.
62 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, para 69 ff.
63 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, para 77.
64 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, para 74.
65 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, para 74 (court discusses these elements).
66 *Netherlands v Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, para 75.
67 *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, para 61.
68 *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, para 60.
69 *Sky Österreich*, C-283/11, ECLI:EU:C:2013:28, para 39.
70 *Sky Österreich*, C-283/11, ECLI:EU:C:2013:28, para 31 ff.
in the constitutional context, especially when derivative right holders, who only receive rights by assignments or licenses, wish to invoke the interests of original right holders, e.g. authors.

In the ECtHR case-law, the cases which fall outside of *ratio* *materiae* are usually cases where an intellectual property right cannot be proved to ever exist in the national law or ceased to exist there.

**II. Interferences that need justification**

Similarly to A1P1, Article 17(1) recognizes two main types of interferences: control of use of property, and, more seriously, deprivation of property. The ECtHR also recognizes a residual category of other types of interferences, which might also be available under the EU Charter, if necessary. Deprivation, unlike control of use of property, requires compensation to be justified. Other types of interferences might also demand compensation as a matter of proportionality, but not as a strict rule. Deprivation, according to the ECtHR's case-law, means a full 'transfer of property' to another person, be it a public authority or private party. It might take the form of a legislative or other public intervention. Cases in which the property stays with the victim and is 'only' emptied of its content, sometimes qualify as 'de facto deprivation' which are then treated in the same way as deprivations under the ECtHR. The CJEU does not recognize this category.

In the great majority of cases, IP rights merely experience 'ordinary' clashes with other rights and interests. The three main categories of case-law are conflicts between IP rights and: (i) other fundamental rights; (ii) the principle of free movement of goods and services; and (iii) provisions of competition law. I have shown in my earlier work that the large corpus of case-law shows a slight disconnect between pre-Charter jurisprudence that mostly...
concerned the second and third category of conflicts, and the newest case-law that centers on the first category. In this part, I will therefore make some focused observations based on this previous work.

First, since Scarlet Extended, the CJEU has highlighted that intellectual property rights are not absolute and must always balanced with other interests. Over the years, the Court held that legislative design of exclusive rights has to be interpreted in light of fundamental rights, such as freedom of expression. This also applies to exceptions and limitations. At the moment, there are three pending cases which will likely define the exact role that other fundamental rights play in judicial interpretations, especially when the legislative design of intellectual property rights potentially neglects other fundamental rights. Advocate General Szpunar, in Pelham and Spiegel Online suggests that fundamental rights ought to play “a sort of ultima ratio [role] which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right.” In other words, only violations of the essence of the rights of others, in his view, can justify an intervention by the court into the legislator’s broad range of choices.

Given the introduction, it might come as a surprise that the Court only exceptionally refers to notions of use of property in the intellectual property case-law. Most of the balancing is unstructured, without classifying interferences as ‘use of property’ or ‘deprivation’. The case-law concerning free movement, which mostly pre-dates the EU Charter, often analyzed cases through the notion of the so called ‘specific subject matter’ which is specific for every right. Its function was to extract the substance of each of the IP rights in the context of balancing. The doctrine of specific subject matter, according to the case-law, “does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration”. Any “such remuneration must be reasonable in relation to the economic value of the service provided”. In particular, “it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service”. Specific subject matter is equally present in the case-law concerning conflicts with competition law policy. Surprisingly, however, it plays no role in situations when Article 17(2) faces other fundamental rights.

The Court only occasionally refers to deprivation. However, with the exception of Luksan, there appear to be no decisions of the ECtHR or CJEU that would classify an interference with an intellectual property right as deprivation of property. In Tokai, the plaintiffs argued that the prohibition of the use of the word ‘Tocai’ for the description and presentation of certain high-quality Italian wines constitutes a “disproportionate and intolerable interference, impairing the very substance of the fundamental right to property of the economic operators concerned”. The CJEU rejected this, arguing that because the prohibition does not exclude any reasonable method of marketing the

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83 Ferdinand Wollenschläger, ‘Article 52 – Scope of guaranteed rights’ in in Jeff Kenner, Angela Ward, Steve Peers and Tamara K. Hervey (eds.), The EU Charter of Fundamental Rights: A Commentary (OUP, 2014), p. 479.
84 Svensson and Others, C-466/12, EU:C:2014:76.
85 Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132.
86 Opinion of the Advocate General Szpunar, Pelham and Others, C-476/17, ECLI:EU:C:2018:1002; Opinion of the Advocate General Szpunar, Spiegel Online, Case C-516/17, ECLI:EU:C:2019:16; Opinion of the Advocate General, Funke Medien NRW, C-469/17, ECLI:EU:C:2018:870.
87 Opinion of the Advocate General Szpunar, Pelham and Others, C-476/17, ECLI:EU:C:2018:1002, para 98; Opinion of the Advocate General Szpunar, Spiegel Online, Case C-516/17, ECLI:EU:C:2019:16, para 62.
88 For instance, it does so in C-347/03, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA), ECLI:EU:C:2005:285.
89 Football Association Premier League and Others, C-403/08, EU:C:2011:631, para 108.
90 Football Association Premier League and Others, C-403/08, EU:C:2011:631, para 109.
91 See multiple references to it in Cases C-241/91 P and C-242/91 P, Magill, ECLI:EU:C:1995:98.
92 C-347/03, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA), ECLI:EU:C:2005:285, para 121.
Italian wines concerned it cannot amount to “deprivation”. 93 Similarly, in *Planta Fabrik*, the CJEU held that a labelling restriction for the outside packaging of tobacco product does not interfere with “the substance of their trade mark rights”. 94 As the proprietors of the trademarks can continue “to make use of them in any way, in particular by wholesale, other than those mentioned in those provisions”, such legislative measures cannot qualify as deprivations. 95 This decision therefore only confirms an earlier less explicit finding of the Court concerning e-cigarettes, which found that marketing restrictions “in no ways hinder the essence of its property right”. 96

Perhaps the most consequential case concerning deprivation of property is *Luksan*. In this case, the Court actually found that “the fact that national legislation denies [the author] the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right”. 97 However, the decision is based on the interpretation of the secondary EU law requiring that rights to exploit a cinematographic work (reproduction right, satellite broadcasting right, etc.) vest by operation of law, directly and originally, in the principal director of a film. 98 As emphasized by the Court, denying these rights would, first, not respect the competence of the European Union in the matter, second, would not be compatible with the aim pursued by Directive 2001/29 and, finally, would not be consistent with the requirements flowing from Article 17(2) of the Charter of Fundamental Rights guaranteeing the protection of intellectual property. 99

In other words, rather than postulating any core rights which could not be ignored by a legislator, the CJEU in *Luksan* equates a violation of secondary EU law with a deprivation of possessions in the sense of Article 17(2). 100 Every violation of secondary EU law as a result of a lack of protection in domestic legislation is thus seen as a deprivation. Had the CJEU based such findings of deprivation on Article 17(2) itself without at the same time finding a violation of secondary EU law, this would have been a clear manifestation of a hard core that ought to be respected by the Union and national legislators. 101

In the ECtHR case-law, deprivation was alleged in *University of Illinois Foundation v Netherlands*, 102 in which the applicant’s patent lapsed due to a failure to pay renewal fees. The applicant complained, arguing that this effect amounted to deprivation. The European Commission of Human Rights, however, found that restoration had no legal basis in Dutch patent law, and thus was outside *ratione materiae*. This suggests that there is no inherent right to the preservation of property, irrespective of the legal design, provided that the conditions of maintaining it are

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93 C - 347/03, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA), ECLI:EU:C:2005:285, para 122.
94 C - 220/17, Planta Tabak-Manufaktur, ECLI:EU:C:2019:76, para 97.
95 C - 220/17, Planta Tabak-Manufaktur, ECLI:EU:C:2019:76, para 98.
96 *Pillbox* 38, C-477/14, ECLI:EU:C:2016:324, para 164; confirming AG’s opinion in para 199 and 200.
97 C - 277/10, Martin Luksan, ECLI:EU:C:2012:65, para 70.
98 *Ibid*, para 72.
99 *Ibid*, para 71.
100 M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 Cambridge Yearbook of European Legal Studies, p. 265; Same view: Grosse Ruse-Khan, ‘Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts To Address Intersections With Intellectual Property Rights’ in Geiger (ed), in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), p 78; Alexander Peukert, “The Fundamental Right to [Intellectual] Property and the Discretion of the Legislature” in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), p 134.
101 Judgement in *Coty Germany* (Coty Germany, C-580/13, EU:C:2015:485) is a demonstration of an expansive reading of the secondary EU law through the prism of a right to effective remedy, effect utile and an underlying positive obligation to protect already granted IP rights.
102 ECommHR, *University of Illinois Foundation v. the Netherlands* (dec.), no. 12048/86, 2 May 1988, CE:ECHR:1988:0502DEC001204886.
reasonable. In Balan Moldova, the Court dealt with a case in which domestic courts declined to enforce copyright against the unauthorized use of a photograph by the state in identification cards. The ECtHR found a violation, but did not qualify it as a deprivation of property. Again, there are other means of exploitation available. In Smith Kline v Netherlands and SIA AKKA/LAA v Latvia respectively, the Court upheld the lawfulness of compulsory licenses to patents and the denial of injunctive relief with respect to use of copyrighted works. In both cases, the ECtHR classified the cases as “control of the use of property”. The underlying reason in both cases appears to be that although they limit exclusivity, they assure compensation to affected IP holders.

1. Essence

There is no systematic use of the concept of ‘essence’ in the intellectual property case-law of the CJEU. The early free movement and competition case-law, as was already mentioned, often refers to ‘specific subject matter’, ‘very subject matter’ or ‘substance’ of a right interchangeably. In these decisions, which often questioned national IP rights from a market freedoms perspective, the Court articulated its view that:

the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

To illustrate the use of the concept of ‘specific subject matter’ further, consider the Volvo case (1988), in which the CJEU held that:

‘The right of a proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position. It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited [as an abuse of dominant position]’

This line of case-law was recently confirmed by Huawei. The Court confirmed this by holding that the need for a high level of protection for intellectual-property rights means that, in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective enforcement of his exclusive rights, and that, in principle, the user of those rights, if he is not the proprietor, is required to obtain a licence prior to any use.

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103 ECHR, Bălan v. Moldova, no. 19247/03, 29 January 2008, CE:ECHR:2008:0129JUD001924703.
104 ECommHR, Smith Kline & French Lab. Ltd. v. the Netherlands (dec.), no. 12633/87, 4 October 1990, CE:ECHR:1990:1004DEC001263387.
105 ECHR, SIA AKKA/LAA v. Latvia, no. 562/05, CE:ECHR:2016:0712JUD000056205, 12 July 2016.
106 Metronome Musik v Music Point Hokamp, C-200/96, EU:C:1998:172, para 21.
107 Volvo v Erik Veng, Case 238/87, ECLI:EU:C:1988:477, paras 8, 9 (emphasis mine)
108 Huawei Technologies Co. Ltd, C-170/13, ECLI:EU:C:2015:477.
109 Huawei Technologies Co. Ltd, C-170/13, ECLI:EU:C:2015:477, para 58.
Similarly worded warnings against the ‘deprivation of protection’ are also found *Coty Germany* by Advocate General Cruz Villalón concerning the right to effective remedy¹¹⁰ and then in *McFadden* by the Court itself. In *Coty Germany*, AG Cruz Villalón argued that ‘it is clear that the essence of the rights would not be respected if the national legislation at issue resulted in the frustration of the right of any holders of intellectual property rights to obtain protection from the courts’. ¹¹¹ In *Mc Fadden*, the Court held that: ‘[s]ince the two other measures have been rejected by the Court, to [reject the third one] would thus be to deprive the fundamental right to intellectual property of any protection, which would be contrary to the idea of a fair balance’. ¹¹² Although here the essence is used in the context of intellectual property disputes, in both cases it mostly concerns the right to effective remedy and *effet utile* of the Union law.

**III. Interim Conclusions**

Based on the above analysis, we can make a number of observations. First, the notion of ‘essence’ is hardly *applied* in the context of intellectual property rights. Instead, the older and newer case-law sometimes uses words such as ‘substance’, ‘specific subject matter’ and ‘very subject matter’ to identify the crucial features of the legislative design of IP rights. In the enforcement case-law, the CJEU also refers to ‘deprivation of protection’, which is interlinked with essential objectives of these rights.

Any reference to essence in the case-law of the CJEU only points towards a higher level of scrutiny, but not towards an untouchable core of rights that may not be abolished by the legislator. Indeed, *Scarlet Extended* stresses that IP rights are never absolute. *Volvo* illustrates this interplay well. The CJEU itself reminds us that while exclusivity is at the core of design rights, it might be limited by competition law in some circumstances. Therefore, rather than drawing any red lines for the legislator, the Court highlights that certain subsets of balancing exercises should not be taken lightly, perhaps because they constitute a more serious type of limitation.

On its own, Article 17(2) is void of any inviolable core understood as a red line which cannot be bridged by any considerations of proportionality. It is empty as to any guarantees going beyond an obligation to avoid arbitrary interferences and potentially to fairly compensate in case of unfavorable changes. Different *legislative choices*, e.g. new rights for press publishers, which are protected by Article 17(2) of the EU Charter, *do* have their essence, substance or specific subject matter. However, there is nothing in the case-law that would suggest that some elements of these rights constitute a hard core, as postulated by the absolute theories of essence.

As a consequence, the main paradigm of the constitutional protection of intellectual property rights on the EU level clearly remains that of proportionality, which allows entitlements to be entirely abolished at the will of the legislator, subject to the Charter safeguards. Dignitary non-economic aspects of intellectual property rights find their protection under different provisions of the EU Charter.

**4. Constructing the Essence of IP Rights**

One can argue that even if the CJEU recognized no hard core of Article 17(2) as of now, it might do so in the future. It could rely on the common constitutional traditions of the Member States. This supposition prompts two obvious questions. First, what is the relationship between any alleged hard core and safeguards against deprivation? Second, what are the common constitutional traditions of Member States?

**I. Essence vs Deprivation**

¹¹⁰ Opinion of the Advocate General Cruz Villalon in *Coty Germany*, C-580/13, ECLI:EU:C:2015:243, paras 36-39.

¹¹¹ Opinion of the Advocate General Cruz Villalon in *Coty Germany*, C-580/13, ECLI:EU:C:2015:243, para 39.

¹¹² *Mc Fadden*, C-484/14, ECLI:EU:C:2016:689, para 98.
Any inviolable core of Article 17(2) would inevitably limit the ability of the states to interfere by ‘depriving’ individuals of property. Situations in the hard core would have to be cases when no compensation can be offered to offset the interference because taking away of rights is always considered disproportionate. As was stated earlier, we see no such case-law before the ECHR or CJEU at this point. Instead, we see the CJEU trying to identify essential features of the IP design, in order to signal when the limitation of the use of property is nearing deprivation. The Court’s use of ‘deprivation of protection’ therefore suggests that under some circumstances, the Court looks at an unprotected right as ‘deprived of protection’, which might trigger compensation requirements, similar to ECHR’s concept of ‘de facto deprivation of property’. However, the use of this phrase does not suggest that the Court would be setting boundaries within which legislators are permitted to act. After providing compensation which respects the criteria of Article 17(1), it is hard to see any further restraints on the legislator in the case-law.

Even looking at Luksan, the only case that found right holders to be deprived of their intellectual property by national law, it is clear that this outcome was preconditioned on the finding of a violation of secondary EU law. On the other hand, AG Szpunar’s proposals in Pelham and Spiegel Online suggest that at least as far as other fundamental rights are concerned, if accepted by the Court, the ‘gross violation of essence’ per se should define the need of the Court to act as a constitutional court and correct the legislator’s design. This, however, does not mean by itself that the Court would subscribe to the absolute theory of essence. In any case, the role and scope of essence seems far from clearly settled.

In the next section, I will look at how essence is understood under different national legal systems and their shared constitutional traditions of international human rights law.

II. Examples of Constitutional Traditions

Providing an exhaustive survey of national traditions is beyond the scope of this article. Instead, I try to demonstrate how some national courts, as opposed to supranational courts, operate with the concept of essence of intellectual property rights. I do not claim these approaches to be representative in any way. My analysis proceeds in the following steps. First, I explain how the CJEU case-law described above was received before the English courts. Second, I contrast this with the traditional German approach to the protection of intellectual property rights under the property clause. Third, I compare the two approaches with Slovakian constitutional doctrine that seems to sit somewhere in between the two, drawing inspiration from other sources of international human rights law, in particular the ICESCR.

1. United Kingdom

One of the jurisdictions that witnessed the most direct attempt to rely on the argument of an untouchable core of intellectual property rights is the United Kingdom. In litigation concerning standardized tobacco packaging, tobacco companies argued that their trademark rights were being unjustifiably interfered with. These laws essentially restricted the ability of firms to advertise their brands. The manufacturers could still place the trade mark upon the products and thus communicate their identities to consumers but the manner in which the name could be used became highly regulated in order to strip away as much of the attractiveness of the advertising as possible. Among many arguments, the tobacco firms viewed such restrictions as de facto expropriation of their trademarks. They argued that the disputed Regulations impair or affect the "essence" of their property rights and that as such the proportionality test is irrelevant and the Regulations are illegal because of Article 52 of the Fundamental Charter which (they argue) goes

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113 R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin), para 270.

114 R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin) (Green J); R (British American Tobacco and others) v Secretary of State for Health [2016] EWCA Civ 1182 (Lewison LJ, Beatson LJ, Sir Stephen Richards).

115 [2016] EWHC 1169, para 82.
(well) beyond the level of protection provided for in A1P1 ECHR and renders illegal any interference with the essence of a fundamental right."\textsuperscript{116} In other words no legislation can interfere with a fundamental right to the extent that it impairs its substance even if that interference would otherwise be proportionate.\textsuperscript{117} As the Court summarized this, '[t]he practical upshot of this submission was that even if the Regulations were proportionate, because they impaired the essence of the trademarks they were still in breach of Article 17.\textsuperscript{118}

Since the ‘essence’ argument was crucial, Article 17(2) received a fair amount of attention. In his first instance judgement, Justice Green rejected the claim that the governmental regulation amounted to deprivation of property. Instead, he classified it as a form of property control in the sense of A1P1, arguing that title to the rights at issue remains in the hands of the tobacco companies and that the laws curtail the use that can be made of those rights but they are not expropriated.\textsuperscript{119} Therefore, no compensation needs to be offered by the state. Faced with the argument that Art 17(2) of the EU Charter offers more protection than ECHR, the judge concluded the following:\textsuperscript{120}

‘I have serious doubts about this analysis and especially the extreme interpretation given to the concept of respecting the essence of the right by the Claimants. Their argument assumes two propositions, neither of which in my view makes legal sense. First, it assumes that each and every fundamental right in the Charter (which is intended to mirror the ECHR) has an absolute and untouchable limit, even when it does not have such a limit in the ECHR. Secondly, it assumes that if on the application of the proportionality test the result is that a measure is proportionate, i.e. (a) suitable relative to its legitimate objective (b) necessary in the sense of being the least intrusive measure and (c) fair in the sense of striking a fair balance between competing interests, that it is still unlawful because the essence of the Claimants’ interest (that has already been fairly balanced and found wanting) is impaired. Such a result is legal nonsense.’

The Court found this “system of inviolable rights” difficult to understand, in particular because it is not clear how “conflicting fundamental rights are reconciled or how or why EU law would take this illogical and counter-intuitive position”.\textsuperscript{121}

Despite this, the judge then took an extraordinary step. Because “the issue is not free from doubt and the terminology used by the Court of Justice has lacked conceptual precision”,\textsuperscript{122} he decided to proceed with his legal analysis on the assumption that inviolable core rights might exist. Perhaps unsurprisingly, he finds no interference with the ‘essence’ of trademark holder’s rights. In order to flesh out the core of trademark rights, the judge inspected legislative design and case-law of trademark law. Here the tobacco companies had to convince that they have not only a negative right to prohibit use of their signs, but also a positive right to exploit such signs on the market. Justice Green and then the appellate judges rejected this idea. In their view, even with an obligation to use a trademark in order not to lose it, trademark rights do not imply positive rights to introduce associated products on the market.\textsuperscript{123} Hence, there can be no violation of the core.

\textsuperscript{116} [2016] EWHC 1169, para 270. 
\textsuperscript{117} [2016] EWHC 1169, para 819. 
\textsuperscript{118} [2016] EWHC 1169, para 820. 
\textsuperscript{119} [2016] EWHC 1169, para 38. 
\textsuperscript{120} [2016] EWHC 1169, para 825. 
\textsuperscript{121} [2016] EWHC 1169, para 829. 
\textsuperscript{122} [2016] EWHC 1169, para 831. 
\textsuperscript{123} [2016] EWCA Civ 1182, para 121 ff.
Some months later, in a different case with a similar set-up, the CJEU itself found no violation of trademark holders’ rights.124 Although the Court did not speak of ‘essence’, it rejected any deprivation arguments, thereby agreeing with the Advocate General Saugmandsgaard Øe,125 and implicitly classifying the interference as control of use of property.126

2. Germany

The German Basic Law, Grundgesetz (GG), does not explicitly mention IP rights. However, the case-law which has developed over the years recognizes it as one of the protected interests under Article 14 GG which protects property in general.127 In addition, the Basic Law contains an essence (Wesensgehalt) clause in Article 19(2) GG, which requires that “[i]n no case may the essence of a basic right be affected.”

In the Schulbuchprivileg decision (1971), the German Constitutional Court laid the ground for constitutional protection of IP rights. The dispute centered on the question of whether German copyright law may contain an exception which allows license-free and royalty-free copying and distribution of works for educational purposes in schools and churches. Although the newly legislated exception only perpetuated the legal situation that had existed in Germany for decades,128 the authors argued that it was unconstitutional. In their view, it violated the author’s right to property under Article 14 GG and Article 27 of the Universal Declaration of Human Rights. The government’s argument was that the copyright law is to be designed primarily by the German legislator and that authors who inherently build on works of others essentially owe this to the public. Moreover, the exception cannot constitute deprivation of property because authors never had a right to authorize these uses in the past.

The Court held that constitutional protection did not imply that appropriation of any form of has to be attributed to right holders.129 This is because “in defining the content of copyright in line with Article 14 GG, [the legislator] should formulate provisions that guarantee the compatibility of the exploitation of the work with the nature and social relevance of the right”.130 The legislator “is not only obliged to protect the interests of the individual, but also to limit her rights to the extent necessary to pursue the public good”.131 When looking at the case at hand, the Court identified the allocation of proprietary interests originating from an author’s creative contributions and their freedom to decide how to use them as the core of the copyright law.132

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124 Case C- 220/17, Planta Tabak-Manufaktur.

125 Case C- 220/17, Planta Tabak-Manufaktur, ECLI:EU:C:2018:530, para 54 (‘Even if the Court finds that a trade mark does confer a positive right of that nature on its proprietor and that Article 13(1)(c) of Directive 2014/40 entails a restriction on that right, that article must, to my mind, be seen as regulating use of the trade marks in question (Article 17(1), third sentence of the Charter) instead of as a deprivation of those rights (Article 17(1), second sentence of the Charter), and it neither casts doubt on the validity of those trade marks nor prevents them from being used other than on the packaging of tobacco products. Nor does Article 13(1)(c) of Directive 2014/40 impair the very substance of those rights. That article in fact merely prevents the elements that it lists from being included in those marks. Manufacturers can still distinguish their products by using other signs. The function of trade marks of indicating origin is therefore not adversely affected’).

126 Case C- 220/17, Planta Tabak-Manufaktur, para 96.

127 Schulbuchprivileg. 31 BVerfGE 229 (1971); Bibliotheksgroschenentscheidung, 31 BVerfGE 248 (1971); Bearbeiter-Urheberrechte, 31 BVerfGE 275; Kirchenmusik, 49 BVerfGE 382 (1978); Germania 3, Case No. 1 BvR 825/98 (2000); Metall auf Metall, Case No. 1 BvR 1585/13 (2016); VG Wort, 1 BvR 1213/16 (2018).

128 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 47.

129 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 35.

130 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 28, as translated by Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 2012), pp., 247–248.

131 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 28, as translated by Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 2012), pp., 247–248.

132 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 34.
The German Constitutional Court eventually found that the statutory exception did violate Article 14 GG. Thereby any potential infringement of Article 27 of the Universal Declaration of Human Rights was left unanswered. The Court argued that although legislation never recognized authors’ rights to include such uses, the argument against them is very weak. After all, other parties, such as publishers and printers, also make profit from distributing the educational materials, and potential licensing is unlikely to be excessively expensive. Therefore, in the Court’s view, the legislator exceeded the boundaries which, based on Article 14(2) GG, it has to be respect when it determines the content of the property authorizations. The Court held that lack of exclusive rights is already a gesture towards public interest and there is no clear reason why the same should apply to the possibility to financially benefit from the use of authors’ works based on compensation.

This decision, which can be easily described as ‘putting right’s into one’s possession’, was somewhat toned down by the next two cases, Bibliotheksgroschen and Bearbeiter-Urheberrechte, the first of which was handed down by the same court on the same day, and the second just a day after. In Bearbeiter-Urheberrechte, the Court had to decide about the constitutionality of a legislative change which transformed the rights of performing artists into a neighboring right and, while doing so, also collaterally shortened or even ended the rights of some of the right holders. This was due to rules which applied the new criteria of duration and its calculation not only to new performances, but also those which predated the amendment.

The Court held that IP rights are not immune to legislative change. Article 14 GG, in its view, does not mean “inviolability of a legal position for all times”. Not every change in the content of the legal position is automatically inadmissible. The legislator is also empowered to interfere in already existing rights and to give them new content. More explicitly, the Court said:

‘The property guarantee and the individual property shall not constitute an unsurmountable limit for the legislative powers when the reforms prove to be necessary. During the reform, the legislator is not placed before alternatives to either keep subjective rights based on the previous law, or to expropriate them under the conditions of Article 14(3) GG; it can also redesign the individual legal positions without violating the property guarantee.’

Since, in this case, the legislator enacted largely the same rules with reference to the need for legal certainty, the Court engaged in a debate about its relevance. While the Court accepted that this principle is important and may justify interference with rights in case of a reform, it remained very critical of the fact that the same argument is used as the main reason for uncompensated deprivations of property. For these reasons, the Court invalidated the provision as long as it applied to pre-existing protected objects.

These cases show that while the German Constitutional Court is willing to give the legislator very broad room for maneuver for its legislative (re)design, it is also ready to moderate it if needed. Although the Schulbuchprivileg case

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133 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 47.
134 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 48.
135 Schulbuchprivileg. 31 BVerfGE 229 (1971), para 48 ff.
136 Bibliotheksgroschenentscheidung, 31 BVerfGE 248 (1971); Bearbeiter-Urheberrechte, 31 BVerfGE 275 (1971).
137 Bearbeiter-Urheberrechte, 31 BVerfGE 275 (1971), para 25.
138 Bearbeiter-Urheberrechte, 31 BVerfGE 275 (1971), para 28.
139 Bearbeiter-Urheberrechte, 31 BVerfGE 275 (1971), para 28.
140 Bearbeiter-Urheberrechte, 31 BVerfGE 275 (1971), para 28 (own unofficial translation).
141 Bearberger-Urheberrechte, 31 BVerfGE 275 (1971), para 46.
142 Bearberger-Urheberrechte, 31 BVerfGE 275 (1971), para 51 ff.
does not emphasize the essence of rights, the latest case-law, in particular Metall auf Metall, reformulates its findings in this light, while also extending the principles to investment protection of phonogram producers. At the same time following the Bearbeiter-Urheberrechte decision, legislative changes and reforms are broadly possible, including shortening, transformation and deprivation, but subject to much higher standards than references to legal certainty. In particular, it appears that compensation is one of the key ingredients for more far-reaching changes. As a result, the German approach recognizes inviolable core rights, as evidenced by the Schulbuchprivileg and Kirchenmusik cases, and means that the legislator is broadly allowed to shape the intellectual property rights, such as by designing their applicability, scope and duration. However, it has to comply with a core obligation to provide some form of protection. It may not reduce it to zero entirely. The social purpose of rights is a source of legitimacy as well as limitation, both of which have to be observed by the German legislator.

3. Slovakia

Unlike the German and English constitutional systems, the Slovak Constitution is much more explicit in its accommodation of IP rights. Its basic constitutional text implements A1P1-style property protection (Article 20) and Covenant-style obligation to protect creators (Article 43). In its seminal Tank Man II decision, the Constitutional Court explained that the Constitution clearly formulates a strong bond between the protection of intellectual creations on the one hand, and freedom of scientific research, artistic freedom and the right to cultural participation on the other.

According to the Constitutional Court, the Constitution in its Article 43 binds the state to create certain material conditions for inventors and creations, with the goal to promote artistic freedom and scientific research. Article 43 thus embodies the constitutional core of protection of creators. This obligation, inspired by 15 of the ICESCR, can be materialized through intellectual property rights, but also by other means. Furthermore, according to the court, these economic rights, provided for the purpose of the progress of science and culture, subsequently fall under the constitutional protection of property. The only unavoidable obligation to protect stems from the creator’s rights. Even these rights, with reference to German doctrine, do not guarantee the possibility to benefit from any use of such creations. At the same time, the Court notes the possible application of the author’s interest in protection of his/her human dignity, honor, reputation and name according to other provisions of the Constitution.

The case-law thus constructs a two-tier system of protection which clarifies a broad discretion of the legislator on the one hand, together with willingness to protect its choices, however, making them subject to a specific purpose behind IP legislation on the other. The ultimate purpose echoes the Covenant’s demands to create material conditions for inventors and creators in order to promote artistic freedom and scientific research by safeguarding a minimum level of material conditions.

143 Metall auf Metall, Case No. 1 BvR 1585/13 (2016).
144 Metall auf Metall, Case No. 1 BvR 1585/13 (2016), para 72.
145 In Kirchenmusik case (Kirchenmusik, 49 BVerfGE 382 (1978)), the Court equally objected to a non-remunerated exception in the copyright law.
146 Rolf Schwartmann and Christian-Henner Hentsch, 'Die verfassungsrechtlichen Grenzen der Urheberrechtsdebatte' (2012) ZUM 759.
147 Metall auf Metall, Case No. 1 BvR 1585/13 (2016), para 74.
148 See the decision of the Slovak Constitutional Court, Case No. II. ÚS 647/2014-22 (2015); for translation by Martin Husovec, ‘the Constitutional Court (Ústavný súd SR): “Tank Man II” (2015) International Review of Intellectual Property and Competition Law 729.
149 Case No. II. ÚS 647/2014-22, para 43.
150 Ibid ("It is up to the state to decide how it will materialize this obligation. Copyright law is just one of the possible means. In any case, any provided protection is not an aim in itself, but only a means to achieve the societal goal of progress of science and art.").
151 Case No. II. ÚS 647/2014-22, para 45.
152 Case No. II. ÚS 647/2014-22, para 45.
4. Interim Summary

Our brief analysis of the German, Slovak and UK approach shows that constitutional traditions differ significantly in how they approach the question of the potential ‘essence’ of intellectual property rights and its function. The UK jurisprudence equates its mechanisms with the Convention and the EU Charter, which, according to the reading of its domestic courts, provides no inviolable core rights at this point. German and Slovak constitutional jurisprudence do recognize inviolable core rights, but the obligations slightly differ. While the German obligation seems more far-reaching, as evidenced by case-law on the matter, the Slovak obligation seems relatively modest. They both equally emphasize the social function of IP rights and broad maneuvering space of the legislator and its ability to reform. However, the Slovak approach, unlike the German one, seems to tie such inviolable core rights with individual creators, and potentially their dignity, while the German approach applies to broader set of entities.

III. International Obligations as Constitutional Traditions: Creator’s Rights

Common constitutional traditions constitute an integral part of the general principles of the law.153 While national constitutions are one of their sources, commonly shared international obligations might constitute another source of such traditions. After all, the Court enjoys discretion when formulating what exactly constitutes these constitutional traditions.154 Long before today’s Article 6(3) of the TEU was adopted, the CJEU used this concept as a way to incorporate human rights considerations in its judicial review. As the Court explained in its seminal Hauer decision (1979), their incorporation was necessary in order to assure that the norms of Union law “only be judged in the light of Community law itself”.155 To safeguard unity and cohesion of the community, the Court “draws inspiration from constitutional traditions common to the Member States”,156 including “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”.157 In Hauer, this way, the Court relied on the ECHR’s safeguards included in A1P1.158

In the context of intellectual property, it is important to keep in mind the International Covenant on Economic, Social and Cultural Rights (ICESCR), which, in its Article 15(1)(c), includes an obligation to provide so called ‘creator’s rights’. The Member States “recognize the right of everyone: (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” ICESCR is binding upon all Member States of the European Union, and some of them, such as Slovakia, even directly implemented it in their constitutions. Its sibling, the International Covenant on Civil and Political Rights (ICCPR) is already widely recognized by the CJEU as an important source of Union law, despite the fact that the EU has never acceded to it.159

ICESCR itself remains widely cited in the Advocate General’s opinions as an equally important source of law.160 Recently, in Renckhoff, Advocate General Campos Sánchez-Bordona, even referenced it explicitly in a copyright dispute, although in the context of the right to education.161 Moreover, as was pointed out in the introduction, the

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153 Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para 15.
154 CJEU has a discretion in formulating the content of these traditions (Céline Romainville, ‘Defining the Right to Participate in Cultural Life as a Human Right’ (2015) Vol 33(4) Netherlands Quarterly of Human Rights 416).
155 Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para 15.
156 Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para 15.
157 Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para 15.
158 Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para 17.
159 Parliament v Council, C-540/03, ECLI:EU:C:2006:429, para 37; Dynamic Medien, C-244/06, ECLI:EU:C:2008:85, para 39.
160 For instance, AG in C-266/16, Western Sahara Campaign UK, ECLI:EU:C:2018:1, para 102; Betriu Montull, C-5/12, ECLI:EU:C:2013:571, para 3.
161 Renckhoff, C-161/17, ECLI:EU:C:2018:279, para 115, footnote 80.
language of Article 15 of ICESCR originates from the Universal Declaration of Human Rights, a non-binding legal instrument that was subsequently accepted as part of customary international law.\(^{162}\)

Based on the above, it is arguable that the creator’s rights enshrined in Article 15 of ICESCR actually constitute part of the Union law. This is potentially very significant because if the EU Charter had to identify any inviolable core of intellectual property rights under Article 17(2) of the EU Charter – in sense of choices that cannot be undone by the legislator, creator’s rights offer themselves as an obvious candidate. However, Article 15 can at most stay at the level of inspiration.

Unlike the protection of purely economic interests enshrined in Article 17(2) of the EU Charter, the Article 15 ICESCR standard is grounded in the human dignity of individuals. It thus has a strong link to Article 1 of the EU Charter. According to Helfer, Article 15 obligations “encompass modest economic exploitation and personality guarantees that, taken together, are more circumscribed than those imposed by intellectual property treaties”.\(^{163}\) If we revisit the case-law of the CJEU, we can actually see that “the protection of the moral and economic rights” (Phil Collins) is already recognized as specific subject matter, or substance of those rights.\(^{164}\) However, again, Article 17(2) of the EU Charter only protects the economic side of interests.

In addition, General Comment No 17 of the Committee on Economic, Social and Cultural Rights stresses that the scope of positive obligation underlying Article 15(1), “need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions”.\(^{165}\) In other words, this could mean that Article 17(2) and its core could, in some circumstances, actually turn itself against the legislative design of intellectual property rights, with a view to emphasizing the interests of creators among the entire set of right holders.

Last but not least, incorporating Article 15 considerations into Article 17(2) would mean that when it comes to essence, not all right holders are equal. This is because Article 15 does not protect legal entities but only creators themselves. According to the General Comment, only the “author”, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists’ enjoy the protection.\(^{166}\) Pure investors would thus benefit from no guaranteed core rights, and be protected only upon legislator’s decisions, which in itself is not necessarily a bad outcome.

To account for differences in structure and goals, if the core ever were to be recognized, even only as an analytical tool within the proportionality exercise, the Court could try to conceptualize it in light of Article 15 of the Covenant. After all, Article 15 should find some reflection within the EU Charter anyway. To be sure, this does not mean mirroring its content within Article 17(2), but only internalizing the economic limb of its imperative that individuals (not corporations) should have a modest claim to reap economic fruits of their personal creations. Such an imperative can also be inferred from reading Article 17(2)’s essence in light of Article 1 of the EU Charter, which is limited to humans and their dignity.

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\(^{162}\) Caterina Sganga, ‘Right to Culture and Copyright: Participation and Access’ in Christophe Geiger (ed.), Research Handbook on Human Rights and Intellectual Property (Edward Elgar, 2015), pp. 572.

\(^{163}\) L Helfer and G Austin, Human Rights and Intellectual Property (Cambridge University Press, 2011), p 513.

\(^{164}\) Collins and Patricia Im- und Export v imtrat and EMI Electrola, C-92/92, ECLI:EU:C:1993:847, para 20.

\(^{165}\) Committee on Economic, Social and Cultural Rights, General Comment No 17 (2005) ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant).

\(^{166}\) Ibid., para 7 (‘The Committee considers that only the “author”, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1 (c). (...) Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.’).
5. Conclusions

The article has shown that the Court of Justice of the European Union does not subscribe to the absolute theory of essence of rights in the area of intellectual property. The essence is not applied systematically, and usually only supports the argumentation. The closest doctrine to essence, at this point, is the specific subject matter doctrine, known from market freedoms case-law. However, this essence is not conceptualized as an inviolable core which the legislator cannot take away. It is only viewed as a tool to identify the core features of the design of various intellectual property rights and their substance, which are then less easily weighted against conflicting interests. The essence of legislative design is not the same as essence of a fundamental right. Even if the Court ever develops the latter notion of essence in intellectual property law, it should try to construe it in light of other international obligations, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR). Borrowing from this external standard of creator’s rights might help bridge the differences between diverging constitutional traditions in the Member States.