THE INTERACTION OF INTELLECTUAL PROPERTY RIGHTS WITH THE OBJECTIVES AND COMPETENCES OF EUROPEAN UNION

Alina Mihaela CONEA*

Abstract

Even though, at least superficially seen, the primary law of the European Union did not conferred legislative competence in the field of intellectual property (IP) to the European decisional level, for many categories of IP rights European Union established its own protective systems. This paper assesses the evolution of the amendments to EU primary law that are incident to IP rights protection. It then circumstances the interaction of IP rights with the competences of the European Communities and the European Union. Finally, it highlights several aspects on the legal basis for the European Union action significant for IP rights. Overall, the paper points out the significance of the Court of Justice of the European Union jurisprudence that opened the possibility of a European intellectual property system.

Keywords: *European Union, intellectual property rights, objectives, competences, legal basis, approximation of laws.*

1. Introduction

From the normative point of view, at least apparently, the primary law of the European Union does not confer legislative competence in the field of intellectual property to the European decisional level.

Thus, the founding treaties of European Union (EU) mentions industrial property in just two articles: the first indicates industrial property as one of the possible exceptions to the free movement of goods and the second which states that the Treaties shall in no way prejudice the laws in Member States governing the system of property ownership. Despite that, European Union has established, or is about to do, its own protective systems[1] for the most important categories of intellectual property rights (IP rights).

In order to approach this contradiction, we find useful to analize it given the constitutional nature of primary norms, in their interaction with the intellectual property rights.

We will first address the evolution of the objective sets out in the founding treaties of European Union. Secondly, the paper presents the interaction of IP rights with the competences of the European Communities and the European Union. Finally, we highlight some aspects on the legal basis for the Community and European Union action significant for IP rights.

1. The objectives of the European Communities and European Union Treaties

European Community objectives were set out in Article 2 of the Treaty establishing the European Economic Community (TEC), in 1957:

"*It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."* [2]

The provision has been amended twice, by the Treaties of Maastricht[3] and of Amsterdam[4]. The Lisbon Treaty[5] repealed Article 2 TEC, which is replaced in substance by Article 3 Treaty on European Union (TEU).

---

* Assist. lecturer PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **alinaconea@gmail.com**).

[1] Hanns **ULLRICH** in William Rodolph **CORNISH**, *Intellectual property*, 4 ed. London: Sweet & Maxwell, 1999, p. 22.

[2] Treaty establishing the European Economic Community (Rome Treaty) (1957/1958).

[3] „The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities (…), to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States", Treaty on European Union (1992), *Official Journal C 191, 29 07.1992.*

[4] „The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.", Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal C 340 of 10 November 1997.*

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

In context of the analysis of intellectual property rights within the European Union, of particular interest is the evolution of the objective *„to promote throughout the Community a harmonious development of economic activities"*. Thereby, following the first changes made in 1993 by the Treaty on European Union it becomes *„a harmonious and balanced development of economic activities throughout the Community"*, adding *„a high degree of convergence of economic performance"*. In the wording of Amsterdam Treaty the objective is to promote *„harmonious, balanced and sustainable development of economic activities"* and *a high degree of competitiveness and convergence of economic performance.*

The Lisbon Treaty, which entered into force on 1 December 2009, makes substantial amendments to provisions concerning the Union's objectives, in the context of the replacement of European Community with the European Union. Thus, article 3 of TEU sets, as regards the economic aspect, that the Union *shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy*. Moreover, this article reiterates to the greatest extent the provisions of the Treaty establishing a Constitution for Europe[6].

The establishment of the *common market* was one of the instruments available to the Community to achieve its objectives[7]. The notion of *'common market'* did not benefit of a definition in the wording of the EC Treaty, but its scope was outlined in the provisions of Article 3 TCE, which detailed the activities of the Community to achieve its objectives.[8]

The concept of *unity of the market* was one of the basic principles of interpretation of Community law. Removing incompatible national rules *„it must therefore be sufficiently comprehensive to include the abolition of all pecuniary, administrative or other obstacles, for the purpose of achieving a unified market between the member states"*[9].

Within the Community/ EU law the *internal market* concept was shaped gradually[10] being established in the Treaty (with the Single European Act), in Article 26[11] of the Treaty on the Functioning of the European Union (TFEU)[12]. The concept of the *internal market* appears to be narrower than that of a *common market*, the definition of Article 26(2) TFEU providing that:

„The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

In the literature[13], it is believed that the language of the *common market* was centred mainly on economic issues; the *single market* has been used particularly in political discourse, while the concept of an *internal market* is typically found in European Union law and judicial decisions[14].

According to settled case-law, the concept of *common market* is defined by the Court of Justice of the European Union (CJUE) in the sense that it „(...) involves the elimination of all obstacles to intra-community trade in order to merge the *national markets* into a *single market* bringing about conditions as close as possible to those of a *genuine internal market*`"[15]. In this respect, the common market is considered as a step to achieve the internal market[16].

According to Article 2(2)(g) of the Treaty of Lisbon, the words "common market" is replaced by "internal market"[17].

The essential question of our analysis is how the intellectual property rights with these restrictions interrelate, given that by their nature they have an effect on intra-Community trade and the competitive structure of the market.

Thus, the EU's objective of establishing an internal market can be considered contrary to a legal

---

[6] Treaty establishing a Constitution for Europe, *OJ C 310, 16.12.2004, p. 3–474.*

[7] Together with an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, according to Article 2 TEC.

[8] According to Barents the term "common market" is rooted in the concept of *Binnenmarkt* of German regulations arising in the 19th century. Negotiations on "common market" were based on various existing customs unions in Germany during the 19th century and the Union's common market between Belgium and Luxembourg (1921) and Benelux (1958). EC adds to these common elements the expansion on the free market to services and capital. Barents, René, The autonomy of community law, European Monographs, The Hague: Kluwer Law International, 2004, p. 200.

[9] Judgment in *Sociaal Fonds voor de Diamantarbeiders*, Joined cases 37 and 38-73, EU:C:1973:165, paragraph 7.

[10] Jacques Pelkmans, 'Economic Approaches of the Internal Market', *Bruges European Economic Research Papers (BEER)* 13 (2008).

[11] Which corresponds to former Article 14 TEC.

[12] Consolidated version of the Treaty on the Functioning of the European Union , Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

[13] Paul Craig, "The Evolution of the Single Market", *The Law of the Single European Market: Unpacking the Premises*, Hart Publishing, 2002, p. 40.

[14] There are also opinions that consider the three notions meaning the same in the context of European law: Davies Gareth, *EU internal market law*, London: Cavendish, 2003, p. 3.

[15] Judgment in *Gaston Schul Douane Expediteur BV, C- 15/81, EU:C:1982:135*, paragraph 33.

[16] Helen Wallace and William Wallace, *Elaborarea Politicilor în Uniunea Europeana*, 5. ed. (București: Institutul European din Romania, 2005). p. 91.

[17] This provision repeats, however, the similar provision of the Treaty establishing a Constitution for Europe, *Official Journal* C 310, 16.12.2004, p. 3–474.

situation in which intellectual property rights are within the exclusive national competence. The consequence of this kind of an approach facing towards the national level of regulation is that legislation will be in a considerable extent oriented and elaborate so as to protect the domestic industry of the Member States. This type of regulation could result in a protective system in varying degrees, which can be detrimental to other Member States[18].

Therefore, this national approach to regulation and protection of intellectual property rights appear to conflict with Article 3(3) TEU which provides that *„The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth (...)"*.

Intellectual property rights have a major impact on the economic market[19]. A holder of intellectual property rights has the right to exclude potential competitors from certain actions, such as manufacturing and importing products that infringe its right. It can also impose certain fees. By their nature and their economic purpose, intellectual property rights falls under the rule of the Treaty. Because of the importance of granting such exclusive rights to boost technical and economic progress, Member States were reluctant to subject national rules on intellectual property protection to the principles and norms of the European Union.

Thus, the Court of Justice of the European Union[20] held, regarding the protection of copyright, that,

„Such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market. That purpose could not be attained if, under the various legal systems of the member states, nationals of those states were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between member states"[21].

Furthermore, in the case *Polydor v Harlequin*[22], the CJUE stated that,

„The scope of that case-law[23] *must indeed be determined in the light of the community's objectives and activities as defined by articles 2 and 3 of the EEC Treaty. As the court has had occasion to emphasize in various contexts, the treaty, by establishing a common market and progressively approximating the economic policies of the member states, seeks to unite national markets into a single market having the characteristics of a domestic market`.*

Regarding the legal status of the objectives of the European Communities, Koen Lenaerts[24] appreciated that according to the Court of Justice of the European Union, the aims on which the establishment of the Union is based cannot have the effect of "*imposing legal obligations on Member States or of conferring rights on individuals*[25]`. Legal impact will be limited to guiding interpretation of European Union law.[26] A significant example regarding our matter of study, concerns the identification of Community competencies under the provisions of the Treaty, interpreted in the light of Article 2 and Article 3 TEC.

„the principles to be considered in the present case are those concerned with the attainment of a single market between the Member States, which are placed both in part two of the Treaty devoted to the foundations of the Community, under the free movement of goods, and in article 3(g) of the Treaty which prescribes the institution of a system ensuring that competition in the common market is not distorted"[27].

3. Competences of the European Communities and the European Union

Express or implied powers

Under the principle of conferral[28],

„*The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*."[29]

The doctrine[30] considers that on the matter of intellectual property, jurisdiction of the Court was

[18] Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate* (London ; Toronto Ont.: Sweet & Maxwell, 1996). p. 42.

[19] CJA Consultants Ltd, European Policy Advisers, *Study on patents: "What are patents actually worth? - the value of patents for today's economy and society*, Britain and Brussels , Report in the project ETD/2004/IM/E3/77, realized for the European Commission, Directorate General Internal Market, 23.07.2006.

[20] The reference will be to Court of Justice of the European Union even for the Court of Justice of European Communities.

[21] Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59, paragraph 12.

[22] Judgment in *Polydor/ Harlequin*, Case 270/80, EU:C:1982:43, paragraph 16.

[23] In that case the Court was asked to apply the jurisprudence developed in the field of intellectual property rights and free movement of goods to an external agreement concluded by the EC with Portugal.

[24] Koen Lenaerts, *Constitutional Law of the European Union*. 2 ed. London: Thomson/Sweet & Maxwell, 2006, p. 84

[25] Judgment in *Alsthom Atlantique*, C-339/89, EU:C:1991:28, cited by Lenaerts, ibidem.

[26] Lenaerts, ibidem.

[27] Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59, paragraph 8.

[28] Relevant also in the institutional framework, Augustin Fuerea, *Manualul Uniunii Europene*, București, ed. a V-a, Universul Juridic, 2011, p. 83.

[29] Article 5(2) TEU.

[30] Hanns Ullrich in, *Intellectual Property, Public Policy and International Trade* (New York: P.I.E. Peter Lang, 2007).

initially *indirect*[31] in the sense that it resulted from the Court's role as guardian of the principles of internal market integration.

The Treaty establishing the European Community mentions industrial property in just two articles: the first indicates industrial property as one of the possible exceptions[32] to the free movement of goods and the second in which it`s states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

In this context, an important consideration is that the Lisbon Treaty retains intact the provisions of the two articles. Therefore, CJUE jurisprudence maintains a fundamental significance.

First, Article 36 TFEU (ex Article 30 TEC) provides that,

„The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...) protection of industrial and commercial property".

Second, Article 345 TFUE (ex Article 295 of TEC) states that,

„The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"

At first sight, Article 36 TFEU seems to indicate that intellectual property rights does not operate as quantitative restrictions or measures having equivalent to quantitative restrictions, as they are exempted from the rules on the free movement of goods. This argument was, moreover, initially relied upon to support that protection of intellectual property rights must remain the exclusive competence of the Member States[33].

However, exactly this exemption from the free movement of goods principle and the limitation of the second sentence, argued the opposite view, that intellectual property rights are within the competence of Community law. The argument is that if the protection of industrial and commercial property was to be considered by the authors of the Treaty as potential measures having equivalent effect to quantitative restrictions, they would not have included the reference to them in Article 36 TFEU, nor the second sentence of the article would have any sense[34].

The Court stated in one of his first decisions[35] on intellectual property rights that,

„Articles 36, 222 and 234 of the Treaty[36] relied upon by the applicants do not exclude any influence whatever of Community law on the exercise of national industrial property rights".

In 1977, in the case *Carlo Tedeschi v Denkavit*, CJUE has ruled that,

„Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member states but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article"[37].

As pointed out by Inge Govaere, this paragraph contains two important elements. The first is an expression of that Article 36 TFEU does not confer exclusive jurisdiction to the Member States and therefore, European Union law is applicable to the exceptions provided therein. The rules on free movement of goods are essentially addressed to the Member States. The first objective is to address the restrictions that may be made to intra-communitarian market by the existence of divergent national legislation. CJUE clarified that the exceptions to that rule, as provided by Article 36 TFEU, may allow the national legislation, under certain conditions, to deviate from the principle of free movement of goods.

The second element is the addition of a new limitation to the possibility of invoking Article 36 TFEU, along with that provided by the second sentence of the article. This provision can be seen as a safety measure to ensure that exceptions will not be unduly relied upon.

Therefore, as a general rule, in order to comply with Article 36 TFEU, national legislation must be proportionate and justifiable according to the first sentence and must not conflict with those referred to in the second sentence of Article 36 TFEU.

From this perspective, the CJUE had to decide on the scope of exceptions to the free movement of goods and services within the meaning of Article 36 TFEU. Thus, in 1971, in *Deutsche Grammophon* judgment, the CJUE stated that,

„Article 36 refers to industrial and commercial property.

On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the treaty does not affect the ***existence*** *of rights recognized by the legislation of a member state with regard to industrial and commercial property, the*

---

[31] Prof. Hanns Ullrich, cited above, calls this first step in the interaction of the Court of Justice with the protection of intellectual property rights as a"resilience and respect" approach, p. 206.

[32] **Augustin Fuerea, Drept comunitar al afacerilor, ed. a II-a, Universul Juridic, Bucureşti, 2006.**

[33] Marcel Gotzen: La propriété industrielle et les articles 36 et 90 du Traité instituant la Communauté Economique Européenne, Revue Trimestrielle de Droit Commercial 1958, p. 262- 279, cited by Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate*. London; Toronto Ont.: Sweet & Maxwell, 1996, p. 43.

[34] Inge Govaere, ibidem.

[35] Judgment in *Établissements Consten/ Grundig-*, Joined cases 56 and 58-64, EU:C:1966:41.

[36] Article 30, 295, 307 TCE in the numbering of the Treaty of Amsterdam; Article 36, 345, 351 TFEU in the Lisbon Treaty numbering.

[37] Judgment in *Carlo Tedeschi v Denkavit*, Case 5-77, EU:C:1977:144, paragraph 34.

exercise *of such rights may nevertheless fall within the prohibitions laid down by the treaty.*

Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the ***specific subject-matter*** *of such property"*[38].

From the normative point of view, it is remarkable that the two articles[39] of the Treaty on the property were not modified by any of the subsequent amendments to the treaties[40].

However, resuming the disposal of the Treaty establishing a Constitution for Europe and according to Article 118 TEU in the consolidated version of the Treaty of Lisbon[41], the Union acquired competence, covered in an express manner, to establish European titles for industrial property protection.

`In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament[42].

Harmonization and unification

Regulatory approach regarding intellectual property rights in the European Union can be of approximation of laws based on Article 114 and 115 TFEU (ex Article 94, ex Article 95 EC Treaty) or the unification at the EU level, based on Article 352 TFEU (ex Article 308 TEC).

Harmonising protection keeps intact the principle of territoriality. Thus, to the extent that intellectual property rights can be obtained, transferred, abandoned or invalidated on the basis of national territoriality, this can cause conflicts that lead to territorial limitation of the market. Harmonization can minimize this effect, but it cannot remove it.

What is significant in the field of intellectual property, is that, except copyright[43], the European Union has established, or is about to do, its own protective systems for the most important categories of intellectual property rights, and also for certain specific matter or sector[44].

The question is whether unification can lead to reverse the effects of territorial limitation of the market. The answer to this question can only be hesitant, as shown by Hanns Ulrich. One argument is that companies are not obliged to have recourse to the Community system of protection that is offered optionally[45].

Legal basis for the Community and European Union action

To remove existing barriers to intra-Community trade due to application of Article 30 TEC (Article 36 TFEU), it can be adopted at EU level harmonization measure, as analysed in the previous section. The possibility of adopting harmonizing measures is based on the fact that Article 30 TEC (Article 36 TFEU) does not confer exclusive jurisdiction in matters concerned to the Member States.

Before the entry into force of the Single European Act, such harmonization measures were adopted on the basis of Article 94 TEC[46].

This article provides that,

`The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."

As a result, harmonizing measures were to be undertaken based on unanimity in the Council

The doctrine[47], indicates that this legal basis, Article 94 TEC, has the valence to deprive Article 30 TEC of substance, leaving it inapplicable to matters subject of harmonization directives. The reason is the

[38] Judgment in Deutsche Grammophon Gesellschaft, Case 78-70, EU:C:1971:59, paragraph 11.

[39] Article 36 TFEU (Article 30 Treaty establishing the European Economic Community) and Article 345 TFEU (Article 295 Treaty establishing the European Economic Community).

[40] This is also valid for the Treaty of Lisbon.

[41] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

[42] Article 118, Treaty on the Functioning of the European Union, *Official Journal* C 326, 26/10/2012 P. 0001 – 0390.

[43] Hanns **ULLRICH** in William Rodolph **CORNISH**, Intellectual *property*, 4 ed. London: Sweet & Maxwell, 1999, p. 22.

[44] Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, repealed by Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, *OJ L 93, 31.3.2006, p. 12–25.*

[45] Hanns **ULLRICH** in D. Vaver and Lionel Bently**,** *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*. Cambridge University Press, 2004, p. 37.

[46] Article114 TFEU.

[47] Inge Govaere, The Use and Abuse of Intellectual Property Rights in E.C. Law: Including a Case Study of the E.C. Spare Parts Debate. London; Toronto Ont.: Sweet & Maxwell, 1996, p. 48.

CJUE judgement in the case *Denkavit*[48]. According to it, the recourse to Article 30 is no longer justified once in that matter was adopted a harmonization directive.

As pointed out by Inge Govaere, Article 94 TEC constituted an important potential base for the harmonization of national laws on intellectual property. However, in practice this has proved difficult, the Member States were reluctant to operate the transfer of competence in regulating the matter of intellectual property[49].

Given the unanimity in the Council provided for by Article 100 TEC (Article 115 TFEU) to avoid blocking decision at EU level when using this legal basis, the Single European Act introduced a new procedure based on Article 100a TEC (Article 114 TFEU).

This allows for the adoption of harmonization measures in codecision and the vote was to be taken in the Council by qualified majority. Loss of veto was counterbalanced by regulating of safeguard measures[50] in Article 100a(4) TEC (Article 114(4) TFEU). Thus,

`If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions`.

In this regard, Inge Govaere believes that, at least potentially, the Single European Act was a return to the situation in which Member States could invoke exceptions to free movement based on Article 114(4) TFEU (ex Article 95(4) TEC). According to Article 352 (1) TFEU (ex Article 308 TEC),

`If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament`.

A relevant analysis[51] regarding the legal basis for design protection is carried out by Hanns Ullrich.

The author wonders whether the establishment of unregistered Community design is not a case of "priority through pre-emption". It further considers that the protection of intellectual property rights at the EU level definitely has the potential to replace long-term national protection by mere reason of economy in terms of cost protection. This can be particularly evident in the case of Community Design where protection is granted by simply registration.

A problematic aspect is considered to be extending protection to unregistered EU design. The question is whether Article 352 TFEU (ex Article 308 TEC) authorize the Union to legislate having a pre-emptive effect on intellectual property rights, while, according to Article 36 TFEU (ex Article 30 TEC) and Article 345 TFEU (ex Article 295TCE) Member States have retained at least sovereignty to maintain their own security systems.

4. Conclusions

Accepting that the EU's objective of establishing an internal market can be considered contrary to a legal situation in which intellectual property rights are within the exclusive national competence, CJUE revealed the EU law incidence in the IP rights matter.

We share the view that without imposing legal obligations on Member States, the legal impact of the objectives set out in the Treaties will be limited to guiding the interpretation of European Union law. CJUE ruled, moreover, that the intellectual property rights "must be determined in light of the objectives and Community action".

On the matter of intellectual property, jurisdiction of the Court was initially indirect in the sense that it resulted from the Court's role as guardian of the principles of internal market integration. An important consideration is that the two articles[52] of the Treaty on the property were not modified by any of the subsequent amendments to the treaties. As a result, the Court of Justice of European Union jurisprudence upholds so far a central significance.

---

[48] Judgment in *Firma Denkavit*, Case 251/78, EU:C:1979:252, paragrapf 14: `The court of justice has held in its judgment of 5 october 1977 in case 5/77 Carlo Tedeschi v. Denkavit Commerciale (1977) that article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member states but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article . Consequently when, in application of article 100 of the treaty, community directives provide for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed, recourse to article 36 is no longer justified and the appropriate checks must be carried out and the protective measures adopted within the framework outlined by the harmonizing directive`.

[49] Inge Govaere, ibidem., p. 48.

[50] Augustin Fuerea, Drept comunitar al afacerilor, București: Universul Juridic, 2006.

[51] Hanns Ullrich in Vaver, D. and Lionel Bently. Intellectual *Property in the New Millennium: Essays in Honour of William R. Cornish*. Cambridge University Press, 2004, p. 39.

[52] Article 36 TFEU (Article 30 Treaty establishing the European Economic Community) and Article 345 TFEU (Article 295 Treaty establishing the European Economic Community).

References:

Specialized literature

- Barents, René, The autonomy of community law, European Monographs, The Hague: Kluwer Law International, 2004;
- Pelkmans, Jacques, "Economic Approaches of the Internal Market", *Bruges European Economic Research Papers (BEER)* 13 (2008);
- Craig, Paul, "The Evolution of the Single Market", *The Law of the Single European Market: Unpacking the Premises*, Hart Publishing, 2002;
- Gareth, Davies, *EU internal market law*, London: Cavendish, 2003;
- Wallace, Helen and William Wallace, *Elaborarea Politicilor în Uniunea Europeana*, 5. București: Institutul European din Romania, 2005;
- Govaere, Inge: The Use and Abuse of intellectual property rights in EC law. - London : Sweet & Maxwell, 1996;
- Lenaerts, Koen, *Constitutional Law of the European Union*. 2 ed. London: Thomson/Sweet & Maxwell, 2006;
- Fuerea, Augustin, *Manualul Uniunii Europene*, București, ed. a V-a, Universul Juridic, 2011;
- Fuerea, Augustin, Drept comunitar al afacerilor, București: Universul Juridic, 2006;
- Govaere, Inge. and Hanns Ullrich, Intellectual Property, Public Policy and International Trade (New York: P.I.E. Peter Lang, 2007);
- CJA Consultants Ltd, European Policy Advisers, *Study on patents: "What are patents actually worth? - the value of patents for today's economy and society*, Britain and Brussels, Report in the project ETD/2004/IM/E3/77, realized for the European Commission, Directorate General Internal Market, 23.07.2006;
- Cornish, William Rodolph, *Intellectual property*, 4 ed. London: Sweet & Maxwell, 1999;
- Vaver, D. and Lionel Bently**,** Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish. Cambridge University Press, 2004.

Jurisprudence

- Judgment in *Sociaal Fonds voor de Diamantarbeiders*, Joined cases 37 and 38-73, EU:C:1973:165;
- Judgment in Gaston Schul Douane Expediteur BV, C- 15/81, EU:C:1982:135;
- Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59;
- Judgment in *Polydor/ Harlequin*, Case 270/80, EU:C:1982:43;
- Judgment in *Alsthom Atlantique*, C-339/89, EU:C:1991:28;
- Judgment in *Établissements Consten/ Grundig-*, Joined cases 56 and 58-64, EU:C:1966:41;
- Judgment in *Simmenthal*, Case 106/77, EU:C:1978:49;
- Judgment in *Deutsche Grammophon Gesellschaft*, Case 78-70, EU:C:1971:59;
- Judgment in *Firma Denkavit*, Case 251/78, EU:C:1979:252;
- Judgment in *Carlo Tedeschi v Denkavit*, Case 5-77, EU:C:1977:144.

Legal texts

- Treaty establishing the European Economic Community, 1957;
- Treaty on European Union (1992), *Official Journal* C 191, 29 07.1992;
- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal* C 340, 10.11.1997, p. 1–144;
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal* C 306, 17.12.2007, p. 1–271;
- Treaty establishing a Constitution for Europe, *Official Journal* C 310, 16.12.2004, p. 3–474;
- Consolidated version of the Treaty on the Functioning of the European Union , *Official Journal* C 326 , 26/10/2012 P. 0001 – 0390;
- Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs;
- Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 93, 31.3.2006, p. 12–25.