EU Property Law

We are now moving to deal with issues (property, contract, tort and artificial intelligence) on which the European Union has unclear competences.

Let us start with property.
One may expect that the internal market presupposes the existence and recognition of proprietary rights which are objects of trade.
Moreover, property rights are recognized and protected by Article 1 of the First Protocol to the ECHR and Article 17 of the European Charter on Fundamental Rights.

"The right to property is guaranteed [as a general principle] in the Community legal order in accordance with the ideas common to the constitutions of the Member States which are also reflected in the first Protocol to the ECHRs" (*Hauer v. Land Rheinland-Pfalz*, C-44/79 [1979], para 17).

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Article 17 of the EU Charter: “1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.”

Yet, property law is still mainly governed by (diverging) national laws.

Article 345 TFEU: “The treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”

It is however recognized that the Article does not imply that the Union is precluded from adopting legislation affecting property rights. A wide interpretation of Article 345 TFEU would impede the operation of other Treaty provisions.

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"The provisions of the Treaty [...] according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty (*Commission v. United Kingdom*, C-30/90 [1992], para 18).

The EU may validly enact legislation giving rise to intellectual property rights of a European scope (*Spain v. Council*, C-350/91 [1995]).

Article 118 TFEU: "[T]he 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."

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Article 3 Directive 2002/47/EC on financial collateral arrangements: “Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement [...] be dependent on the performance of any formal act.”

Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property

Article 9 Directive 2011/7/EU combating late payment in commercial transactions

Directive 1994/47/EC, now replaced by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

Directive 1999/44/EC, now replaced by Directive (EU) 771/2019 on certain aspects concerning contracts for the sale of goods

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Since very early, the Union has made efforts to create EU-wide, unitary IP rights.

This risk of market segmentation was originally addressed by ECJ's case-law, which recognized the principal of exhaustion.

Once the holder of the IP right has marketed a product covered by the right in question, its territorial right is exhausted and the product may be traded to other Member States: *Merck v. Stephar*, C 187/80 [1981] on patent rights; *Dansk Supermarked v. Imerco*, C 58/80 [1981] on copyright and trademarks

From the 1990s onwards, a number of specific legislative acts were also adopted, also because the subject matter was already partially covered by international agreements of which many Member States where parties, such as the Paris Convention for the Protection of Industrial Property of 1883, the Berne Convention for the Protection of Literary and Artistic Works of 1886, and the Trademark Law Treaty of 1994 (now all administered by the World Intellectual Property Organization).

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It should however be kept in mind that IP law is still mainly national and that there are huge differences between domestic models of IP protection.

United States	European Union
• protection for moral rights is limited • copyright protection requires creation and registration • fair use is an exception • in case of online infringements, 'notice and take down'	• protection for moral rights is broad • copyright protection requires creation • fair use is not an exception • in case of online infringements, 'notice and stay down'

The EU has intervened on design, trademarks, know-how, patents, and copyright.

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Directive 98/71/EC on the legal protection of designs

Regulation 6/2002/EC on Community designs and Regulation (EU) 2017/1001 on the European Union trademark

Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trademarks

Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unalwful acquisition, use and disclosure

Convention on the grant of European patents [1973]

Agreement on a unified patent courts was concluded in Brussels [2013]

Regulation (EU) 1151/2012 on quality schemes for agricultural products and foodstuffs

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Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, recognizing the exclusive rights of authors to reproduce (Article 2(a)) and publicly communicate their works, including the right to make works available to the public (Article 3(1)) (with the the exceptions or limitations provided for in Article 5(2) and (3)) and further establishing the rule of Community-wide exhaustion of the distribution right (according to which a copyright protection is exhausted within the territory of the Community if the first sale or other transfer of ownership of an original work or of a copy of it is made by the righolder or with his consent: Article 4(2)).

Directive 2006/116/EC on the term of protection of copyright and certain related rights, harmonizing the duration of proprietary protection over literary, artistic and cinematographic works across Europe

Directive 2009/24/EC on the legal protection of compeuter programs, extending copyright protection, as well as the principle of exhaustion, to softwares

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Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market, introducing a new consumer right to access a portable online content service when traveling in the EU: “[t]he provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence” (Article 3(1)).

Directive 2019/790/EU on copyright and related rights in the Digital Single Market, introducing new exceptions and limitations (E&L) to copyright for data mining (Articles 3 and 4), teaching (Article 5) and cultural heritage (Article 6). Article 17 makes online providers of content-sharing liable for copyright infringements, except if they reacted promptly to the infringement. Article 15 recognizes to EU press publishers the right to claim revenues from online uses of their publications (within 2 years) by service providers; the right does not arise in cases of hyperlinking, non commercial uses, use of short extracts and quotations for criticism.

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In the field of copyright the EU has so far enacted directives, whose implementation is left to the Member States.

Coherence has been ensured by the CJEU, which has interpreted the majority of these acts as form of maximal harmonization, and has insisted in the need of their autonomous interpretation.

"An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC" and falls under no exception, meaning that "that process cannot be carried out without the consent of the relevant rightholders" (*Infopaq v. Danske Dagblades Forening*, C-5/08 [2009]).

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"Article 2(c) of Directive 2001/29/EC […], must, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear". It further held that "A Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of that directive […] Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation of the corresponding substantive law" (*Pelham v. Hütter*, C-476/17 [2019]).

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"Article 2(a) and Article 3(1) of Directive 2001/29/EC [...] must be interpreted as constituting measures of full harmonisation of the scope of the exceptions or limitations which they contain. Article 5(3)(c), second case, and (d) of Directive 2001/29 must be interpreted as not constituting measures of full harmonisation of the scope of the relevant exceptions or limitations". As a consequence, freedom of information and freedom of the press "are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29/EC, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively" (*Funke Medien v. the Federal Republic of Germany*, C-469/17 [2019]).

Collateral support to the harmonization of copyright rules also stems from the application of EU competition law.

The European Commission has fined Valve, owner of the online PC gaming platform “Steam”, and the five publishers Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax € 7.8 million for breaching EU antitrust rules.

Valve and the publishers restricted cross-border sales of certain PC video games on the basis of the geographical location of users within the European Economic Area (‘EEA'), entering into, the so called “geo-blocking” practices. The fines for the publishers, totalling over €6 million, were reduced due to the companies' cooperation with the Commission. Valve chose not to cooperate with the Commission and was fined over €1.6 million.