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Human Rights and Competition Law: Possible Impact of the Proposed EU Constitution

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It is an honour and a pleasure to have the opportunity to make the opening address to this symposium held by the AHRC Centre for Studies in Intellectual Property and Technology Law. A theme is to be the important issue of human rights in their bearing on intellectual property (“IP”) and technology law. I bring to bear little expertise on the fine-grained problems you will discuss, but may perhaps have something of interest to impart in relation to current constitutional developments in the European Union (“EU”).

I recently took part as an alternate member from the European Parliament in the Convention on the Future of Europe that drafted the basic text of the Constitution of the European Union, whose ratification we were all to have been debating prior to a referendum on ratifying it some time earlier than October 2006. Let me say a little on how the constitutional debate seems to me to connect up with human rights and with IP and technology law. The starting point is with the process of adopting what has come to be known as “The Charter of Fundamental Rights of the European Union” (“Charter”).

1. The Charter of Fundamental Rights of the European Union

In June 1999 the European Council, meeting in Cologne, decided to establish a “Convention” of parliamentarians and governmental representatives to prepare a document declaring the rights which citizens of the EU enjoy in virtue of that citizenship. Citizenship of the EU had itself first been established by the Maastricht Treaty of 1991, but had been perceived as very much a damp squib. This was because little that was new came with it, other than the right of a citizen living in a member state other than her/his own to vote and stand for office in regional or local authority elections, and in elections to the European Parliament. The Council hoped that some kind of solemn reminder of the panoply of rights associated with EU citizenship would help to re-connect citizens to the institutions of Community and Union.

The Convention was chaired by Roman Herzog, former President of the German Federal Republic, and of its Constitutional Court. It was made up of sixteen representatives from the European Parliament, two members from each of the Parliaments of the fifteen Member States (thirty in all), a personal representative of the Head of State or Government of each member State, and a Member of the European Commission. Each full member had the backing of an alternate member, so the whole number of those participating was one hundred and eleven in all, along with various observers entitled to speak but not vote. The Convention started its work in December 1999, and produced its proposed Charter. This was received and approved by the European Council in Biarritz in October 2000. Eventually, in the Treaty of Nice, the Charter was recognised as a “politically binding” instrument, but not as a legally binding part of the constitutional framework of the EU. The refusal to give it legally binding character was chiefly due to the UK government’s obstinate resistance to this, for reasons that re-emerged in the later constitutional convention, of which I will say something in due course.

2. The Substance of the Charter

The Charter is divided into six substantive sections, concerning: “Dignity; Freedoms; Equality; Solidarity; Citizens’ Rights; and Justice.” These cover, in simpler and more

direct language, the classical rights enshrined in the European Convention on the Protection of Human Rights and Fundamental Freedoms (“ECHR”), but extend them into ground covered by the Council of Europe’s Social Charter, the Community Charter of Fundamental Social Rights of Workers, other international conventions to which the Union or its Member States are parties, and the constitutional traditions of the Member States. Thus, for example, the “Equality Rights” extend into rights of children, of the elderly, and of those afflicted by disabilities.

Following the substantive parts, there are four “horizontal clauses” regulating the application of all the substantive rights. These aim to ensure that there is co-ordination between the Charter and related instruments like the ECHR (Article 52 [now Constitution I-112]). They also prescribe that the Charter binds only the EU’s institutions, being relevant to the Member States only when they are implementing EU law (Article 51 [now Constitution I-112]). Further, they do not confer any new powers on the EU or its institutions – whatever powers they have, they must respect these rights when exercising the powers; but they do not acquire new powers to make the rights effective. Article 53 [now Constitution I-113] provides that nothing in the Charter limits or restricts other rights recognised in international law, and Article 54 [now Constitution I-114] guards against purported invocations of rights that in fact abuse them to the detriment of others.

3. Towards a greater role for the Charter? The Convention on the Future of Europe

Scarcely was the ink dry on the signatures of the Treaty of Nice, than a new process began to warm up. By the end of 2001, under the Belgian Presidency, the European Council meeting at Laeken resolved to call into being a fresh Convention: “a Convention on the Future of Europe.” This one was set up to review the existing treaties, to consider the Charter, to consult widely, and to come up with recommendations for constitutional improvement in the EU’s structures and institutions: these might even include bringing forward proposals for a constitution of the EU, but need not do so.

This time the Convention included parliamentarians and government representatives from the thirteen countries that were candidates for, or aspired to become candidates for, membership of the Union. That is, Rumania, Bulgaria and Turkey took part along with the ten countries that in the end acceded to full membership on 1 May 2004. Again, there were sixteen Members, with alternates, from the European Parliament, two (plus two alternates) from the Parliament of each participating state, a Government representative with alternate from every government, two Commissioners, a President – Valéry Giscard D’Estaing – and two Vice Presidents, Jean-Luc Dehaene and Giuliano Amato, plus various observers – all in all 203 active participants, plus up to ten observers who made frequent observations.

From the beginning, on 28 February 2002, President Giscard exhorted members to keep in their sights the possibility of a “constitutional treaty” or “treaty constitution” as the possible output of the Convention. At the end of the “listening phase” of deliberations in June 2002, various working groups were established to inquire into known areas of difficulty. Most reported back by the late autumn of 2002, with some carrying forward into early 2003. Meanwhile, at the end of October the Praesidium of the Convention – its steering committee – published for discussion the draft table of contents of a possible constitution or constitution treaty.

From early 2003, slices of draft text filling in the contents were issued to the conventioners and published to the wide world. Vigorous debates took place on the floor of the Convention, and torrents of amendments, often substantially overlapping ones, flowed in from the pens of the conventioners. All this was conducted in complete openness, with verbatim debates and all agendas, papers and contributions available on the Convention website, and with a link over to a public forum website for the airing of opinions by interested citizens. The process of amendment was on the face of it chaotic, but Secretary-General Sir John Kerr and his extraordinarily competent team in the Convention secretariat made heroic efforts at systematisation. In a private conversation subsequently, Sir John remarked to me that every single participant who had lodged amendments could find elements in the final text that bore the mark of amendments she/he had lodged, though of course not everybody succeeded on every point.

By June 18, a draft of the basic elements of the Constitution – Part I – had been settled, and Part II, the Charter, was incorporated as a binding element in the Constitution, with some minor adjustments to the text brought forward from Nice. By mid-July, Part III was finished to the best of the Convention's ability in the time available. It adjusts and re-states everything in the present Treaties about the policies of the EU and the details of its competences in relation to the single market, the customs union, economic and monetary union, defence and security, justice and home affairs, and all the rest of it. Part III keeps all the existing Treaty law, and the *acquis* under it, in force in a manner that is compatible with the constitutional framework laid down in Part I. Part IV regulates the coming into force of the Treaty and the Constitution it encapsulates, and the future amendment thereof.

Inspired, perhaps, by the open-ness of the proceedings at the Convention itself, the Intergovernmental Conference convened by the Italian presidency in October 2003 carried on its business with considerable open-ness. Governments declared their hands openly, and revealed the red lines they would not cross, even for the sake of a constitutional consensus. Some intractable points emerged from the discussions, and no final agreement could be achieved in 2003. The incoming Irish presidency in 2004 expended its whole negotiating energy tying up loose ends and resolving points of disagreement. Finally, on 17-18 June 2004 agreement was reached on all outstanding points, and on 29 October 2004 Heads of State and Government signed finally perfected texts in all official languages.

The Treaty Establishing a Constitution for Europe was finally in being, and awaiting ratification within two years by each member state according to its own constitutional provisions. This treaty contains what is still very recognisably the Constitution drafted by the Convention, though with some rather messy compromises built on, as well as some genuine improvements.

4. The Charter and IP

For today's purposes, the part of The Treaty Establishing a Constitution for Europe that interests us is the Charter, including Article II Article II-77, on the right to property:

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair

compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

2. Intellectual property shall be protected.

Intellectual property, we note, is to be protected – but which property in what kinds of ‘thing? For example, is computer software to be subject to patents, or only to copyright? All these controversial points presumably remain open, provided that any régime adopted secures adequate protection for the rights involved. Once a decision is made as to protection, however, how revocable will it be? Could a decision to extend patent protection, e.g., in the hotly debated case of software, be subsequently revoked, as an instance of a “use of property regulated by law in so far as is necessary for the general interest”? Can there be relevant abuses of IP rights, as in the case of obstacles to provision of generic drugs in poor countries afflicted with (e.g.) the AIDS epidemic? How do we hold in balance the right to life and health and the right to property?

Such questions are, doubtless, meat and drink to human rights lawyers and to IP specialists. They are also of real public and professional concern, as the present colloquium will richly demonstrate. Antinomies, difficulties, and balancing problems of such a kind explain the anxiety some governments expressed during both the Charter and Constitutional Conventions considered above about the prospect of adopting the Charter as a legally binding instrument or, a fortiori, as a built-in part of a new ‘Constitution for Europe’.

5. Contesting human rights

The Charter is an attractive document because it is written in simple and categorical terms, without endless exceptions and qualifications being expressed. The stylistic contrast with the 1950 ECHR is striking – as an example in the Appendix below will perhaps make vivid. Difficulties, however, will inevitably arise from the existence of two instruments, both about fundamental rights, binding on the same persons and institutions. All the more will this be so if the Constitution comes into force. For then the EU, having acquired international legal personality, will itself have to accede to the ECHR as foreseen in Article I-9(2).

In such an event, there will be a situation in which EU citizens will confront institutions bound, by their own constitution, to respect the Charter in favour of all persons within the EU; while at the same time those institutions are bound, as a matter of public international law, to respect the ECHR rights. Over the former, the Court of First Instance and the European Court of justice will have jurisdiction, over the latter, the European Court of Human Rights in Strasbourg. Will there arise two sets of rights jurisprudence, a Luxembourg interpretation of rights and a Strasbourg interpretation? If so, which is to prevail in case of conflict? How will all this dovetail with decisions of states’ constitutional courts, or other highest jurisdictions, concerning human rights enshrined in domestic constitutions, or by means of the ‘domestication’ of ECHR rights as achieved, e.g., by the (UK) Human Rights Act 1998?

The better, and more probable, view is that the Strasbourg Court will be recognised as the absolute and final long-stop on human rights issues. All other jurisdictions should, and probably will, fall into line with its holdings, including those allowing a margin of

national (or EU-wide) appreciation, especially concerning the concept of “more extensive” protection. Thus may be avoided an indigestible superabundance of rights differently specified in different instruments, all of them legally binding.

6. The proper role of courts

Related to this problem is one concerning over-empowerment of judges. The UK Government in particular has an apparent horror of the idea that judges, especially judges in supranational tribunals, may conduct themselves after the fashion of unruly horses, running wild in the leeways of discretion afforded by vaguely-written instruments such as the Charter. For example, how are the clauses on bodily integrity going to be read? What is the juridical cash-value of a right to strike, even one qualified as being “in accordance with accordance with Union law and national laws and practices”; how strong a qualification is that in relation to the ‘right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action’ (see Article II-88)?

Commissioner Antonio Vitorino chaired a working group on the Charter and its incorporation in a constitution. Baroness Scotland, the UK government’s alternate member at the Convention, represented the case of those concerned about such issues. She pressed hard for recognition of the problematic character of the legal incorporation of Charter rights along side of ECHR rights, and national constitutions and constitutional traditions.

The compromise eventually achieved was to strengthen the ‘horizontal clauses’ now enshrined in Article II –112, to ensure that limitations on EU competences elsewhere in the constitution also limit the scope of applicability of Charter rights. They also ensure that the constitutional traditions of the Member States shall have to be taken into account in interpreting the rights based on them. Also, the articles of the Charter that express principles become judicially cognisable only to the extent that these principles may have been put into effect by legislative acts or executive decisions, and then only for the purposes of interpreting the Act or decision in question. Finally, a further requirement set by the UK, before it would agree to incorporating the Charter in the Constitution, was aimed at ensuring that certain travaux préparatoires should be available, and used, as a guide to interpretation of the Charter if it came legally into force. These were ‘the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention’. (See the Preamble to the Charter, i.e., to Part II of the Constitution.)

7. Conclusion

As a participant in that working group, I strongly supported the incorporation of the Charter in the Constitution, but also tried to assist in overcoming apprehensions and objections such as those raised by Baroness Scotland. It would be unthinkable to have a new constitution but to say nothing about rights in it, and barely thinkable to shunt the rights into a siding labelled “Political Declaration”. On balance, a reasonable compromise was achieved that will rein in any unruly horses that turn up in the courts of the EU. Just how the fundamental rights will impinge on the difficult issues affecting the law on IP and technology in their interaction with competition law is a matter for much careful thought. That it will certainly receive in the coming two days.

Since the time of this presentation to the Colloquium, the defeat of the 'Yes' side in French and Netherlands referendums has effectively derailed the project to adopt the EU Constitution. Nevertheless, the Charter remains in force as a political declaration, and most of the problems discussed here will in due course have to be resolved one way or another, especially if the Charter ever acquires full legal status.

APPENDIX

ECHR and Charter

It is instructive to compare Article II – 66 of the Charter with its ancestor, Article 5 of the 1950 Human Rights convention. The former is lapidary in its simplicity:

Article II-66

Right to liberty and security

Everyone has the right to liberty and security of person.

With this should be compared the relative verbosity, but also legal exactitude of:

Article 5

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a the lawful detention of a person after conviction by a competent court;
- b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law

to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

It is an interesting question how exactly the terms of the ‘horizontal clause that is now Article II –112 (3) will reflect on the relationship between the text of 1950 and that of 2000/2004. It says:

3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Does this mean that all the exceptions and qualifications made explicit in ECHR Article 5 are impliedly present in Article II – 66, or not? Would the ‘more extensive protection’ have to be derived from a Union law other than the Charter itself, or should the Charter be read as possibly itself extending protection. It seems more reasonable to consider that the Charter does not itself extend protection beyond that of the ECHR in those articles that deal with the same rights as the ECHR covers, but it does so in articles that cover new ground derived from other instruments subsequent to the ECHR. Otherwise it would be a matter for fresh lawmaking to provide more extensive rights, in a way that would not fetter or cramp other rights guaranteed in the Charter.