Book Reviews

I. Govaere. *The Use and Abuse of Intellectual Property Rights in E.C. Law*. London: Sweet & Maxwell, 1996. Pp. xxxiv, 337.

Intellectual Property is no longer the preserve of a specialized branch of private law. It has become one of the hottest topics in international trade law. As the gap between the substantive law of the GATT and regional economic organization closes, the EC law on intellectual property has an importance which extends beyond the shores of Europe. Particularly interesting, therefore, is this new and ambitious book, which goes further than being a mere statement of what the law is. Indeed, Govaere's study is partly a law book and partly a book about the law.[1] As a law book, Govaere's study can hardly be faulted. The volume from this perspective is a veritable 'hornbook' on the treatment of national intellectual property rights under the European rules on the free movement of goods and competition. It masterfully presents the issues that the European Court of Justice (the 'Court') has faced in the field, its responses and the current state of the law. In addition, Govaere elaborates the various interpretations of the Court's case law put forth in the commentary, thereby giving practitioners and academics the doctrinal and theoretical tools to shape the future of the law.

As a critique of the law, Govaere argues that the Court has failed to achieve the proper level of intellectual property protection. It disingenuously pretends to respect the existence of national intellectual property laws, she maintains, while routinely emptying them of their substance. Govaere writes that the correct doctrinal approach lies in a 'functionality test', whereby the Court would straightforwardly invalidate national intellectual property laws that do not 'conform' with the 'function of the intellectual property right concerned'. To ensure the uniform application of EU law, the Court would give each intellectual property right a single 'European' definition (at 69). This test, Govaere argues, would achieve the proper balance between free trade and intellectual property protection and would provide a coherent rationale for striking down national laws.

Govaere makes a sharp argument that the Court alternatively over- and under-protects intellectual property rights. She points out, for example, that, under the 'consent theory', a patent holder who markets its product in a Member State that does not afford patent protection cannot enjoin its importation from that Member State.[2] She contrasts this ruling with the decision that a patent holder may enjoin the importation of products that it was required to market under a compulsory licence.[3] These decisions, Govaere quite correctly argues, penalize competitive, and reward anti-competitive, behaviour. Their flaw, she concludes, stems directly from the Court's failure to consider that the function of patents is to grant monopoly rights to inventors as a reward and incentive to disclose their invention to the public (at 165-8).

Govaere also puts forward a persuasive argument that the Court *de facto* nullifies national intellectual property laws. Among other cases, she points to the ruling that broadcasters which held a copyright in their programme listings could not prevent the publishers of weekly guides from using the listings without a licence. In that case, Govaere comments, the Court completely eviscerated the national right. While its decision was justified on the ground that the function of copyright does not encompass the protection of facts, Govaere argues, the Court disingenuously insisted that it only struck down a

1 Weiler, 'Review Essay, The Court of Justice on Trial', 24 *CMLR* (1987) 555 (reviewing H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986)).

2 *Merck & Co., Inc. v. Stephar B.V.* [1981] ECR 2063, discussed at 81-85.

3 *Pharmon v. Hoechst* [1985] ECR 2063, discussed at 161-168.

vaguely defined 'abusive' exercise of the right.[4]

I first take issue with Govaere's argument because, even assuming that the Court may invalidate a national intellectual property law consistent with Article 36, she ignores the difficulty inherent in defining a universal function of intellectual property that would transcend the conflicting theoretical approaches to the field. The debate over the boundaries of trademark protection illustrates this proposition. Traditional trademark theory holds that marks serve to minimize the likelihood of consumer confusion as to product source and prohibits the use of a mark in connection with competing products only. The 'dilution' theory challenges this notion and prohibits the use of a mark on non-competing goods on the ground that such use 'dilutes' the mark's selling power and its hold on the consumer.[5] This debate has been raging among academics and the courts, with Member State courts interpreting national laws differently according to which theory they follow. If a Member State court issued an injunction against the use of a mark on non-competing goods based on a dilution analysis, the Court would be required under Govaere's test to select a European trademark theory to determine whether the national law as applied should be upheld. On what basis would the Court pick one theory over another?

Likewise, a country may reject the utilitarian theory of copyright (advocated by Govaere), according to which facts are so necessary to the development of knowledge that copyright may not attach to them. A country may instead follow a labour or a personality theory, under which an author who invested resources or personal commitment in uncovering facts is entitled to copyright protection.[6] On what basis may the Court conclude that the 'essential function' of the right should be different?

Further, even a single theory of intellectual property may provide alternative definitions of the boundaries of intellectual property. For example, law and economics holds that law-makers should determine 'with respect to each type of intellectual product, the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses'.[7] Suppose a law-maker decided to grant copyright on facts as a trade-off for, say, shortening the life of copyright to five years? Would the Court impose a different 'bundle of entitlements' on the Member State?

In the end, Govaere's argument fails because it requires the Court to harmonize *de facto* the intellectual property laws of the Member States. If the Court defined a European purpose for intellectual property rights, it would force Member States to adopt essentially similar laws. The Court may tinker, as it does, with intellectual property protection for the sake of free trade, but it cannot thrust itself as the all-empowering theorist of intellectual property and harmonize the field through the back door. Govaere explains that political resistance from the Member States will prevent harmonization in the foreseeable future (at 48). Absent harmonization, though, what we see may just be all that we can get.

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4 *RTE and ITP*, Joined Cases C-241/91P and C-242/91P (Magill appeal), at 135-150.

5 See, e.g., T. Martino, *Trademark Dilution* (1986), at 26; Schechter, 'The Rational Basis of Trademark Protection', 40 *Harv. L. Rev.* (1927) 813.

6 On the labour theory, see Hughes, 'The Philosophy of Intellectual Property', 77 *Georgetown L.J.* (1988) 287, at 296-314. On the personality theory, see M. Radin, *Reinterpreting Property* (1993), at 36-44.

7 Fisher, 'Reconstructing the Fair Use Doctrine', 101 *Harv. L. Rev.* (1988) 1659, at 1704.

Lowenfeld, Andreas F. *International Litigation and the Quest for Reasonableness: Essays in Private International Law*. New York: Oxford University Press, 1996. Pp. xxvii, 239. Index. § 65.

Is it possible to identify a universally acceptable standard of reasonableness in the multifarious world of private international litigation? Andreas Lowenfeld, Professor of