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Legal Pragmatism and Intellectual Property Law

Legal Pragmatism has a longstanding tradition of looking at the law from a pragmatic point of view. This line of thinking is particularly well suited for analysing intellectual property (IP) and its economic implications. Deriving from American legal thinking, legal pragmatism – like legal realism – often seems to be irreconcilable with continental European dogmatic jurisprudence. However, dogmatic reasoning gives enough leeway to allow for pragmatic results. Legal pragmatism can be applied within the framework of dogmatic thinking. This is especially true in the area of IP Law where economic effects play a major role in both, making and applying the law.

1. Legal Pragmatism and Law and Economics

Legal Pragmatism can be defined as a concept with four major aspects: contextualism, anti-foundationalism, instrumentalism and practical reason.¹ This concept goes well together with economic thinking in jurisprudence.

1. Contextualism

The first aspect, contextualism, underlines the influence of culture on legal reasoning. It is – like the whole concept of legal pragmatism – heavily influenced by legal realism. Although this aspect is of great heuristic importance it does not directly relate to the value of economic reasoning in legal thinking.

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1 See Butler, *Legal Pragmatism*, in: *Internet Encyclopedia of Philosophie*, URL: <http://www.iep.utm.edu/leglprag/> (last seen on 21.12.2015); Cotter, *Legal Pragmatism and the Law and Economic Movement*, 84 *Georgia Law Journal* 2071, 2073 et seqq. (1996); Cotter, *Legal Pragmatism and Intellectual Property Law*, in: Balganesch, ed., *Intellectual Property and the Common Law*, 213 et seqq. (2013); Martin, 22 *Rechtstheorie* 525, 532 et seqq. (1991).

2. Anti-Foundationalism

The picture changes when it comes to the second principle, anti-foundationalism, meaning that the law reflects values and interests of many different actors and groups. In the area of IP law such a widening of the horizon has occurred over the last decade especially when the value of the public domain and of boundaries to IP preserving the public domain has become the focus of academic and political IP debates. With regard to law and economics anti-foundationalism can be understood as a way of thinking which allows taking into account economic arguments. Therefore, at least positive law and economics can be easily adapted to legal pragmatic thinking. On the other hand normative law and economics, from a pragmatist's point of view, can be quite problematic if and to the extent that it tries to justify all legal reasoning by economic effects. Such monocausalism seems irreconcilable with legal pragmatic thinking.

3. Instrumentalism

Arguably, the most important aspect of legal pragmatism is its third principle, instrumentalism, meaning the evaluation of legal rules by practical consequences. This aspect runs perfectly parallel with the consequentialist thinking of law and economics. It is also of great importance for IP law which, as will be shown more elaborately later, relies heavily on the justification by its mainly economic consequences. However, instrumentalism as an argument shows one of the main problems of legal pragmatism as a whole oscillating between descriptive and normative reasoning. Whereas all three concepts, contextualism, anti-foundationalism and instrumentalism are certainly true to a certain extent as a description of the actual process of making legal decisions, it is by far less clear whether this provides a normative argument that legal reasoning should be that way. To avoid the naturalistic fallacy normative concepts have to be added to merely describing legal reality (this is true for legal pragmatism as well as for legal realism). Nevertheless instrumentalist thinking combined with utilitarian normative concepts has its value and is one of the cornerstones of IP law and economics alike.

4. Practical Reason

The fourth principle of legal pragmatism, practical reason, understood as the practice of making rational decisions in light of uncertainty, is of great value for any modern jurisprudence. Social and technological changes accelerate constantly and therefore increase the uncertainty law makers and lawyers have to face. The ever present lag time between progress and the law seems to increase. This underlines the value of the legal reasoning that specifically takes into account

factual uncertainty. To overcome such uncertainties different legal principles may be applied, like general clauses or legal rules using private instead of public information as a basis (e.g. liability rules instead of simple regulatory rules. The concept of uncertainty is one of the major objects of research in economics. Therefore law and economics plays a major role when it comes to information asymmetries and other uncertainties in the legal area. As a result the flexibility of legal norms may be increased. This may lead to differences between common law and civil law solutions as well as to collisions with the principle of legal certainty. Once more the line between descriptive and normative thinking has to be clearly drawn. Nevertheless practical reason and subsequent flexibility of legal rules are of great importance and can be achieved even within the civil law system.

II. Pragmatic Thinking and IP Law in Europe

As shown in the first part, legal pragmatism can be easily applied to IP law. This is not only true for pragmatism as a description of actual legal reasoning but also for legal pragmatism as a normative concept. The key aspect in this regard is instrumentalism understood as an emphasis on the consequences on legal rules and their application. This leads to a huge influence of economic arguments (law and economics). Whereas legal pragmatism was developed by American jurists and seems to be better suited for common law systems, pragmatic thinking may also be applied in civil law systems. The following chapter tries to show how pragmatic thinking is part of current European IP jurisprudence highlighting some major cases currently being discussed.

1. Patent Law

Patent law arguably is the area of IP with the greatest influence of economic reasoning and in consequence of an instrumentalist view of law. Interestingly, instrumentalism and practical reason are nevertheless without boundaries. For instance from an economic perspective the one-size-fits-all-approach to patent terms is less beneficial than a sector specific solution would be.² Nevertheless, so far only in one area of technology patent terms were amended by the introduction of supplementary protection certificates. The example of the tomato and the broccoli cases³ show that especially in the area of patent prosecution there is a tendency to apply the law with less flexibility. The European Patent Office reached

2 Kerber, Zur Komplexität der Anwendung des ökonomischen Anreizparadigmas bei geistigen Eigentumsrechten – Ein wirtschaftspolitischer Analyserahmen, 5 ZGE/IPJ 245, 264 et seqq. (2013).

3 EPO, Decision G 2/12, Tomatoes II, March 25, 2015; EPO, Decision G 2/13, Broccoli II, March 25, 2015.

its conclusion – the patentability of plant products despite the non-patentability of breeding methods leading towards such products – by strictly applying article 53 lit b EPC (see article 4 Directive 98/44/EC). Therefore it came to the conclusion that plant products are not necessarily plant varieties in the sense of this article and confirmed patentability. Although the underlying rationale seems correct (plant innovation being clearly a part of technology not only in the area of gene technology but also in the area of new breeding methods) the judgement should have clearly spelled out this argument instead of relying on a verbal application of the law. Arguably, in patent law there exist two different legal cultures. Patent litigation is mostly carried out by lawyers. Even civil lawyers have a large toolbox of legal reasoning at their disposal. For instance teleological interpretation, despite being a classical dogmatic method, allows for taking into account the purpose of function of legal rules. This is clearly legal pragmatism. On the other hand patent prosecution is mostly carried out by trained engineers who only have additional legal training. This seems to lead to a tendency to use legal methods less liberally and for instance to apply the law more literally.

On the other hand the dualism of legal and technical training sometimes seems to have a moderating effect. Patent law is therefore not only an example of an instrumentalist use of the law but also of anti-foundationalism where different actors with different backgrounds can be observed.

An example of how different groups with different agendas influence patent law is the influence of ethical considerations on patent law. The decisions on stem-cell patents by the European Patent Office and the CJEU⁴ can be considered as landmark decisions when it comes to ethics and patents. In general a trend towards loading patent law with more ethical considerations can be observed. This seems to be problematic not only because of frictions with regulatory law but also because of the specific competence of patent offices to decide technology related matters and moreover due to the shifting nature of ethical perspectives.⁵

Another area of patent law where legal pragmatism is needed and applied seems to be patent trolling.⁶ Economics has provided a clear indication that patents under certain circumstances can be detrimental to public welfare. This leads to the pragmatic question how such effects can be alleviated. The key factor seems to be the unconditional granting of an injunction of patent infringement.

4 CJEU, Decision C-34/10, *Brüstle/Greenpeace*, October 18, 2011; CJEU, Decision C-364/13, *International Stem Cell*, December 18, 2014; EPO, Decision G 2/06, *Use of embryos/WARE*, November 25, 2008.

5 Zech, *Life Sciences and Intellectual Property: Technology Law put to the Test*, 7 ZGE/IPJ 1, 9 et seq. (2015).

6 For the phenomenon of patent trolling see Ohly, “Patenttrolle” oder: Der patentrechtliche Unterlassungsanspruch unter Verhältnismäßigkeitsvorbehalt? – Aktuelle Entwicklungen im US-Patentrecht und ihre Bedeutung für das deutsche und europäische Patentsystem, GRUR Int 2008, 787, 792 et seq.; Osterrieth, *Patent-Trolls in Europa Braucht das Patentrecht neue Grenzen?*, GRUR 2009, 540, 541 et seq.

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Whereas an injunction as an equitable remedy under the common law system is not provided per se the civil law systems provide injunctive relieve without further requirements. Different dogmatic solutions have been proposed. From a pragmatic point of view the dogmatic construction is less interesting than the actual solution. The ECJ in the case of standard essential patents opted for competition law as a solution. According to the Decision *Huawei/ZTE*⁷ an action for infringement can be regarded as an abuse of a dominant position under certain circumstances. Whereas some commentators would rather opt for a solution within the framework of IP law from a pragmatic point of view this is an apt solution.⁸

2. Copyright Law

Copyright law is less receptive to economic considerations due to its traditional roots in authors' personality aspects (at least within authors' rights systems). Therefore copy right is less instrumental than patent law on the one hand but is a clear example of the influence of disparate interests on the other hand. All in all copy right law is an area of IP law in which legal pragmatism should be more broadly applied.

A first example is the CJEU Decision *UsedSoft/Oracle*⁹ where the principle of exhaustion (first sale doctrine) was applied to the sale of intangible goods. On the one hand this decision is dogmatically inconsistent applying the doctrine of exhaustion which was clearly constructed for corporeal goods to incorporeal goods. However, this can be considered as pragmatic behaviour putting pragmatic reason before dogmatic clarity. On another level the CJEU's decision also lacks pragmatic considerations especially regarding its economic reasoning. The key reason for applying the principle of exhaustion to the sale of software is, according to the CJEU, the "comparability" of a sale of software on a data carrier and a sale of software via download.¹⁰ Nevertheless, an economic evaluation is missing. There is evidence that the sale of corporeal goods and incorporeal goods is economically different and should also be treated differently from a legal per-

7 CJEU, Decision C-170/13, *Huawei/ZTE*, July 16, 2015.

8 Ullrich, *Patente und technische Normen: Konflikt und Komplementarität in patent- und wettbewerbsrechtlicher Sicht*, in: Leistner, ed., *Europäische Perspektiven des geistigen Eigentums*, 63 et seqq. (2010); Hauck, "Erzwungene" Lizenzverträge – Kartellrechtliche Grenzen der Durchsetzung standardessenzieller Patente, *NJW* 2015, 2767, 2768 et seqq.; Hauck, *Das Phänomen "Patent Privateering" – Auswirkungen und wettbewerbsrechtliche Zulässigkeit strategischer Patentübertragungen*, *WRP* 2013, 1446, 1449 et seqq.; Heinemann, *Standardessenzielle Patente in Normenorganisationen, Kartellrechtliche Vorgaben für die Einlösung von Lizenzierungsversprechen*, *GRUR* 2015, 855, 858 et seqq.; Hilty/Slowinski, *Standardessentielle Patente – Perspektiven außerhalb des Kartellrechts*, *GRUR Int* 2015, 781,784 et seqq.

9 CJEU, Decision C-128/11, *UsedSoft/Oracle*, July 3, 2012.

10 CJEU, Decision C-128/11, *UsedSoft/Oracle*, July 3, 2012, Rn. 47 et seqq.

spective.¹¹ Moreover other legal solutions are available, especially contract law. The CJEU's decision seems therefore to be overly pragmatic.

Another example where a desired result was reached by applying the law without clarifying the economic effects of the decision is the CJEU's Bestwater Decision.¹² Although from a consumer point of view the admissibility of content embedding seems desirable, its economic impact is still unclear.

3. Trade Mark Law

Trade Mark Law is another area of intellectual property which is clearly economically driven. Nevertheless, current decisions sometimes seem to be overly pragmatic instead of clearly instrumental or economically precise. The CJEU's L'Oréal/Bellure Decision¹³ with its theory of trade mark functions seem to be based on economic reasoning at first glance. However, it only argues from an entrepreneur's point of view. Protecting a huge variety of economic trademark functions only makes sense from a micro-economic perspective. From a macro-economic perspective it seems too detrimental to the public good. Like in copy right law a rather instrumental than overly pragmatic approach seems to be preferable. Law and economics arguably is the most important tool when it comes to draw decisions in the area of industrial property law. However, using law and economics means using its whole toolbox including analyses of the overall economic impact and – to the extent possible – empirical studies.

III. Conclusion

Legal pragmatism is part of the IP reality in Europe. Especially the instrumental view is important for the making and the application of intellectual property law. Law and economics is an essential part of legal reasoning, but not the only aspect that has to be taken into account. Instrumental and dogmatic thinking are not necessarily opposites. Especially teleological interpretation and methods to follow the function of a legal rule without its verbal application as a boundary are instruments to allow for instrumental thinking within the civil law framework. Between patents and trade marks on the one hand and copy right on the other hand there is a difference regarding the importance of instrumentalist and eco-

11 Zech, Vom Buch zur Cloud, die Verkehrsfähigkeit digitaler Güter, 5 ZGE/IPJ 368, 375 et seq. (2013); Kerber, Zur Komplexität der Anwendung des ökonomischen Anreizparadigmas bei geistigen Eigentumsrechten. Ein wirtschaftspolitischer Analyserahmen, 5 ZGE/IPJ 245, 245 et seq. (2013.)

12 CJEU, Decision C-348/13, BestWater, October 21, 2014.

13 CJEU, Decision C-487/07, L'Oréal/Bellure, June 18, 2009.

conomic reasoning. This is due to the personality driven roots of copy right within authors' rights systems.

Flexibility is a key aspect of practical reason and can be implemented in common law and civil law systems alike. However there is a difference between common law where flexibility is ingrained and civil law where flexibility has to be obtained by using interpretive measures such as teleological interpretation. Flexibility can also be obtained by the law maker by using general clauses and legal terms that are open to interpretative development.

Anti-foundationalism as the third aspect of legal pragmatism can be found in IP in different legal cultures. This holds not only true for patent law where patent prosecutors and patent litigators work together but also for the area of copy right law where authors and lawyers have to cooperate. The collision of different cultures, namely technology, art, trade and law, sometimes leads to disputes. It is also one of the main reasons for intellectual property being such an interesting area of law.

Zusammenfassung

Legal Pragmatism untersucht das Recht von einem praxisbezogenen Standpunkt aus. Diese Betrachtungsweise eignet sich besonders gut für eine Untersuchung geistigen Eigentums. Wie auch die Strömung des Legal Realism scheint der Legal Pragmatism, der ebenfalls aus der amerikanischen Rechtstradition stammt, nicht mit dogmatischem Rechtsdenken in Einklang zu bringen zu sein. Dennoch lässt auch die Rechtsdogmatik genügend Raum für die Erreichung pragmatischer Ergebnisse. Legal Pragmatism kann daher auch im Rahmen dogmatischen Denkens zur Anwendung gebracht werden. Dies gilt in besonderer Weise für das Gebiet des geistigen Eigentums, wo ökonomische Funktionen eine wichtige Rolle sowohl bei der Rechtssetzung als auch bei der Rechtsanwendung spielen.

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