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The New Constitutional Architecture of Intellectual Property

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1. From IP Constitutionalism 1.0 to 3.0

How should we perceive the constitutional architecture of intellectual property (IP)? Should we focus on constitutional provisions authorising the legislature to enact IP laws for specific purposes? The IP clause of the US Constitution,1 the legal bases under European Union (EU) constitutional law, and similar provisions of constitutional rank elsewhere, would then form the natural starting points for our analysis. Or should we rather concentrate on how fundamental rights affect IP?2 IP has indeed triggered important developments relating to both types of constitutional issues. The constitutionality of the copyright term extension in the US,3 the extent to which EU basic freedoms or legislative efforts could affect national copyright,4 the legal basis and the overall constitutional acceptability of the EU Unitary Patent,5 and the conformity with human dignity of the EU Biotechnology Directive,6 provide examples of such constitutional issues.

However important such questions continue to be in practice, they represent what Alexander Somek has called constitutionalism 1.0—the constitution as a constraint on public powers—and constitutionalism 2.0—the constitution representing the supreme value of human rights. But we have already entered constitutionalism 3.0 with new phenomena and constitutional architecture. Novel features and trajectories of constitutionalism 3.0 are grafted upon the previous versions, thus increasing the complexity of the overall constitutional assemblage.7 Besides protecting human rights and against discrimination based on

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nationality, states are now increasingly developing ways to interact with authorities beyond the nation-state. Political authority is gradually being transferred to transnational authorities such as the World Trade Organization (WTO). Alexander Somek explains these developments of constitutionalism 3.0 by the global polity being systematically subjugated to the interests of global capital.

Several other writers have reached similar conclusions. For example, Nancy Fraser contends that instead of using politics to tame markets, states now use markets to tame politics. As other analysts have noted, democratic influence on policy-making emanating from civil society discourses appears as a source of indeterminacy for realisation of the aims of such policies, relating to securing the confidence of actual and potential investors and avoiding capital flight. As Saskia Sassen has captured it, ‘law assumes the function of a counter-weight to politics’ instead of being conceptualised as ‘frozen politics’. Scholars under the banner of the new constitutionalism emphasise that global constitutional structures have been erected to shelter the interests of global capital from the unpredictability of democratic forces and progressive judges alike. Such measures lock in and seek to solidify the achievements of powerful businesses on global, regional, and domestic levels alike. They shelter intellectual capital, as it is created through legislation and could otherwise equally easily be reduced or cancelled through legislative or judicial action.

Besides this constitutional transformation, the societal meaning of IP has experienced profound changes. In early modernity, understood as the industrial society, IP regulated relations between authors and publishers and affected specific industrial firms only. IP had a negligible impact on social life and probably even on levels of innovation. In late modernity, understood as the current networked information society, IP concerns all businesses and has become the most valuable asset of many corporations. IP law now broadly regulates cultural and informational resources, cultural non-market production, and technological structures necessary for communication and open and pluralistic public spheres. In late modernity, these constitute the basic prerequisites of individual autonomy and a functioning civil society alike. This development brings out the mismatch between traditional IP doctrine and its discourse based on innovation policy, on the one hand, and, on the other,

8 Nancy Fraser, ‘Transnationalizing the Public Sphere: on the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World’ in Seyla Benhabib, Ian Shapiro, and Danilo Petricioli (eds), Identities, Affiliations, and Allegiances (Cambridge University Press 2007) 57.
9 See John S Dryzek, Deliberative Democracy and Beyond (Oxford University Press 2000) 27 and Fritz W Scharpf, Governing in Europe: Effective and Democratic? (Oxford University Press 1999) 41, noting that competition among systems of regulation has features of a prisoner’s dilemma in that all countries that compete are tempted to make more extensive concessions to capital and business interests than they would otherwise have preferred.
10 See on a general level Saskia Sassen, Territory, Authority, Rights: from Medieval to Global Assemblages (Princeton University Press 2006) 196 and 202 (hereafter Sassen, Territory, Authority, Rights).
12 Against widespread belief to the contrary, patents did not likely have a great impact on economic growth during the industrial revolution. See Joel Mokyr, Intellectual Property Rights, the Industrial Revolution, and the Beginnings of Modern Economic Growth (2009) 99(2) American Economic Review 349. The patent system offered a false hope for the vast majority of inventors. The expected payoff of a patent was in all likelihood negative (ibid 354).
the new politics and discourse focusing on the effects of IP on human lives, power over emerging technological systems, and the impact on societal developments at large.14

As IP rights have simultaneously become stronger and broader in coverage, they signify ever deeper limitations on communication, artistic expression, economic liberty, education, research, and many other policies related to human rights. Together with the developments of constitutionalism 2.0, this forms the core background for understanding the current mainstream discourses on the constitutionalisation of IP. These discourses focus on the controlling effects of fundamental rights on IP expansion and its negative repercussions on other policies related to fundamental rights. In these discourses, fundamental rights possess the ideal role of re-establishing the lost balance of IP law, thus taming its excessive intrusion into broad spheres of human life and society. In a Habermasian spirit, human rights are thought to safeguard the democratic nature of society by protecting the public and private spheres of the lifeworld from internal colonisation and the expansionist tendencies of economic and administrative systems in the form of intrusive and innovation-monomaniac IP laws.15 But fundamental rights lack the potential to solve the problems of constitutionalism 3.0. Often, rather, they constitute part of the problem.

Against this background, this chapter aims to look beyond discourses reflecting constitutionalism 2.0 and sketch some of the central features of the new 3.0 constitutional architecture in the context of IP. In particular, I will study the characteristics of this constitutional development from the perspective of social acceleration. This zooms the focus into novel developments of IP beyond mainstream constitutional discourses reflecting constitutionalism 2.0 and the ‘healing power’ of fundamental rights. As Alexander Somek and William Scheuerman have pointed out, politics under permanent social acceleration—lurching from one crisis to the next—has transferred decision-making from notoriously slow legislatures to more rapid transnational networks, executive governance, and privatised regulatory practices.16 The chapter also draws from the school of new constitutionalism. It argues that the prevailing new constitutionalist architecture of IP is best understood through the role of constitutional norms in both accelerating and decelerating change. In particular, the chapter argues that the judicature, the executive, and the private sphere continue to replace legislators as the critical drivers of IP policies, that lock-in mechanisms such as the three-step test and international investment agreements (IIAs) provide the stability needed for acceleration, and that the notion of structural proprietarian bias captures the spirit of the prevailing multipolar IP constitutionalism.

The chapter will proceed as follows. The next section will discuss the core characteristics of constitutionalism 3.0 in the context of IP and discuss a selection of representative examples related to the transformations in question. The examples might convince the reader but cannot substitute for a more systematic analysis, which would be required to corroborate the propositions made. Such a massive exercise, however, cannot be pursued here. Conclusions will draw the threads together.

15 Protecting the public and private spheres of the lifeworld would enable administration based on legitimate legislation, which is based on communicative action within the public and private spheres of the lifeworld. See in more detail Tuomas Mylly, Intellectual Property and European Economic Law—The Trouble with Private Informational Power (IPR University Center 2009) 42–56 (hereafter Mylly, Intellectual Property and European Economic Law).
16 Somek, Cosmopolitan Constitution (n 7) 22.
2. IP Constitutionalism 3.0: Accelerating and Decelerating Features

2.1 Acceleration in Action: Courts, Administrative Offices, and Businesses Emerge as Key Regulators

2.1.1 Acceleration and constitutional transformations
An emerging discourse of sociology and political theory sees social acceleration as the key to understanding modernity. As Hartmut Rosa argues, dynamic stabilisation through continuous growth, acceleration, and innovation has become the structural imperative of modern societies. Modernisation is not only taking shape in time: it transforms time structures and horizons. In late modernity, understood as a new phase within modernity, transformative social change takes place within a single generation. Because of the rapidity of social change, politics becomes situational.

A central concept that Hartmut Rosa has developed to account for the changing role of law in acceleration is de-synchronisation. Whereas technological, economic, and cultural change accelerates and the pace of everyday life speeds up, the same does not apply to legislating. It is burdened by an accelerating need to react to and process new phenomena, growing uncertainty over the future, and increasing complexity and differentiation in terms of values and interests. Moreover, legislative decisions concerning issues such as genetic engineering, development of the Internet, and artificial intelligence involve long-term repercussions. Legislating then tends to become more time-consuming, causing legislation to constantly lag behind and become increasingly dysfunctional under the conditions of a high-speed society.

The problem is deeper than a simple time lag. In late modernity, past experiences become gradually irrelevant in providing useful guidelines for future situations. As a result, democratically legislated positive law often fails to fulfil its aims. It becomes desynchronised vis-à-vis the accelerating sub-systems and partially relocated into faster decision-making fora. Relocation into more rapid systems causes the symptoms typical of late modern law, such as delegation of legislative power to the executive and more lately to regulatory agencies, empowering the executive generally, see Adrian Vermeule, Law’s Abnegation. From Law’s Empire to the Administrative State (Harvard University Press 2016) (hereafter Vermeule, Law’s Abnegation) and Deidre

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19 Rosa, Resonance (n 18) 308.
20 Rosa’s analysis does not account for the likely influence of IP as an institution on technological, economic, and cultural acceleration processes. By providing exclusive rights on globally new and inventive technological solutions (patents) and creative expression (copyright), among others, IP inhibits competition based on imitation. By doing so, it shifts competition from a production level to innovation and creation levels. This spurs ever faster innovation and cultural renewal due to intensified competition on these levels. The patentability of incremental invention and the low threshold of originality for copyright likely further accelerate inventive and creative activities. Invention and creation become imperatives for almost any business: they become routinised and chronic parts of almost any economic activity, rendering older technologies and cultural artefacts redundant at an ever-faster pace.
21 Rosa, Social Acceleration (n 17) 262–67.
22 ibid 262.
23 On the expanding role of the executive generally, see Adrian Vermeule, Law’s Abnegation. From Law’s Empire to the Administrative State (Harvard University Press 2016) (hereafter Vermeule, Law’s Abnegation) and Deidre
judicature, recourse to technical standardisation as a regulatory strategy, and increasing private and technological ordering. These trends are visible in the development of IP on global, regional, and domestic levels alike.

But acceleration also needs the relative stability that law provides for long-term investment. As Hartmut Rosa points out, dynamic stabilisation of modern societies rests upon patterns of long-term investment: the prospects of long-term investment must be calculable. Law provides this relatively stable infrastructure for diverse acceleration developments. The faster the pace of acceleration, the more a solid and stable legal infrastructure is needed.

Constitutional law plays a particular role in providing that stability: a constitution binds future generations to an (allegedly) enduring set of institutional arrangements and broad principles to control legislative output. Constitutional protection of property and freedom to conduct a business on the nation-state and regional levels, as well as mechanisms securing property and investment on the global level, such as international investment law and international IP law, constitute the core of these new constitutional protections. As IP exists only in law, it would be—without constitutional safeguards—at the mercy of legislators and courts. This constitutes one of the reasons for the development of diverse constitutional mechanisms to protect IP, ranging from the specific mention of IP under protection of property ownership in Art 17(2) of the EU Charter of Fundamental Rights to protection of IP through international investment norms and international IP treaties.
Next, I will discuss the IP-related constitutional transformations in more detail. In particular, I will treat the changing regulatory role of the courts, administration, and the private sphere and link these transformations to IP developments.

2.1.2 Courts assume regulatory functions

2.1.2.1 Introduction

Since the mid-twentieth century, an accelerating shift of power from legislatures to judiciaries has been diagnosed in the vast majority of developed countries. Ran Hirschl argues that this shift of power results from combined strategic interests of political, economic, and judicial elites, each purporting to strengthen and prevent the erosion of their hegemonic positions. Whilst judicial elites and high courts benefit in the form of greater esteem and decision-making power, economic elites benefit from improved protection of their property interests and commercial freedom. Political elites, in turn, benefit when the judiciary manages to secure the continuation of their policy programmes when competing groups manage to intensify their influence on electoral politics.\(^{31}\)

In constitutionalism 2.0, the judiciary assumes a key role as it supervises the implementation of the constitution perceived as an enduring value system reflected in fundamental rights. Courts continue to censor legislative activities and seek to ensure the conformity of all legislation with the said value system anchored in the basic rights of the constitution.\(^{32}\) As Ran Hirschl recalls, the emerging bias of this fundamental rights adjudication in favour of protection of private property, or at least individual rights and negative liberties, disproportionately services the interests of economic elites.\(^{33}\) Yet the shift of power to judiciaries also relates to social acceleration. Accelerating techno-economic developments raise new legal issues and questions ever faster and in greater magnitude. They reach the judicature before the legislature manages to react. Courts will then have to resolve these issues in the absence of bespoke laws. They may take the opportunity to develop the law actively. This appears to apply to IP and the European Court of Justice (ECJ), in particular.

Two judicial developments will be treated as examples: the ECJ’s use of fundamental rights proportionality as a regulatory approach in the area of copyright and the creation of a highly specialised court in the framework of the EU’s unitary patent package, effectively insulating unitary patent law from the general doctrines and judicial review mechanisms of EU law.

2.1.2.2 Human rights proportionality empowers courts

Proportionality and balancing have emerged as the core judicial concepts of our time.\(^{34}\) They are part of nation-state law, EU internal market and IP law, WTO law and international investment law.\(^{35}\) Yet human rights law constitutes the most important domain.

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\(^{32}\) Somek, *Cosmopolitan Constitution* (n 7) 16 and Wistrich, ‘Evolving Temporality of Lawmaking’ (n 28) 781.  
\(^{33}\) Hirschl, *Towards Juristocracy* (n 24) 46–47.  
\(^{34}\) Alexander T Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 The Yale Law Journal 943. In the context of European copyright law, see Mylly, ‘Proportionality in the CJEU’s Internet Copyright Case Law’ (n 24).  
for the application of proportionality. Through proportionality, courts seek to define an appropriate relationship between the different conflicting interests at play, each entitled to legal protection. The proportionality test ultimately boils down to ‘weighing’ or ‘balancing’ a right against another right or public policy and their background values and interests. As proportionality provides very little guidance on how to finally decide, it is inherently indeterminate and empowers the decision-maker. Who the decision-maker is matters more than the specifics of the test. Introducing rights proportionality to a new setting typically does not affect the inherent biases of the outcomes. For example, in investment arbitration rights proportionality merely endows an investor-friendly outcome with a human rights gloss and enables more pervasive review of host state measures.

A modern constitutionalism 2.0 view of legal change is based on the idea that legislation contains a predetermined balance of values and interests, presumed to remain stable over at least some time. When the underlying values and interests change, the legislator enacts a new law. The basic rights of the constitution are thought to represent an enduring set of established principles capable of controlling this long-term legislative evolution. The role of human rights proportionality in this view is thus based on the idea that relatively stable constitutional norms control the contents of legislative acts: the past controls the future but does not determine its contents. In the IP context, this means that human rights control IP laws passed by the legislator by censoring their excesses. As human rights constitute an enduring set of principles for the protection of good causes, it is often presumed that their application to IP is beneficial by contributing towards re-establishing the ‘lost balance’ of expansive IP law. The mainstream view pacifies critiques: as the proportionality test is the only game in town, courts do not problematically expand their powers or make new law, as no new rules are created in the process and there is no alternative to proportionality.

But human rights proportionality assumes new functions in constitutionalism 3.0. In contrast to the idealistic human rights project of constitutionalism 2.0, human rights proportionality is frequently harnessed to the service of global capital through strong protection of property and business rights of corporations. Proportionality also becomes an instrument with which courts and other judicial decision-makers adapt the law to accelerating techno-economic change. New questions emerge at a rushing pace, but the legislature cannot keep up. Proportionality offers a solution.

In constitutionalism 3.0, human rights proportionality emerges as one of the key judicial regulatory strategies in European and international IP law. It provides the judiciary with exceptional decision-making power over core information society trajectories without

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adequate limitations on how to rule. It is future rather than past-oriented in the sense that proportionality-weighing promotes law’s ability to react to changing values and technological and economic evolution but without changes in legislation. Proportionality could accordingly be seen as a law-making process that continuously adapts the content of the rule to changing needs, circumventing the complexities of rules of change, but on the other hand subjecting the adjudicated phenomena to the possibility of authoritative co-regulation by the legislature. In other words, it could compensate for—but also facilitate—the lagging and incomplete responses of the legislature in fields such as Internet copyright, and provide flexibility to the application of existing laws not tailored to addressing emerging techno-economic questions. The new role of proportionality is connected to social acceleration and de-synchronisation of the legislature from accelerating sub-systems. Two examples serve to illustrate the novel meaning of fundamental rights proportionality in constitutionalism 3.0.

In Mc Fadden, the ECJ answered whether a provider of an open Wi-Fi network, Mr Mc Fadden, could be ordered to terminate or password-protect his business’s Wi-Fi network to prevent copyright violations by third parties using the network. The case demonstrates how proportionality enables deep-going regulation of new technologies in the absence of specific legislation. It also exposes the ECJ’s standard bias: overprotection of private property and business rights at the expense of the systemic effects of open network provision on communicative freedom and diversity.

The ECJ enabled injunctive relief ordering Mr Mc Fadden to take preventive measures. When establishing a ‘fair balance’ between the multiple rights at stake, the CJEU noted that monitoring all of the transmitted information would infringe the Ecommerce Directive. On the other hand, terminating the Internet connection would cause a serious infringement of the access provider’s freedom to conduct a business. This would not represent a fair balance between the fundamental rights to be reconciled, when also considering the limited infringement of copyright in question. But the ECJ held that an injunction requiring the Wi-Fi access provider to password-protect the connection so that users can be identified is in conformity with the requirement of a fair balance of rights. Indeed, it suggested that nothing less would adequately secure the protection of property ownership of copyright holders.

39 This is the most common critique of proportionality according to Anne Peters, ‘Proportionality as a Global Constitutional Principle’ in Anthony F Lang Jr and Antje Wiener (eds), Handbook on Global Constitutionalism (Edward Elgar Publishing 2017) 262.


43 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH [2016] ECLI:EU:C:2016:689. As I have discussed the case elsewhere, it suffices here to briefly explain its significance for the arguments developed. See Mylly, ‘Proportionality in the CJEU’s Internet Copyright Case Law’ (n 24).

The judgment overlooked that open Wi-Fi standards enable mesh networks and other infrastructure innovation in the absence of asymmetric power to dispose over the resource. Open anonymous Wi-Fi networks constitute a commons: they enable community-created infrastructures based on sharing. Recognising such systemic effects would have exposed the judgment’s regulatory nature. Failure to do so demonstrates that the ECJ reserves substantive decision-making powers to itself, to the exclusion of the legislature, even where judgments restructure techno-economic trajectories. The judgment participates in triggering a shift from a mixed Wi-Fi infrastructure with multiple providers towards a one-sidedly commercial access infrastructure. Public, small business, and private individual Wi-Fi providers will diminish in numbers and might disappear, signifying a reduction in market pluralism and communicative diversity. Similar injunctions will likely lead to Wi-Fi providers’ self-censoring. Germany provides a precedent: open Wi-Fi providers vanished after a court found they may infringe copyright indirectly in Sommer unseres Lebens.

The GS Media case adds to the evidence that proportionality often operates as a regulatory strategy with respect to new technologies and that private property rights dominate over structural effects on the information society and freedom of expression. The ECJ interpreted—under the notion of communication to the public—whether hyperlinking to content placed on the Internet without the copyright owner’s permission infringes copyright. The Court had already decided that hyperlinking falls under the communication right in Svensson and BestWater. Still, there was no required ‘new public’, as hyperlinking was to content made freely available by the copyright owner. Advocate General Wathelet warned in vain that significant impairments to the functioning of the Internet and development of the information society could follow, should the ECJ rule that hyperlinking forms an act restricted by copyright. The ECJ did not heed the warning but took the opportunity to regulate—in detail—diverse conditions where hyperlinking infringes copyright.

The ECJ ruled that where a private Internet user not acting for profit does not know and cannot reasonably know about absence of the copyright owner’s consent, there is no infringement. It developed the ‘ought to know’ standard by resorting to freedom of expression: it had to limit the reach of the initial decision to place hyperlinking to unauthorised content under the communication to the public right in the first place. The ‘ought to know’ standard is a vague test likely leading to chilling effects in terms of linking done without profit motivation. To make matters worse, the ECJ ruled that it is legitimate to expect that a person who posts such a link ‘for profit’ should carry out the necessary checks to ensure that the work concerned is not illegally published. Thus, it established a rebuttable presumption of knowledge about both the protected nature of the work and absence of the copyright owner’s authorisation for hyperlinking ‘for profit’. This creates multiple problems and is antithetical to the ubiquitous practices of hyperlinking on the Internet.


To rebut the presumption, the for-profit hyperlinker must carry out diverse checks akin to a due-diligence exercise. Due to their presumed knowledge of an infringement, website hosts, blogs, and social media accounts operating ‘for-profit’ must now monitor and verify the content they link to. But uncertainty prevails, as it is unclear...
It would have been too restrictive to simply include hyperlinking under the ‘communication to the public’ right: the right is inherently inflexible and does not offer the means to account for specific circumstances. The ECJ’s decision to subject hyperlinking under the communication to the public right already in Svensson and BestWater caused the need to create flexibility through rights proportionality. The ECJ hence distinguished hyperlinking for profit from hyperlinking done privately and created the respective burden-of-proof rules for both. Although a superficial reading of the GS Media case might celebrate a victory for freedom of speech—the ECJ limited the communication right based on freedom of expression—the reality is the other way around. Rights proportionality enabled copyright to restrict hyperlinking in the first place.

Provision of Wi-Fi networks and hyperlinking constitute issues that could be subject to specific legislative measures based on communications law and protection of freedom of expression on the Internet, in particular.\(^\text{50}\) It is not self-evident why their regulation and acceptability should centrally fall under copyright law: the current framing is by no means the only available option. To the extent such issues fall under copyright law, they could be seen to fall outside the exclusive rights or remedies at the disposal of the copyright owner. Alternatively, they could be seen to fall under Member State competence for example through the doctrine of indirect copyright liability, which is not harmonised by EU directives. But the ECJ has treated both issues as falling under EU copyright norms. It has resorted to fundamental rights proportionality in deciding on their allowability.

Copyright law appears to function as a gate through which diverse techno-economic phenomena and questions first reach the courts and become resolved. Multiple potential explanations exist for this. Copyright law in its present form operates in rapidly renewing technological environments of communication, business, and culture. Organised copyright owners enforce their rights assertively. In the absence of specific copyright norms, courts use proportionality to resolve emerging questions. In the EU context, the ECJ fills in gaps in copyright harmonisation through teleological and principle-oriented interpretative methods. A copyright-owner-friendly bias enlarges exclusive rights, remedies, and what becomes protected in the first place.

This development suggests that proportionality now offers an alternative for the traditional law-making model, at least in the EU context studied. Proportionality as a regulatory instrument allows taking account of varying constellations of interests and changing valuations over time. It enables adjustment of the law in the course of technological evolution. Concrete rules guiding conduct will emerge from such combinations of values and interests, applied by courts on a case-by-case basis. They may establish long-term techno-economic and cultural paths. The judicial outcomes and trajectories they motivate could facilitate legislative efforts. When courts identify the relevant values and interests and balance them in a specific context, they pave the way for the legislature to co-regulate the subject matter in question, as Chris Thornhill suggests. But the developments which courts set in

\[^\text{50}\] See about hyperlinking on the Internet from the perspective of freedom of expression Magyar Jeti ZRT v Hungary, App no 11257/16, 4 December 2018.
motion could also become hardly reversible shifts for the legislature. For example, once new asymmetrically operated technologies to connect to the Internet replace open Wi-Fi mesh networks, the window of opportunity for an alternative model to develop might close.

Even though human rights proportionality enables faster responses by the law to accelerating techno-economic and cultural developments, it may also participate in lock-in and deceleration. Whenever courts pronounce authoritatively that a specific outcome follows from the essence of a right, the legislature may not be able to reverse the result. For example, it could be difficult for the legislator to change the outcome of the Mc Fadden judgment, as the ECJ identified the remedy as falling within the essence of the right. To the extent that the court’s existing bias in question favours protection of corporations’ property and business rights over other rights and collective aims, human rights proportionality creates legal certainty for IP owners and businesses by securing long-term investment and freedom of business. The details may surprise, but the tenet is predictable.

But even the typically IP-friendly approach of the ECJ is not enough to secure the interests of tech owners. A generalist court like the ECJ might be influenced by competition, consumer protection, or other similar laws and base its decisions on the wrong kind of ideas. Reserving judicial decision-making for IP-friendly judges only and preventing recourse to generalist courts on appeal might do the trick. This is what took place in the context of the unitary patent system in Europe. Thus, the focus broadens from rights proportionality to the entire constitutional design, tailored to keep the future of European patent law on a narrow track maximising rights.

2.1.2.3 Vacuum-packed patent law: solitary judges of the unitary patent system

Reserving judicial decision-making to patent law specialists and inhibiting appeal to generalist courts empowers the specialised judiciary and secures it space to develop the law relatively freely, detached from the normative requirements emanating from competing rationales of health, environment, or research, among others. It is a way to reinforce the desired decision-making bias: who makes the final decisions is the most critical factor affecting outcomes. As with the ECJ’s use of proportionality, empowering specialised patent judges at the same time enables continuous and rapid adjustment of the law to new techno-economic phenomena and long-term lock-in to patent-friendly values—simultaneous acceleration and deceleration of the law.

This is the unitary patent package of the EU. A specialised court—the Unified Patent Court—was created. Appeal to generalist courts was blocked.\(^51\) Although the unitary patent system is supposed to be a creature of the Union, the ECJ was excluded from the competence to interpret its substantive patent provisions. To achieve this, late in the negotiation the key patent provisions on infringement and defences were transferred from the respective Union regulation (the EPUE Regulation) to an international agreement outside the reach of the ECJ, the Agreement on a Unified Patent Court (AUPC).\(^52\) The AUPC is not part of Union law, as the Union is not a party to it. The transfer was due to concerns on the part of European patent experts relating to time lags resulting from references to the ECJ and the

\(^{51}\) For a more detailed critique of the unitary patent package, see Mylly, ‘Hovering between Intergovernmentalism and Unionization’ (n 5).

ECJ’s lack of expertise in patent law. They likely disfavoured the ECJ’s patent judgments not reflecting a strong patents ideology.

National law will define, among others, rights based on prior use of an invention and compulsory licensing. One of the core balancing mechanisms of patent law—compulsory licensing—was, in other words, left to the application of national law, limited to the respective territory of the granting Member State. Establishing a domestic competence for compulsory licensing with a mere recital is questionable, especially against the background that unitary patents are supposed to produce uniform effects. Art 5(2) of the EPUE Regulation requires that the scope of a unitary patent and its limitations ‘shall be uniform in all participating Member States in which the patent has unitary effect’. Hans Ullrich has argued that compulsory licensing might be entirely precluded because of this. In any case, the way compulsory licensing is regulated in the package reflects the underlying logic: strong rights are defined on the European level, while some core limitations are left to the application of domestic laws. This constitutes another critical feature of the package structurally limiting recourse to competing rationales of health, environment, and so forth.

As the Unified Patent Court’s competence with respect to unitary patents is exclusive, it will be the sole court competent to apply and interpret the totality of norms applicable to unitary patents. Its role will thus be of paramount importance for the future development of European patent law.

It will also be one of the most specialised patent courts in the world. For comparison, the specialised patent court’s decisions in the US (the United States Court of Appeals for the Federal Circuit) can be appealed to the Supreme Court. The Unified Patent Court may only make preliminary ruling requests to the ECJ on limited issues covered by Union norms. There is no right of appeal to any general court hearing other than patent disputes. The unitary patent system also lacks the US’s general jurisdiction trial courts, providing broader perspectives to patent cases. Finally, unlike the Unified Patent Court, the Federal Circuit has case jurisdiction rather than issue jurisdiction, enabling it to rule on subject matter other than patent law. Still, the Federal Circuit has been criticised for overly protective patent law interpretations. It boasts the highest reversal rate in the US.

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55 See Art 7 of the EPUE Regulation (unitary patents as property); Art 28 of the AUPC (prior use right); and Recital 10 of the EPUE Regulation (compulsory licensing).
57 See Ullrich, ‘Select from Within the System’ (n 56) 43–44.
59 See Dreyfuss, ‘International Perspective’ (n 58) 152–57. See also Clement Salung Petersen, Thomas Riis, and Jens Schovsbo, ‘The Unified Patent Court: Pros and Cons of Specialization—Is There a Light at the End of the
corrective possibility exists in case of the unitary patent package and the rulings of its specialised court. The competence of the Unified Patent Court is issue-specific, limited in Art 32 of the AUPC to patent law in the strict sense, and ambiguous ‘related defences, including counterclaims concerning licences’ (Art 32(1)(a)).

As the Unified Patent Court is detached from the legal orders of Member States, it neither interacts with other domestic courts nor has recourse to general doctrines of law anchored in domestic legal orders. It is a transnational court specialised in European patent law only; cut loose from the chains of any Member State background legal order, its constitutional framework, basic rights, and general doctrines of law. The prospect that the Unified Patent Court might start to develop general doctrines of law for the unitary patent package is no relief. Quite the contrary: due to its composition such doctrines are likely to be geared towards protecting patent-specific interests and values. The court system of the unitary patent package is self-contained, nearly hermeneutically sealed from potentially disturbing outside influences. The Unified Patent Court follows procedural norms tailored for the unitary patent package, detached from any particular Member State or EU norms and designed to provide strong procedural rights for patent owners.

Opportunities for dialogue between different courts and approaches are hence absent. The unitary patent package lacks all the key paths existing in the US for keeping up the connections between patent law and law in general. The mindset of a narrowly construed patent law community will prevail in the absence of adequate correction mechanisms. This in-built institutional bias towards patent-specific interests will contribute to shielding exclusive patent rights from limitations within patent law and, in particular, from laws outside patent law.

Unitary patents and the whole system are shielded against judicial threats in several ways. The norms providing the unitary patent its contents—the AUPC and the European Patent Convention (EPC)—are not subject to judicial review. European Patent Office (EPO) grant decisions—the organ granting European patents to acquire unitary effect—are not subject to direct judicial review either. When norms—like the AUPC and EPC—reflect a strong patents mindset, they are insulated from judicial review by generalist courts. When the decision-maker—the EPO and the Unified Patent Court—is specialised and biased in favour of the interests of patent owners, their decisions are saved from judicial review and appeals to generalist courts. As will be elaborated under conclusions, the exact opposite happens about norms capable of limiting the exclusive rights of IP owners: international IP and investment law subject them to their internal judicial review mechanisms, such as the three-step test and the protective standards of investment law.


60 The Unified Patent Court judges will be experienced patent trial judges and technology experts. See about their selection criteria Arts 14–16 and 18 AUPC and Petersen and others, ‘Unified Patent Court’ (n 59).


62 Dreyfuss, ‘International Perspective’ (n 58).

63 Similarly, Petersen and others, ‘Unified Patent Court’ (n 59).

64 See in more detail Mylly, ‘Hovering between Intergovernmentalism and Unionization’ (n 5).
The empowering of courts has its counterforces. Courts defer increasingly to administrative agencies. Agencies are often better positioned to update policy under outdated laws, under conditions where legislators can no longer keep pace with accelerating subsystems. The sheer volume of administrative decisions, guidelines, and policies implies that courts cannot effectively supervise administrative decision-making. Second, private ordering and conflict resolution transfers issues and procedures beyond the reach of courts. These mega-trends—the rise of administrative state, private ordering, and private conflict-resolution—relativise the power of courts in constitutionalism 3.0. The role of administrative offices will be discussed in the following.

2.1.3 The executive and IP offices as lawgivers
Already in the 1950s, Carl Schmitt noted the ‘motorisation’ of traditional legislative processes in the form of a shift of power from the legislature to the executive. Subsequently, the transfer of power from the legislature to the executive has been diagnosed as one of the critical structural changes of our time and a distinctive feature of late modern globalisation. As Adrian Vermeule has argued, judges and lawyers have willingly left administrators broad leeway to set policy, interpret unclear laws, and even define the boundaries of their own powers. In these processes, the role of constitutional law has during the most recent times been ‘to get out of the way’. This signifies for Adrian Vermeule the emergence of the administrative state. The executive expands its own power of unilateral action by exploiting ambiguous constitutional powers, broad and vague delegations, and discretion forming an unavoidable part of power over prosecution and enforcement. This enables administrative agencies to modify or even change the course of policies in the absence of new legislation. It is most typically not the formal legislative rules promulgated by administrative agencies under delegation that have the biggest impact but informal regulations, guidelines, policy statements, policy development through administrative decisions, and the like.

This development is also visible in the EU. As Deidre Curtin has argued, executive action, in general, has moved much more to centre stage in terms of the actual overall output of the Union. A critical component of this development has been the creation of independent regulatory agencies with the power to adopt binding legal acts without any involvement

65 Vermeule, Law’s Abnegation (n 23) 68 and 217.
66 Cohen, Between Truth and Power (n 25) 143–68.
68 See generally about this development Sassen, Territory, Authority, Rights (n 10) 17, 234, 269, and 168–84. Sassen sees the constitutive difference of the current globalisation to early post-Second World War system to relate to the internal transformation of the national state, marked by a significant shift of power to the executive, in particular. For an analysis of such a shift, see Eric A Posner and Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (Oxford University Press 2010) focusing on the US.
69 Vermeule, Law’s Abnegation (n 23) 68.
70 Wistrich, ‘Evolving Temporality of Lawmaking’ (n 28) 788.
by the EU Commission. In the IP field, these comprise the European Intellectual Property Office (EUIPO) and the Community Plant Variety Office (CPVO).\(^\text{72}\)

The continuous strengthening of the administrative state is best visible as concerns registrable categories of IP. The administrative state is likely the most developed in the field of patents, with the WIPO-administered Patent Cooperation Treaty (PCT) enabling a centralised application procedure on the global level and national and regional patent offices cooperating intensively and creating new law. As Peter Drahos has demonstrated, patent offices change or modify the operation of the patent system through their decisions, guidelines, and interpretations. In particular, the trilateral offices of the United States Patent and Trademark Office (USPTO) in the US, the Japanese Patent Office, and the EPO have emerged as networked global regulators by cooperating intensively, streamlining their approaches, and affecting patent law developments and interpretations in other patent offices through technical assistance and training.\(^\text{73}\) As patent offices are typically funded through patent-related fees, they have an incentive to enable patenting and thus invite new applications even when patent legislation would initially pose obstacles through statutory exclusions to patentability or other norms with similar effect. Hence, the drive towards global convergence most typically follows the most patent-friendly approach, resulting in a gradual watering-down of regional or national exclusions to patentability.

Transnational IP offices like the EPO, in particular, operate autonomously without the risk of generalist courts being able to review their decisions. EPO decisions are excluded from judicial court review by virtue of Art 3(1) of the Protocol on Privileges and Immunities of the European Patent Organisation.\(^\text{74}\) The EPC Contracting States have accepted the EPO's immunity and the absence of judicial review. Nor can the European Court of Human Rights (ECtHR) review EPO decisions directly. It has accepted the EPO's immunity against domestic courts even where the processes before the EPO have appeared problematic from the perspective of fair process rights.\(^\text{75}\)

After the EPO first develops a line of decisions, followed by internal review decisions by its Boards of Appeal, and later codification of this case-law in its guidelines, it becomes exceedingly difficult for any judicial or legislative organ to reverse the development. Reversal through an amendment to the EPC is even more unlikely, in particular when EPO case-law has established new categories of patentable inventions, which start to enjoy protection of property ownership under domestic constitutions, the European Convention of Human Rights (ECHR), and other relevant human rights instruments.\(^\text{76}\) More typically, the EPC

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\(^{73}\) See Drahos, Global Governance of Knowledge (n 23).


\(^{75}\) Rambus Inc v Germany, App no 40382/04, 16 June 2009; Lenzing AG v Germany, App no 39025/97, 9 September 1998. According to the Rambus admissibility decision of the ECtHR, for holding a member of the European Convention liable for the EPO’s actions, the applicant would have to establish that the protection of Convention rights afforded by the EPO system was ‘manifestly deficient’. The ECtHR cannot review EPO decisions directly, as the EPO is an international organ. Similar logic applies to the German Constitutional Court. See BVerfG, 2 BvR 1458/03, DE:BVerfG:2006:rk20060703.2bvr145803.

\(^{76}\) European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953, as amended by Protocol Nos 11 and 14 which entered
and EU legislation will be modified to codify existing practices. After administrative (r)evolution of the law within the EPO’s confines, the Union could simply argue that its legislative proposal would change nothing.

This is what happened with the proposal for a directive on the patentability of computer-implemented inventions. After the EPO first watered down the EPC prohibition on the patentability of computer programs as such, the Union legislator was left with the task of codifying the EPO’s law-creation into its own proposal. Although the codification did not succeed, it did not make a substantive difference: the EPO-created (reversal of) the law was already in force in Europe, uncontestably due to the absence of judicial review of EPO decisions.

The patentability of the so-called second medical indication under the EPC provides another, less well-known example of such processes. A second medical indication is a finding that a known pharmaceutical compound can also be used for the treatment of another disease. A drug developer often discovers that the patented substance has unanticipated effects on conditions not under investigation during clinical trials. The prevailing view of the early 1980s was that a second medical indication was impossible to patent. It was assimilated to a method of medical treatment explicitly excluded from patentability and considered to lack novelty, technical effect, and industrial application. However, starting from the 1983 landmark decision in *Eisai*, the EPO gradually watered down the exclusion of medical methods from patentability. The EPO’s solution was to enable the claim as a manufacturing process leading to a medical compound for a specific therapeutic application—instead of a medical method, which is excluded from patenting. This was based on acceptance of the so-called Swiss-type claim. The EPO hence established the category of purpose-limited process patents. But this resulted in problems with novelty, as the manufacturing process and the resulting compound did not differ from the existing process and compound. Curiously, the new use renders the manufacturing process and compound novel.

As the case-law developed, not only new diseases but also new categories of patients, new methods of administration, and more exactly defined treatments became objects of patenting. Even a novel direction ‘once a day before sleep’ for a known compound could

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constitute a patentable invention.\textsuperscript{82} When combined with strategic tinkering of marketing approvals and supplementary protection certificates (SPCs),\textsuperscript{83} it became easy for pharma to ‘evergreen’ patents, to unduly extend effective patent terms, and delay the market entry of generics.\textsuperscript{84} The exclusion of therapeutic, surgical, and diagnostic methods from patentability in Art 53(c) EPC thus only came to mean that if a pharmaceutical compound is known and someone has demonstrated a new therapeutic, surgical, or diagnostic effect for it, the claims must be given a particular wording, in order to avoid the prohibition of patents for new medical uses. In other words, the exclusion did not render unpatentable any new solution using a pharmaceutical compound.\textsuperscript{85}

Domestic judgments largely followed the EPO’s case-law, making it easy to codify the outcome. Through EPC 2000, Art 54(4)–(5) of the EPC was modified to the effect that second and further medical indications are now protected as purpose-limited product patents. Now that the EPO can base its decisions on the revised EPC text, it has abandoned the Swiss-type claim as legally questionable.\textsuperscript{86} As the EPO’s Guidelines for Examination explain, it is typically possible for the applicant to reformulate a claim that proves initially problematic from the perspective of the prohibition of patents on treatment methods into an acceptable form during the examination procedure.\textsuperscript{87} Hence, instead of claiming the use of product X for the treatment of cancer (which would be contrary to the prohibition of patents for medical treatments) or use of substance X for the manufacture of a medicament for the treatment of cancer (the Swiss-type claim now replaced by a purpose-limited product patent claim for pharmaceuticals), the applicant could simply claim product X for use in the treatment of cancer. A still new patent could be obtained for claiming product X for use in the treatment of leukaemia, as leukaemia is a specific type of cancer.\textsuperscript{88}

The fact that the TRIPS Agreement does not require WTO members to protect second and further medical indications did not stop the EPO and the EU from globalising this patent fallacy.\textsuperscript{89} The EPO has done so through its technical assistance to developing country patent offices\textsuperscript{90} and the EU through its bilateral trade treaties,\textsuperscript{91} both insisting that second
medical indications must be patentable. This has effectively locked in the solution on a global level.

In addition to the EPO, the EUIPO is becoming an increasingly influential and autonomous decision-maker. As a fully self-financed agency of the EU, it has no budgetary dependency on the representative institutions. The Council, although possessing formal powers of scrutiny, has effectively ignored its supervisory functions over the EUIPO. Its board consists of EUIPO’s competitors—heads of Member State patent and trade mark offices. The board has reportedly not been interested in rigorous oversight of the EUIPO’s activities and development.

The EUIPO’s Boards of Appeals are responsible for deciding on appeals against EUIPO’s first instance decisions. The General Court supervises the legality of Boards of Appeal decisions. General Court judgments can be appealed to the ECJ on points of law. Yet, the Boards of Appeal are becoming influential decision-makers. After the ECJ’s Puma judgment, precedents issued by EUIPO examiners and Boards of Appeal could be required to be expressly considered in a following decision in compliance with the administration’s duty to act consistently. The ECJ reasoned that the principles of equal treatment and sound administration, codified in Art 41(2) of the EU Charter, require the EUIPO to refer to its past precedents and state its reasons for any departure. This strengthens the precedential value of EUIPO decisions and those of its Boards of Appeal and facilitates active development of EUIPO case-law and its codification in EUIPO guidelines. Although still far from the position of the EPO, the EUIPO and its Boards of Appeal could hence elevate their precedents and guidelines from mere persuasive arguments to binding sources of law and de facto primary materials upon which future decisions will be based.

The empowering of executive and administrative offices is less pronounced with respect to copyright and, in particular, trade secrets with no administrative agencies granting rights. The current regulatory trend of these non-registrable rights is rather based on empowering the judicature. Yet the French Hadopi law (especially in its original form) and the Italian AGCOM Regulation empower administrative agencies in the enforcement of copyright on the Internet for the sake of accelerating the procedures for the removal of content (AGCOM Regulation) and notifying Internet subscribers of suspected copyright infringements (Hadopi law).

The executive is also increasingly involved in meta- or co-regulation of copyright with private entities. Art 17(10) of the DSM Directive (already referred) provides a topical example. It insists that the Commission initiates and orchestrates stakeholder negotiations

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92 Busuioc, 'European Agencies' (n 72) 97–112; Scholten, Political Accountability of EU (n 72) 136–37 (concluding that the political and hence democratic accountability of the CPVO and EUIPO shows some serious gaps).
95 See also Martin Husovec’s and João Pedro Quintais’s chapter ‘Too Small to Matter? On the Copyright Directive’s Bias in Favour of Big Right-Holders’ in this volume. Poland has disputed the compliance of Art 17 of the EU’s DSM Directive with freedom of expression and information as protected in the EU. See Poland v European Parliament, Council of the European Union [2019] OJ L130, 92. Poland argues that the preventive control mechanisms (in practice filtering) of content uploaded online by users, as required by Art 17, infringe the EU Charter of Rights. See also European Commission, the Communication from the Commission to the European Parliament...
intended to produce ‘best practices’. Based on such stakeholder dialogues with online content-sharing service providers, copyright owners, technology providers, and user organisations, the Commission issues ‘guidance’ on the application of Art 17 of the Directive. The guidance is detailed and, as Art 17(10) notes, the guidelines entail balancing between fundamental rights and securing the use of exceptions and limitations. Through this mechanism, the Commission could regulate private entities directly and update the law, thus side-stepping the EU and Member State legislatures and the idea of directives. In other words, the Directive empowers the Commission, together with private parties, to regulate further key questions of digital copyright and related fundamental rights. Although this regulatory strategy could produce regulatory standards fitting the current techno-economic practices, it could also end up in self-regulation with less rigorous oversight on the part of the Commission.96

2.1.4 Private ordering as requested by courts, legislatures, and governments
As with balancing and administrative ordering as regulatory strategies, private ordering has emerged as one of the law’s key responses to acceleration and the legislature’s failure to keep pace. Private ordering enables accelerated decision-making but at the same time produces a lock-in to privatised decision-making, thus participating in the law’s deceleration enabling long-term global investment. Only a very brief discussion is possible here. Its purpose is to highlight how courts, legislatures, and the executive promote and even request private regulation, but at the same time transform themselves in the process in order to co-regulate, hence emphasising the role of public law and institutions over the course and effects of the constitutional transformation in question.

Courts actively defer decision-making to private entities on the Internet and other technological domains: they avoid questions requiring technological expertise and entrust the decision-making power to private entities in charge of the technological environments in question. The ECJ’s UPC Telekabel judgment serves as an example.98 The Court answered whether an outcome prohibition as regards an Internet service provider’s (ISP) obligation to block a copyright-infringing website is in conformity with Union law. An outcome prohibition defines the preferred outcome without specifying the means of achieving it; it leaves discretion to the implementation stage. The ECJ not only accepted but preferred outcome prohibitions over more specific orders. The ISP could thus be ordered to choose the means satisfying the rights of all parties to an acceptable extent. Whether blocking finally takes account of the parties’ rights cannot be known at the stage of the court proceedings. The judgment, in other words, allows delegation to business entities of decision-making power over rights of others. This creates room for private regulation.

This delegation to the private sphere strengthens an existing bias of copyright law: it excludes or weakens the relevance of some important values and interests that courts could

96 Cohen, Between Truth and Power (n 25) 187, raises the same concern with respect to US legal developments.
97 See generally about private ordering eg Callies and Zumbansen, Rough Consensus (n 26); Cohen, Between Truth and Power (n 25); and in the context of IP Hilty, ‘Intellectual Property and Private Ordering’ (n 26) 898–930.
consider when giving more specific orders. Outcome prohibitions shift the related burden of proof over effects on Internet users’ rights from the ISP to users after the measure has been taken. Although users must be secured rights to challenge the measures, they are hypothetical ex-post rights. It is expensive and uncertain to challenge the measures afterwards. Some values and interests, such as those related to the neutrality and openness of the Internet, will not necessarily be represented by any of the parties capable of challenging the measures. Hence, even when formal rights to challenge measures are secured, a bias favouring individual rights of ISPs and copyright owners is created or strengthened due to the reduced likelihood and depth of any court review over the measure finally adopted. Court review becomes incidental and insignificant in the light of the magnitude, speed, and transformative force of privatised and typically automated decision-making.

The mere possibility of outcome prohibitions induces private regulation between ISPs and copyright owners: their typical terms come to form the basis for private bargaining over the need for and types of blocking or other technological measures. Whenever ISPs and copyright owners find a mutually agreeable solution, no need arises to apply for an outcome prohibition. The ECJ’s preference of outcome prohibitions over specific injunctions could facilitate more comprehensive privatisation of copyright enforcement. The longer-term effect of such private enforcement and bargaining is to regulate rights on the Internet broadly. ISPs and copyright owners dispose not only of their own rights but also of user rights and traditional Internet values and freedoms.

The UPC Telekabel case is only one example of this phenomenon—it should be seen in the light of other cases with similar effects. In this development, public law and courts establish a zone of self-regulation for Internet intermediaries within which they may de facto regulate Internet infrastructures and the rights of Internet users. The possibility of subsequent court review is there, but due to the sheer volume and speed of privatised decision-making, it becomes gradually more and more illusory, especially after automation of private decision-making.

In addition to courts, legislators delegate regulation to private business entities. With the InfoSoc Directive (already referred to), the EU legislature shifted the task of copyright enforcement from states and courts to the shared responsibility of platforms and right-holders. This turned Internet platforms into key actors of copyright enforcement, based on notifications from right-holders and removal of content by platforms. The DSM Directive (already referred to) transforms this reactive standard into a more proactive model with its Art 17. It subjects the safe harbour of online content-sharing providers either to copyright licensing agreements negotiated with the creative industries or to preventive filtering systems intended to inhibit copyright-infringing user content uploads. Right-holders will have a more limited role compared to the increasingly proactive role of Internet platforms. Hence, major Internet and social media platforms are starting to regulate artistic, political, and user expression and behaviour through their policies and algorithms. Technological design will—even more than before—operate as a regulator of what is possible and what

99 A similar strategy of entrusting intermediaries with an obligation to balance multiple fundamental rights can be found for example in Google Spain (the right to be forgotten), as well as in the ECtHR’s Delfi judgment (an Internet news service’s liability to filter abusive user comments). Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez [2014] ECLI:EU:C:2014:317; and the case Delfi AS v Estonia, App no 64569/09, 16 June 2015. In both, the Internet intermediary was entrusted with notable decision-making power over privacy and freedom of expression of others.
is not. With the DSM Directive, YouTube's Content ID becomes the regulatory standard of content regulation.

As Chris Thornhill suggests, judicial rights proportionality may result in the targeted phenomenon becoming more easily regulable by the legislature. Delegation of decision-making power to Internet intermediaries in *UPC Telekabel* likely facilitated the regulatory strategy adopted in the DSM Directive as concerns the obligations of online content-sharing service providers. Online content-sharing service providers similarly assume obligations to consider and balance a plethora of rights in a proportionate way to avoid their own liability, but without much legislative information as to whether and how they could manage these obligations in practical terms. Instead, the Commission is given powers to crystallise ‘best practices’ with the stakeholders, as already discussed. Thus, the Directive uses online content-sharing service providers in cooperation with copyright owners as prima facie private regulators of diverse copyright-related rights. The Directive also assigns a role to the executive in co-regulating the rights in question together with the said private entities. The ECJ's proportionality analyses facilitated and affected the stated regulatory strategy. Hence, we are witnessing co-regulation and meta-regulation involving the judiciary, the legislature, the executive—and private actors. Public law's role in privatising regulation is far more central than perceived in social acceleration research and accounts of transnational private regulatory practices as 'global law without a state'.

State-based law (including EU law) is being transformed in the process, enabling it to interact and co- and meta-regulate with the new modes and forms of private ordering.

The executive could also push regulation to the private sphere due to failed public law proposals. Private regulation of IP has indeed been boosted by the dead ends of some prominent international and domestic IP proposals, such as the Anti-Counterfeiting Trade Agreement (ACTA) on the international level, the Digital Economy Act 2010 in the United Kingdom (UK), and the Stop Online Piracy Act and Protect IP Act in the United States. As Natasha Tusikov has pointed out, the executive in the UK, the US, and the EU played a crucial role in pushing IP owners, Internet search, advertising, payment, and domain name service providers to agree on Memoranda of Understanding (MoUs) to enforce IP rights on the Internet. The businesses got an offer they could not refuse: should they fail to produce the desired measures, public law would come back with a vengeance. The resulting MoUs have led to accelerating notifications, various measures choking suspected target sites and automation of notifications, blocking, filtering, and other censoring of suspect websites or content.

Due to infrastructural path-dependency and the speed and volume of automated decision-making, a shift towards algorithmic private governance—for example in the form of automated detection and filtering of copyright and trade mark infringements by Internet platforms—could become an irreversible regulatory shift once set in motion. What first
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starts as law’s acceleratory turn could then end up in systemic deceleration and de facto lock-in to privatised algorithmic regulation.

In addition to their superior technological expertise, speed, and ease of decision-making, private entities running the Internet and other technological domains are not constrained by restrictions of territoriality and sovereignty. From these perspectives, they are the supreme regulators of the Internet and other technological universes. Traditional legislatures have well understood this. Intermediaries have become part of what Jack Balkin has dubbed ‘new school’ speech regulation—techniques that regulate speech through control of digital networks, in particular intermediaries. But gradually, intermediaries and other key private entities become more independent regulators.

The role of courts, legislatures, and governments has been elemental in this power-shifting. Property rights cannot be fully privatised as they need—in the end—state backing. The strong involvement of the public institutions in private ordering emphasises the continued responsibility of the public law and public institutions over the privatised regulatory domains.

The examples discussed suggest that public institutions are transforming their own role and functions in the process. Courts are starting to rely increasingly on private entities to balance and adjust rights on technological domains but seek to secure formal appeal rights for users. Similarly, when legislatures shift decision-making power to intermediaries, they try to maintain some of the safeguards of traditional law and write wish-lists for private regulators. The executive pushes private regulation further to compensate for its policy failures and enters—at the request of the legislature—into regulatory conversations with private regulators to issue ‘guidance’ in the spirit of co-regulation, thus establishing an enduring link to private regulators. These testify to attempts at meta- and co-regulation, changes in the self-perception of public law institutions, and attempts to hook some public law controls on the snowball of private regulation rolling down the hill at an accelerating speed. Questions of democratic legitimacy, rule of law, and biases inherent in private regulation start to emerge gradually as private regulation becomes increasingly detached from the public law impulses and requirements that set this private ordering in motion in the first place.

2.1.5 Conclusion on courts, administrative agencies, and private entities as key regulators

Could the judiciary, administrative offices, and private entities each become simultaneously empowered in constitutionalism 3.0? The magnitude of administrative decision-making connotes that it is in the judiciary’s self-interest to leave the administration and offices enough autonomy through non-interventionist standards of scrutiny. Instead of becoming buried under an avalanche of tedious administrative decisions, courts prefer to focus on the most significant cases only. The judiciary and the executive do not compete with private regulatory practices either. Instead, they both push private corporations to regulate IP and other rights on the Internet and other technological domains, where courts and

104 See generally about territoriality and private transnational business Justin Rosenberg, The Empire of Civil Society—A Critique of the Realist Theory of International Relations (Verso 1994) and related to ordering through digital code, Pistor, Code of Capital (n 29) 186.


106 See also Pistor, Code of Capital (n 29) 230.
administration lack the required technical expertise, not to mention the capacity, to adjust regulatory measures rapidly and on a continuing basis. As the recent example of the DSM Directive’s Art 17 shows, the legislature gladly empowers both the executive and private entities to (co-)regulate copyright and, for example, the use of content-filtering technologies on the Internet. In the process, public institutions transform their own identities.

The empowerment of the judiciary, administrative offices, and private corporations is naturally a long-term process with occasional backlashes and even contradictory developments in some areas: no transformation is total or unilinear. But the transformations are visible, nevertheless.

2.2 Deceleration: Lock-In Stabilises Expectations and Enables Acceleration Developments

2.2.1 Introduction

Although legal stability and resistance to change can be seen as integral parts of law in general, anchoring the regulatory wins of investors and IP owners on the global constitutional level constitutes a noteworthy development. As business and technologies globalise, the protective legal infrastructure becomes increasingly overarching and disciplinary. Domestic civil laws, changeable at the whim of democratic majorities or progressive judges, have ceased to provide the calculability and stability needed for business operations and investment activities. Even the stickier domestic constitutions offer insufficient protection, as they can be changed by large enough democratic majorities and authoritarian-inclined regimes alike. Hence, overlapping global, regional, and domestic constitutional protections have mushroomed. These new constitutional norms and practices focus on sheltering the stability of private law and administrative rights to the extent and for the parts needed by globally operating investors and businesses. As intangible assets replace tangible possessions as the most valuable form of investment, the new constitutional norms refocus on protecting informational possessions and business freedom in general, particularly IP, trade secrets, administrative licences and permissions, and freedom of contract.

The new constitutional norms form overlapping networks of protection. The systemic effect of these overlaps is to inhibit legislative and judicial change that might threaten intangible assets or the business freedom of globally operating businesses. In other words, the function of these overlapping global-level protections is to lock in current levels of IP protection and to shelter existing business models based on those rights, in short, to function as a kind of insurance policy against unpredictable political majorities and progressive courts.

Two examples will be discussed: the three-step test of international and EU IP law and international investment law. The three-step test protects exclusive IP rights from the introduction of new exceptions or limitations to IP rights or from interpretative broadening of existing ones. International investment law extends its protective effect to abrupt impairments of IP protection, be they caused by the judicature, legislature, or executive. Importantly, investment law may also protect the uses of IP, thus going beyond the protective scope of international IP law.

2.2.2 Deceleration in action: three-step test and international investment agreements

2.2.2.1 Three-step test censors exceptions and limitations to exclusive IP rights

The first example of the new constitutionalist lock-in is the three-step test of international and European IP law. The three-step test operates as part of multiple interlinked international law instruments. Its idea is to control the availability and scope of exceptions and limitations to IP rights. The most important international treaties incorporating the test comprise the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the Marrakesh Treaty.

The applicability of the test has expanded from controlling exceptions to the copyright reproduction right in Art 9(2) of the Berne Convention to all copyright exceptions in Art 13 of the TRIPS Agreement and Art 10 of the WIPO Copyright Treaty. The TRIPS Agreement extends its applicability to patent and trade mark law. The test has been further solidified in the Marrakesh Treaty. It subjects an already tightly tailored copyright exception for protection of the rights of the visually impaired to the strictures of the three-step test.

On the WTO level, the three-step test establishes a globally operating judicial review mechanism for exceptions. The test is applied in a trade-related context, leaving aside other rationales of IP protection and the interests, values, and norms underlying the limitations and exceptions. This applies in particular to copyright. As interpreted by a WTO Panel, the three-step test shields the exclusivity inherent to copyright by establishing a type of judicial review for exceptions based on economic values and the interests of the copyright owner only.

108 For a more detailed treatment of the three-step test, see Martin Senftleben’s chapter “From Flexible Balancing Tool to Quasi-Constitutional Straitjacket—How the EU Cultivates the Constraining Function of the Three-Step Test” in this volume.


110 Art 13 TRIPS Agreement (n 109) covers all exclusive rights under copyright law. It reads as follows: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Art 10 WIPO Copyright Treaty (n 109) extends the applicability of the test under Art 9(2) Berne Convention (n 109) to all authors’ rights, not only the reproduction right. Art 10 WIPO Copyright Treaty reads as follows: “Limitations and Exceptions: (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author; (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

111 Art 13 TRIPS Agreement (n 109) (three-step test for copyright law) differs from Art 30 TRIPS (three-step test for patent law) in that the latter only disallows exceptions to patent rights that do not unreasonably prejudice the legitimate interests of the right-holder. Moreover, in contrast to Art 13, Art 30 explicitly requires interest weighing by its reference to the legitimate interests of third parties. The three-step test is cumulative, connoting that each part of the test must be fulfilled for an exception or limitation to be acceptable.

112 United States—Section 110(5) of the US Copyright Act (15 June 2000) WT/DS160/R (Panel Report). An exception conflicts with normal exploitation if the activities pursued under it enter into economic competition with the ways that copyright owners normally extract value from their copyrights, ‘and thereby deprive them of significant or tangible commercial gains’. An exception would be in harmony with normal exploitation should it be confined ‘to a scope or degree that does not enter into economic competition with non-exempted uses.’ The Panel concentrated on curtailment of the economic value of exclusive rights also in the application of the third step, unreasonably prejudice to the legitimate interests of the right-holder. Prejudice would reach an unacceptable level
In other words, the substantive grounds behind the exceptions do not become weighed against the interest in protecting copyright. Irrespective of the weight of public interest behind the exception or limitation, be it based on fundamental rights or public policy grounds, the three-step test sets an absolute threshold beyond which no statutory exception to copyright is permitted to go. The three-step test thus in effect subordinates fundamental rights and societal policy aims reflected in the exceptions under judicial review based on international IP law. In constitutionalism 2.0 it should surely be the other way around: conclusions reached within copyright, patent, or trade mark law should be acceptable from the perspective of fundamental rights. There is no reason to presume that the three-step test produces outcomes that are automatically in conformity with fundamental rights.

EU copyright directives embrace the three-step test as a regulatory instrument by referring to the Berne Convention or by borrowing the language of the three-step test.\textsuperscript{113} This transforms it into an adjudicative test affecting the interpretation and application of copyright exceptions before the ECJ and the domestic courts of the Member States. To make things worse, the ECJ has decided that there can be no exceptions directly based on fundamental rights as protected in the EU—those listed in the InfoSoc Directive and limited by the three-step test must suffice.\textsuperscript{114} Although decision-making standards other than the three-step could dominate in some cases concerning exceptions to IP rights, the test nevertheless participates in solidifying a structural bias in favour of strong IP protection.

Overall, the three-step test makes legislative introduction of new exceptions to IP rights more risky and hence unlikely. It inhibits broad readings of existing exceptions or interpretative creation of new ones in adjudication. In this sense, the test decelerates legal change that might otherwise follow from democratically legitimate attempts to renew legislation, or justified efforts to renew judicial interpretations. The three-step test operates as an epistemological bottleneck in decision-making: the substantive grounds behind exceptions are not evaluated or weighed against the interests being protected, especially as concerns copyright. The WTO context exacerbates the situation. The WTO is a trade-centred organisation. Its dispute settlement organs do not represent human rights law expertise, nor do its norms reflect a human rights dimension. This is why, contrary to what has been proposed,\textsuperscript{115} WTO dispute settlement organs should not strive for a comprehensive overall assessment of limitations covering human rights considerations, as this would, in any case, be problematic on the WTO level due to the inevitable trade and economic bias.


2.2.2.2 International investment agreements empower corporations and inhibit abrupt change

International investment agreements (IIAs) offer another example of a new constitutionalist mechanism inhibiting legal change for the benefit of long-term global investment. Due to the rapid proliferation of IIAs, investors now enjoy a strong position to challenge regulatory activities by states worldwide. IIAs permit claims for substantial damages and allow investors to seek enforcement of awards directly before domestic courts. Investor-state dispute settlement (ISDS) gives arbitrators broad jurisdiction over what are fundamentally regulatory disputes. Arbitrator authority typically covers any state decision affecting investors’ protected assets. Increasingly, IP constitutes a protected asset benefiting from the protective standards of IIAs.

These protective standards are not specific requirements like those of international IP law, but generic and abstract notions such as ‘full protection, fair and equitable treatment (FET), prohibition of expropriation, and impairment of use and enjoyment’ of investments. The FET-standard, in particular, functions as a gap-filling norm. To a certain degree, it protects an investor’s legitimate expectations in the stability of the host state’s legislative environment. It originally had the much narrower role of securing the minimum standard for treatment of aliens as protected under customary international law.116

As IIAs enable private claims against host states and might treat international IP norms as applicable law in ISDS, investment law offers a unique opportunity for wealthy businesses to challenge domestic laws with international IP norms, which are otherwise typically applied between states only. Investment law thus provides investors with an investor-friendly forum to litigate international IP law as part of their IIA-based claims. Investors merely need to translate the alleged breach of an international IP norm into the broad language of investment protection standards.117 This option is significant, especially with regard to TRIPS and other international treaties lacking the capacity to enjoy direct or self-executing effect in the Union or elsewhere.118 Should an investor succeed in invoking such norms as part of ISDS, political discretion in the implementation of TRIPS and other treaties lacking direct effect would be jeopardised. Political discretion constituted the main reason for excluding direct and self-executing effect of TRIPS in the Union and elsewhere.

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117 Henning Grosse Ruse-Khan, ‘Challenging Compliance with International Intellectual Property Norms in Investor-State Dispute Settlement’ (2016) 19 Journal of International Economic Law 1, 10. Ruse-Khan (ibid 9) emphasises that there must be a link or ‘hook’ in investment law enabling claims based on international IP law, such as umbrella or safeguard clauses or substantive standards such as expropriation and FET. As with human rights, investment tribunals normally lack jurisdiction as regards stand-alone international IP law claims.

118 See about the effects of EU IP treaties Tuomas Mylly, Constitutional Functions of the EU’s Intellectual Property Treaties in Josef Drexl, Henning Grosse Ruse-Khan, and Souhir Nade-Philix (eds), EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse? (Springer 2014) 241, 255.
Even if an investment tribunal finds no breach of an international IP norm or host country’s own legislation, a host state measure that lessens the value or inhibits the use of a protected IP asset might still infringe investment treaty standards, such as indirect expropriation or FET. This is enabled by the broad applicability of IIA norms to any host state measures affecting foreign investors’ assets. In other words, IIAs can be used more broadly than IP treaties to challenge diverse measures and laws that for example affect the related business model or profit margin of the investor. TRIPS and other international IP treaties only provide negative rights to prevent certain acts. They leave governments the freedom to pursue legitimate public policy objectives outside the scope of IP, requiring no exception under TRIPS. Investment treaty protection could reach any laws, measures, or even court rulings that affect the existence, value, or possibilities to positively use IP in the host state. These might include, for instance, health, food, social, labour, minority protection, communications, environmental and competition law, as well as industrial and cultural policy measures and general doctrines of law.

Even individual court judgments could trigger the application of IIA standards. The *Eli Lilly v Canada* case demonstrates that an abrupt change in the law could breach investment norms. The tribunal held that as the judiciary is an organ of the state, judicial acts will, in principle, be attributable to the state. This means that a judicial act or omission could constitute expropriation. Although the tribunal emphasised deference towards domestic courts by limiting its review to very exceptional cases, a *fundamental or dramatic change* from previously established law might nevertheless be caught by investment norms. As Canadian doctrine underwent incremental and evolutionary changes, there was no breach.

But investors could still challenge the judicial application of IP or other laws whenever this might reduce the value of IP assets. For instance, a too radical or abrupt judicial development of the abuse of rights doctrine or judicial broadening of an exception to copyright could constitute acts triggering ISDS. The same applies to judicial orders invalidating existing IP rights, such as trade marks or patents. *Eli Lilly v Canada* makes the role of investment law explicit: to decelerate, inhibit, or prevent the wrong kind of legal change to protect long-term global investments.

Investment treaties and ISDS provide a de facto judicial review mechanism on a global level. They regulate the effects of international IP treaties and other international law, such as international health law. They could start to regulate the limiting effects of any laws on IP assets on a regular basis. As investment treaty norms focus on the profit interests of the IP owner only, to the exclusion of focusing on innovation incentives and other legitimate values and interests protected in IP law, they could start to affect the remaining legitimacy of global IP protection.

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120 *Eli Lilly and Company v Government of Canada*, ICSID Case No UNCT/14/2, Final Award (16 March 2017), paras 221–25, 337–351 and 387.

the effect would be systemic, global-level protection against undesirable socio-economic changes which multinational investors might otherwise have to face.

2.2.2.3 Conclusion on lock-in and deceleration
IIAs, three-step tests, and other IP norms with similar effects provide IP—together with protection of property ownership as a human right—with protection beyond nation-state constitutions. IIAs expand factual protection beyond the traditional idea of IP—the negative right to prohibit others from specific uses with respect to protected subject matter. IIAs protect IP assets from the limiting effects of other laws, hence shielding positive use rights around the negative right protected by traditional IP norms. IIAs further strengthen IP by enabling direct invocation of international IP norms by private investors and by offering an investor-friendly forum for the interpretation and application of IP norms. This signifies a structural shift in the international protection of IP assets.

The complementary role of these norm complexes is, on the one hand, to immunise exclusive rights from perceived internal threats emanating from IP laws, such as the expansion of IP law’s exceptions or exclusions from protectable subject matter. The additional role of investment treaty norms, on the other, is to provide protection against external threats arising from conflicting norms in cultural, environmental, competition, human rights, and other laws. No single norm participating in locking in a strong form of IP protection provides absolute immunity from any threats. But having double or even triple constitutional protection on a global scale makes interference with IP rights riskier for countries, and backward steps in treaty-based protection more complex and therefore improbable.

Due to these multiple overlaps of different regimes, levels and types of regulation, the IP system as a whole has become increasingly complex. This system complexity forms part of the underlying bias. As no final authority is capable of settling the relations between different norm complexes on the global level, the most powerful actors benefit: they have the knowledge and resources for the needed regime and forum shifting.

3. Concluding Observations

Constitutional discourse of IP cannot ignore the evolution of constitutionalism from its 1.0 to its 3.0 version. The new constitutional architecture of IP is manifested in overlapping global and regional shifts related to globalisation and acceleration. To stay relevant, scholarly discourses should broaden their interest to analysis of administrative and private ordering and the de facto regulation by the judicature enabled for example by rights proportionality and specialised courts. Global lock-in mechanisms based on IP treaties, investment law, human rights, and other instruments similarly deserve more attention. With the system as a whole being transformed, scholarly analysis should also be targeted at the totality and its functioning. This chapter constitutes an attempt to sketch such an overarching perspective. What other observations could be formulated?

Traditional legislation is no longer the primary source of perceived problems nor the ‘solution’. Failed legislative initiatives could be pushed to private regulation, as shown by the example of the MoUs related to enforcement of IP on the Internet. Courts and administrative offices could create new law or repeal the old. The EPO did so in the case of computer-program and second-medical-indication patenting. The ECJ regulated open
Wi-Fi provision and hyperlinking with a combination of copyright and fundamental rights. These should be treated as what they are: not interpretation or application of existing law, but creation of new law. Seeing this enables critical questions related to democratic legitimacy, the role of administration, the judiciary, and private regulators in general. Excessive focus on traditional legislation prevents us from posing such questions.

Fundamental rights cannot solve the problems of constitutionalism 3.0 either. Rights proportionality empowers the courts. In the case of the ECJ and investment tribunals, in particular, the scales are tilted in favour of the property and business rights of corporations. How could fundamental rights cure the EPO’s abundant administrative rule-making favouring patentability, the ECJ’s or investor tribunals’ bias in favour of property and business rights, or problems related to rapidly expanding automated enforcement of IP on the Internet? But a simple return back to the legislator in the form of ‘legislated rights’ in overcoming the problems of fundamental rights proportionality and overly broad rights is no solution either.122 Due to de-synchronisation of the legislature from accelerating sub-systems, such proposals seem anachronistic.

As each decision-maker has its particular bias, the question of who makes the decisions becomes a core element of constitutional design: the highly specialised EPO or the Unified Patent Court representing the epistemic community of patent experts; a business, property, and internal market-friendly ECJ; a human rights-tunnel vision ECtHR; investor-friendly investor tribunals; free trade-minded WTO dispute settlement organs; generalist courts of nation-states with their legal-cultural fixations; or perhaps global Internet platforms together with copyright owners? Even if each of them were to apply the same norms—for example international human rights—the outcomes remain persistently diversified because of the prevailing bias of the decision-maker.

Traditional positive law approaches cannot even identify the ongoing transformations. Sources of law doctrine, formal analysis of legislative output, focus on domestic courts, and recourse to mainstream interpretative judicial methods are not helpful when analysing, for example, EPO’s regulatory action or private ordering by Internet platforms. Many developments of constitutionalism 3.0 fall outside not only the positivist scholar’s interest but the whole vocabulary for discussing them. For the traditional constitutional law scholar, in turn, the types of phenomena discussed in this chapter do not make constitutional law—in many cases not necessarily even law at all. To enable the study of the ongoing transformations, this chapter drew from political and sociological theories of social acceleration, the transdisciplinary school of new constitutionalism, and similar socio- legally tuned discourses which enable asking how law interacts as a societal system and enables new power structures in the course of the transformations in question.

What emerges from the studied phenomena is a pattern of overlapping lock-ins and slow-downs, but also accelerations of the law. Some regulatory developments enable faster responses, such as relocating decision-making to courts, administrative offices, and private

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122 More generally, the broad constitutional transformations studied in this chapter cannot be ‘solved’—especially not by any single legal gimmicks legal scholars tend to offer before full diagnosis. Yet there may remain potential for countermovement also within law, as demonstrated by the chapters of this volume in Part VI Counter-narratives.

ordering. Other developments stabilise and lock in parts of the law essential for long-term global investment. Acceleration is enabled by the relative stability that law provides for long-term global investment, especially in the form of global protection of trade and investment, regulatory alignment, and globalised protection and enforcement of property rights and contracts. Due to path-dependency and the magnitude and speed of administrative and private regulation, the transformations become hardly reversible shifts, exhibiting signs of system-level lock-in.

Another pattern relates to judicial review. The patent-friendly norms of the EU’s unitary patent package (AUPC and EPC), the EPO’s decisions, and the Unified Patent Court’s judgments are shielded from judicial review or appeals to generalist courts. But judicial review mechanisms have been created to challenge liberal exceptions to exclusive rights (the three-step test) and any laws, interpretations, or administrative practices capable of limiting the IP owner’s property interests or business freedom (property ownership and investment norms). The judicial review mechanisms function as epistemological bottlenecks. They channel the available background values and interests to decision-making selectively: the effects on IP and its economic value count to the exclusion of countervailing user and public interest. They thus exhibit a consistent bias.

What Peter Drahos has described as proprietarianism of contemporary IP law is thus also present in its constitutional structures. According to Drahos, a proprietarian in the strongest sense of the definition believes that activities that first give rise to economic value should lead to property rights, that there is no limit to the objects in the world at which such activities may be aimed, that the possessor should take all, that ownership privileges should trump community interests, and that the world and its contents are open to ownership. Peter Drahos, A Philosophy of Intellectual Property (Australian National University Press 2016) 235.

On structural bias, see Martti Koskenniemi, From Apology to Utopia (Cambridge University Press 2005) sub-chapter 3.3. of Epilogue. I have discussed the notion of structural proprietarian bias in the context of international and European IP law in Tuomas Mylly, Intellectual Property and European Economic Law (n 15) 112–20 and 212–20. As Henning Grosse Ruse-Khan notes in his chapter ‘Effects of Combined Hedging: Overlapping and Accumulating Protection for IP Assets on a Global Scale’ in this volume, a protective standard ‘in dubio pro protection’ emerges: it is typically safer for legislators, administration, and courts to leave IP rights untouched, or at least to minimise interference with them.