

*Re-Writing the Treaties with Precedent: Intellectual Property Rights and  
EU Law*

European Union Studies Association Conference, Nashville, 2003

Panel: 9 E

Margaret McCown

Max Planck Institute For Research in Common Goods

Poppelsdorfer Allee 45

53115 Bonn

[mccown@mpp-rdg.mpg.de](mailto:mccown@mpp-rdg.mpg.de)

**Abstract:**

Intellectual property rights disputes constitute one of the longest standing conflicts between the European Court of Justice and EU Member States over the scope of ECJ authority. Although the treaties explicitly reserve to member states the right to maintain copyright and patent regimes, by the early 1970s the European Court of Justice had begun delivering pro-integrative decisions in such disputes. These judgments eliminated or re-wrote national regulations and contravened the explicit intentions of the treaties; it is unsurprising that their legitimacy was constantly challenged by member states. This paper examines why it was, however, that member states were unable to effectively challenge the Court's decisions and how the ECJ developed an extensive and nuanced set of EU level rules, governing traders' intellectual property rights. This paper shows the importance of (1) private litigants' strategies of intensive repeated litigation and (2) the ECJ's move to precedent based decision making in the 1970s to its capacity to contravene Member State preferences.

In an often told story, the European Court of Justice is credited with the transformation of the EC legal system from an international to a constitutional legal order with the concomitant increases in legal and judicial authority implied by this change. How this transformation occurred is, on one level, uncontested: through a series of activist judgments, the Court created new rules establishing the supremacy of EU law, granting rights to individuals and creating entirely new areas of EU law. At another level, however, there remains much debate in the field as to how a court, powerless to enforce its rulings and reliant on other actors for referrals, managed to drive such a process. This is, of course, one of the classic questions in political science with regard to courts, albeit one with greater resonance in the context of an international court - a species usually characterized by only weak authority and narrow jurisdiction. The answer that has emerged has tended to locate the ECJ in a set of relationships of mutual influence, wherein, under certain circumstances, actors such as the European Commission, acting as a 'bellwether' of the political climate (Burley and Mattli 1993), advocates general (Stein 1981), national courts (Weiler 1994; Alter 1998; Alter 2001), EU member states (Garrett 1995; Garrett, Kelemen et al. 1998) and private litigants (Stone Sweet and Brunell 1998; Stone Sweet and Caporaso 1998) bolster the court. Different theoretical approaches very much tend to privilege the importance of certain actor configurations over others.

One of the more forcefully argued approaches lays great emphasis on the decisive role of the EU member states in this process. The dominant member states or majority coalitions of member states are said to exert significant influence on ECJ decision-making and to be able to consistently pressure the court into delivering rulings favoring them (Garrett 1992; Garrett 1995; Garrett, Kelemen et al. 1998). In this way, ECJ decisions and thus the body of EU law, are argued to be reflective of

the preferences of the member states. Although there are a variety of competing hypotheses about the ECJ's role in European integration, intellectual property rights disputes present a particularly salient case with regard to this variety of intergovernmentalism because the treaty articles that govern 'industrial and commercial property rights' (Art 295 EC, ex-Art 222) in the EU reserve the right to regulate them exclusively to the member states. As will be discussed more extensively below, the ECJ had essentially to rewrite the treaties in its case law in order to even review intellectual property rights (IPR) disputes, a development that was vigorously protested by the member states. Inasmuch as simply hearing these cases arguably tramples a treaty guaranteed right granted exclusively to the member states, the intellectual property rights case law seems to present an interesting context in which to examine intergovernmentalist accounts of ECJ decision-making. This paper represents a preliminary examination of these ideas in the context of IP cases, with the principal goal of exploring factors that might contribute to rendering this pressure from member states ineffectual.

This paper examines two factors in particular: the impact of precedent, both in terms of the creation and application of judge made law to disputes and the role of repeat litigants. Precedent, it will be shown, imposes soft constraints on all actors that reduce, in low level but pervasive ways, their ability to challenge Court interpretations. Put most baldly, in a precedent based system, the body which makes the rules with which actors argue in Court, is fundamentally advantaged. Litigants that are well enough endowed with resources and with a sufficiently long term interest in an area of law can bring a steady stream of such cases and follow through on judgments (Alter and Vargas 2000) maximizing the likelihood that Court decisions will be effective. Moreover, in contrast to the majority of preliminary reference cases,

which are usually a dispute between a private litigant and a public body, a very high proportion of these cases involve two private litigants. Member states are thus less likely to be directly involved, and reduced to filing observations as a sort of European *amicii curiae*, while a set of vocal (and wealthy) private actors articulate a desire for a set of effective European-level rules for resolving these disputes.

### *The Treaties and Intellectual Property Rights*

The EC Treaty would seem to strictly protect member states' rights to organize the regulation of intellectual property rights regimes at the national level, preventing review by the ECJ and application of EU law. Article 295 EC (ex-Article Art 222) states quite explicitly that the 'Treaty shall in no way prejudice the rules in Member States governing the system of property ownership' (EC 295) while the Article 30 (ex-Article 36) derogations to the free movement of goods provisions (Article 28, ex-Article 30) unambiguously specify 'protection of industrial or commercial property' as measures not precluded by Treaty provisions. Whilst 'industrial and commercial property' might not sound, to an Anglo-American audience, like a phrase that explicitly refers to copyright, patent or trademarks, this is, in fact, precisely the language used in Continental legal systems to describe IPRs (Tritton 2002: 461). Moreover, as will be discussed below, the Court's treatment of these articles in the early IP cases leaves one with little doubt that it was well aware that the framers' intentions were to protect this member state competence.

The structure of the other trade provisions and priorities set out in the treaties, and the ways in which IP protected products tend to be marketed, however, left the Court in a difficult position. The rationale behind national IP rules tends to be that they protect products that are expensive to develop, but easy to exploit by

competitors. Innovation is thus construed as a public good that it is collectively beneficial to protect. By virtue of being expensive to develop, however, companies often find that it is most economical to market grant licenses to other firms to produce and or distribute the product, especially in foreign markets. That, second, firm, then owns the exclusive right to distribute the product in the country for which they have the license and the situation may arise that two identical products are marketed differently in two EU countries. Where these 'parallel' goods are priced differently it may be worth it for an entrepreneurial trader to simply import the good, rather than buy it from the domestically licensed producer and thus, as Craig and De Búrca point out (Craig and De Búrca 1998: 1026) it is easy to see how strict interpretation of IP rules giving exclusive rights to distribute a product might undermine treaty Art 28-30 (ex 30-36 EC) prohibiting all measures hindering the trade in goods across borders. In modern Europe, goods such as books, music and video recordings, pharmaceuticals and trademark protected items represent lucrative industrial ventures, from the point of view of firms, and, from the point of view of the ECJ, a significant component of intra-Community trade. There is, moreover, a pronounced free trade bias in the ECJ's case law and disputes over the free movement of goods provisions constitute one of the oldest areas of litigation. It would, therefore, have been difficult for the ECJ to ignore these questions as tangential to its goals of promotion free movement of goods or as marginal to the integration of the common market. Free movement of goods disputes constitute one of the largest groups of preliminary references – 680 cases had been brought by mid 1998 (Stone Sweet and Brunell Dataset) – and it is an area of law significantly governed by court constructed rules. It is therefore an area of law in which Court might be anticipated to take an activist stance.

*The European Court's Treatment of Intellectual Property Rights*

The ECJ's verbal gymnastics in the early IPR cases are extraordinary, even for a Court that commonly makes extensive use of teleological reasoning, and not particularly well received. The existence of intellectual property rights may, indeed, be reserved to the member states, the Court declared (78/70 *Deutsche Grammophon*), but the *exercise* of them must be subject to EU treaty provisions on free movement of goods and is, thus, subject to review before the Court. This was, not surprisingly, hugely unpopular with the member states; they submitted observations protesting the admissibility of these cases in all of the early decisions (c.f. 24/67, 40/70, 78/70, 192/73, 16/74, 51/75) as well as in more recent cases (60/98). Even lawyers acknowledge that 'in analytic terms, [this] distinction is questionable' (Craig and De Búrca 1998: 1027, see also Cornish 1996: 34).

Lawyers did, however, concede the importance of these disputes and, irrespective of the quality of the reasoning of the Court, endorsed its decision to review the cases in the light of free movement provisions. More importantly, litigants strongly felt the need for effective judicial interpretation of the intersection between IP rules and EU trade provisions. The Court continued to receive a steady stream of 2-3 intellectual property rights disputes a year, from the late 1960s onwards and proceeded to construct, in its case law, a fairly extensive set of rules to govern these cases.

The most important principle to emerge from this case law is that of 'exhaustion of rights'. This essentially asserts that where a good is exclusively licensed to a distributor, once that license holder has placed the good on the market for the first time, they 'exhaust', their right to protect it via that license. They cannot, therefore, use an exclusive distributors license to prevent the import of the same good

from another member state. The Court went ahead and applied this principle in the context of all of the principal types of IP disputes: patents (15/74), trademarks (16/74) and copyrights (55/80).

Establishing these rules merely paved the way for litigants to ask more specific questions, predicated on these foundational precedents. What is the nature of property constituted by a trademark? importers asked. Is it legitimate to import a good and repackage it, affixing the trademarks of the distributor, but leaving in place packaging bearing the mark of the producer (ECJ 102/77)? Yes, the Court answered, as long as the function of the trademark as a signal to consumers of the origin of a product is not compromised. But, could a company, seeking to repackage a product, change the trademark affixed to it (3/78)? In trademarks and in all of the other branches of IP case law, litigants very quickly brought follow-up cases, addressing issues contingent on the Court's previous decisions. In short, the ECJ's precedent came to not only govern the resolution of cases, but also to shape the premises and form of subsequent disputes.

#### *European Level Legislation Governing Intellectual Property Rights*

The EU has, however, been as slow to adopt harmonizing European level legislation governing IPRs, as the ECJ was precocious in attacking national rules. The classic dynamic of negative, court driven integration, followed by harmonizing positive integration (Scharpf 1996) has not materialized to an extent that matches the ECJ's fairly aggressive review of these cases. The ECJ quite explicitly acknowledged this, noting in 1990 that, 'in view of the modest scale of legislative activity in relation to trademarks, and to intellectual property in general, the task of reconciling [national IP rules and article 28] has fallen mainly to the court.' (ECJ 10/89).



Getting legislative agreement from member states rather hostile to the idea has been slow and arduous (Vintje 1995: 361; Bentley and Sherman 2001: 16). Initiatives, again driven very much by the private sector, have been tabled since the 1970s: the European Patent Convention was signed in 1973, but did not create a Community patent, but only coordinating provisions, while the Community Patent Convention has attempted to do so, but met with limited success (Vintje: 361, but see Leith 1998: 512). Some advances have been made in the area of trademarks, largely by means of directives, including Directive 89/104, which seeks to harmonize trademark laws across the EU. There is a Community Trademark Register (Regulation 40/94) and, of course, a dynamic debate over the protection of electronic data, indicative of an increasing commitment to these issues in the last decade. Very basic issues of Community competence to review IP cases appears to have been at issue in the delays over constructing legislation – in a decision interpreting the trademark directive (89/104), the advocate general indicates the question arose and was debated in the context of drafting that law (AG report 10/89, para. 54), even though the Court's case law guided the form of many of the directive's provisions (AG report 10/90, para. 53).

In total, only 47 legislative acts pertaining to IPRs have ever been passed at the European Level<sup>1</sup>, while in comparison, by 1998, there had been 69 decisions pursuant to preliminary references alone. While there are, therefore, some recent provisions that will likely serve as the framework for a European level legislative regime, their effects are only now becoming visible and the initiatives from previous decades have not amounted to much (Craig and De Búrca: 1058 –9). This is largely because it has remained such a contentious issue – evidence of the fact that while the member states may not have been particularly effective at countering the ECJ, there

---

<sup>1</sup> Drawn from [http://europa.eu.int/eur-lex/en/lif/reg/en\\_register\\_1720.html](http://europa.eu.int/eur-lex/en/lif/reg/en_register_1720.html)

remained, for a very long time, relatively little consensus about the legitimacy or form of European level rules on IPRs.

*Member State Opposition to European Level Intellectual Property Rights Rules*

Intellectual property rights disputes seem to present a situation in which one would expect member states to have tried to rein in the European Court of Justice and in which it would seem that they should be very able to do so. There are articles in the treaties that they drafted with the express intent of protecting these rights and which have never been amended in the course of the many subsequent treaty revisions. The Court had to go to the lengths of creating artificial distinctions on the basis of tenuous arguments that even the legal community finds unconvincing.<sup>2</sup>

It also appears to be an issue that compels their attention. The single best measure of the saliency of a case to member states is whether they, and how many, file observations before the Court. Future research will specify this point more precisely, counting the observations filed in each case and recording which actors filed them in order to enable us to evaluate whether attracting the interest of (1) the majority of member states, or (2) of the dominant member states, has the effect on outcomes predicted by Garrett et al. This will also enable us to determine whether a broad range of member states oppose these cases, or if there is a set of particular member states who challenge them.

Member state discontent with these provisions was also of reasonably long duration and the issue has not grown much less controversial over time. This fundamental lack of consensus is visible in the extreme difficulty experienced by the Commission in creating harmonizing legislation, with the result that, for a long time,

---

<sup>2</sup> Although, importantly, the legal community does accept almost without question the importance of the ECJ's right to review these cases and so, in effect, only critiques the quality of its reasoning.

the only European level rules governing IPRs were court created. The types of arguments that member states make about the nature of IPRs and their own right to regulate them did change over time: – eventually they shifted from arguments that flatly refused to accept the exercise versus existence distinction, to more moderate ones, based on attempts to qualify and narrowly construe existing precedents. They constantly contest, however, that there is a legitimate European dimension to IPRs and struggle (if on the defensive) to maintain that it should be left to be resolved at the national level. Better data on the observations filed by member states, which is still being collected, will also allow us to see whether there is, eventually, a decrease in the level of opposition to ECJ review of these cases and if so, if it coincides with the beginning of legislative activity in the 1990s.

One is left, however, seeking positive explanations for what factors might underpin the Court's ability to so consistently evade censure from a large group of member states so determined to do so. As discussed above this paper makes a preliminary evaluation of the influence of precedent based decision making by ECJ judges and strategies of repeat litigation, on the ability of member states to affect decision making.

#### *Private Litigants and the Demand for European Rules on Intellectual Property Rights*

The private dimension of these disputes makes them rather distinctive. As noted above, many preliminary references cases and most free movement of goods disputes are conflicts between a private party and a public entity. In contrast, virtually all IP cases are conflicts between two private actors, meaning that member states are not directly involved in the vast majority of these legal proceedings.<sup>3</sup> Moreover, they

---

<sup>3</sup> It also offers an interesting insight into the priority that the ECJ gives its own case law. The Court has long considered cases between two private parties, rather than between a public and private body, to be

are typically large corporations (the majority of cases are brought by pharmaceutical companies, followed by media distribution/publishing firms) that are able to afford the slow and expensive process of bringing cases to the ECJ and where the financial gains from a favorable decision make it worth it. They are, in fact, able and likely to pursue long planned litigation strategies in an attempt to reshape rules in a direction beneficial to them. There is, after all, a lot of money at stake: IP protected goods account for 6% of EU GDP and rising.<sup>4</sup>

A small set of firms brings a very large portion of the intellectual property rights cases resolved by the ECJ. In this sense then, there are a very few, quite wealthy, actors that play the role that Rawlings dubs 'repeat players' (Rawlings 1993) and they act as strategically as one would expect actors to in an iterated game. What is particularly interesting is that although they compete fiercely to get their preferred formulation of rules institutionalized in ECJ decisions they are, crucially, more or less united in a desire to have clear and effective EU level rules. Most of these actors have been both defendants in cases (trying to claim national IP rules for protectionist purposes) *and* appellants with some regularity and as such see benefit in having clear and unambiguous rules with which to organize contracts and to defend themselves in legal proceedings. This makes these cases an interesting example of private organizations seeking to create transnational level rules to govern public goods. As with the analysis of member state observations, more comprehensive data, which is in the process of being collected, will allow one to substantiate this claim more systematically.

---

rather distinctive and been unwilling to extend the direct effect of directives, so called 'horizontal direct effect' to such disputes. These cases make quite clear, however, that the ECJ is quite willing to accord horizontal effects to its own decisions, giving us a clue as to the priority that it accords its own judge made law in the hierarchy of EU legal rules!

<sup>4</sup> [http://europa.eu.int/comm/internal\\_market/en/intprop/overview.htm](http://europa.eu.int/comm/internal_market/en/intprop/overview.htm)

As has been argued elsewhere, a crucial component of effective litigation strategies is follow-through from the litigants (Alter and Vargas 2000). That is very much the case in these disputes. Inasmuch as it has been quite difficult to obtain legislation as a means of consolidating these gains, following them up has largely taken the form of subsequent litigation. Firms don't just bring a single case, but rather a sequence of them, taking advantage of the logic of precedent. When the ECJ makes a decision, thereby creating a potential precedent, that decision can become more locked in, to the degree to which it forms part of the premises of new disputes that, when resolved, also come to be used as precedents. The faster that cases are brought, the more the Court decides cases using precedents, and the more litigants use them as the basis for subsequent claims, the more effective is this process. As is evident in Figure 1, litigation has proceeded at a fairly rapid rate, generating a large set of cases for the ECJ to rule on.

--- Figure 1---

A European pharmaceutical distributor provides an excellent illustration of the litigation strategies the firms have deployed in this area of law. Centrafarm is a company that buys drugs developed and produced by other companies, to distribute in multiple EU member states. It was thus particularly advantaged by an ECJ case law limiting companies' ability to rely in IPRs to block imports. In the 1970s is launched a concerted legal attack on these rules by simultaneously bringing suit against Sterling Pharmaceuticals over the use of a patent (15/74) to block imports and Winthrop BV for the use of trademarks (16/74) to do the same. In one fell swoop, a single firm managed to get the principle of exhaustion of rights applied to both patents and trademarked products trade in the EU. It then went on to consolidate this gain, bringing a string of subsequent cases, pursuing the question of repackaging of

trademarked products in court against Hoffman La Roche (102/77) and American Home Products (3/78), and all told being involved in seven cases before 1980. It managed therefore to quickly generate a rather large body of case law that was of long term importance - the judgments against Sterling and Winthrop BV are foundational precedents in this area of law and among the most cited in IP decisions.

Member states are left, then, in a position where it is not just a single decision that they oppose, but an entire web of case law. It has been argued elsewhere that this effectively means that there is a relatively small window of opportunity in which for member states to oppose ECJ decisions that they particularly dislike (McCown 2002). Once established, precedent is institutionalized through use – as a given decision is used as the basis of other rulings, it becomes enmeshed in a whole network of links joining cases, and it grows progressively harder to change one precedent without substantively altering settled case law.

Member states tend to respond to this defensively, rather than offensively. Either as litigants, or here as observers, they don't wish to make ineffective arguments and it is clear, in an area of law largely constituted by precedent, that arguing with precedents is most successful. Particularly when the substance of a dispute is premised on some previous decision or set of decisions, actors opposing that case law find it effective, and fairly quickly move to, making qualifying arguments. Therefore, when member states try to put pressure on the ECJ, to deliver an outcome that they prefer, they usually do it in the form of assertions about how the ECJ ought to distinguish the case at hand from its previous case law and this has the effect of incrementally ratifying, through tacit acceptance the ECJ's past case law (McCown 2001).

We see this clearly, if we return to the issue of the *Centrafarm* cases and examine the positions of the member states in them. In the early decisions, the member states simply argue against the existence versus exercise distinction and their arguments are barely even repeated by the ECJ – one has to turn to the advocate general report to even find a summary of them. Looking at the decisions in which the rules from *Centrafarm v. Sterling* and *Winthrop* are applied, however, one sees member states that have changed tactics. When the litigants in *GEMA* (ECJ 55/80) argued that the Court should apply the exhaustion of rights principles in the context of copyrights, the French government merely argued to distinguish the earlier *Centrafarm* case. It contended that features intrinsic to copyrights made them very different from patents or trademarks and that the precedents ought therefore not to be applied, but in no way did it challenge the legitimacy of the precedents. In *HAG II* (ECJ 10/89) the German government similarly doesn't even raise the question of the validity of the foundational case law. Instead, it takes issue with the then-new Trademark directive (mentioned above) and argues that it should be construed narrowly, restricting itself to contesting that 'the present case should not be resolved on the basis of its provisions.' (A.G. Report 10/89, para. 51). This same pattern continues through out this line of jurisprudence.

#### *Precedent and ECJ Decision Making*

Contrary to what seems to be assumed in most literature about the ECJ, the use of precedent by the Court in its decision-making varies considerably along a number of dimensions. An international court, initially staffed entirely by civil law judges<sup>5</sup>, the Court did not begin by making decisions with precedent. It gradually

---

<sup>5</sup> Both international and civil law systems avoid the explicit use of precedent and formally deny its effects.

adopted the practice, which has been the vehicle of legally integrative rules, such that over 80% of contemporary cases are based at least in part on judge created rules. The use of precedent in decision-making varies, moreover, across areas of law with some types of disputes relying on it much more heavily than others (McCown 2002).

Unsurprisingly, decisions in areas of law that are more extensively judicially constructed, such as the ECJ's gender equality jurisprudence, are grounded much more extensively in precedent than those such as tariff or agricultural disputes, where there is a large and extensive code, governing the cases. Free movement of goods disputes rely fairly often on precedent – the mutual recognition principles are rather famously court-constructed (Alter and Meunier-Aitsahalia 1994), with about 60% of all decisions making reference to a precedent. As noted above, this is not distributed constantly, but rather the practice has increased over time so that citation levels in contemporary cases are about 15% higher than the average for the domain. In the IP cases, overall citation rates are rather similar: 42 of 69 cases make rely on a precedent rule in some part of their decision, but one finds that the rate at which it is used has increased dramatically. After a critical mass of decisions had accumulated, making a sufficient body of precedent available, use of it increased quickly and by the mid 1970s had become the norm.

---Figure 2---

The graph is affected by the small number of cases in most years. In 1993 for instance, 0% of cases cite a precedent, but there was only one decision in that year. It is still clear that, by the late 1970s, use of precedent in decision-making was firmly established as the norm.

The extent to which disputes come to be governed by precedent can be, to a degree, measured. As the body of precedent becomes more complex, and more



decisions become rooted in judge made law, these rules are combined and deployed in more sophisticated ways and citation patterns reflect this change. The average number of precedents referenced in a decision rises as the legal questions raised by litigants and the judgments delivered by the ECJ are increasingly nested in a growing set of interdependent rules. The patterns in the IP cases reflect this, while the average number of precedents invoked in a decision in the free movement of goods domain as a whole is 3.6, the overall average in IP cases is almost 4, while in the judgments of IP cases referred in the 1990s, it is nearly six. One also begins to find precedents organized into sets that are repeated together across multiple cases – evidence that the legal rules generated by the Court become more structured over time and the sets of precedents on which later cases are predicated grow more formalized. It has been shown that both the increase in the average number of precedents invoked in decisions and in the use of sets is highly correlated with increasing recourse to precedent based argumentation by the ECJ (McCown 2002).

For member states wishing to challenge the ECJ in an intellectual property rights dispute this means that they are enfolded in an ever-widening network of judge made law. Member states were very unenthused, for example, by the decision in *Centrafarm v. Sterling* (ECJ 15/74), but, as discussed above, were less and less able to challenge it with every passing case. It is one of the most cited precedents – it and its twin *Centrafarm v. Winthrop* (ECJ 16/74) are explicitly invoked in 10 subsequent decisions. These decisions thus become rooted in the ‘parent’ precedent rules and jointly influence the premises of later decisions. For example, *Centrafarm v. Winthrop* and a later decision, dealing with repackaging of trademarked goods, *Hoffmann La Roche v. Centrafarm* (ECJ 102/77) are cited together several times, jointly defining the ECJ’s rule on parallel importers who attempt to repackage goods

before selling them on a market where they compete with the trademark holder. The first time they are combined is in a decision, *HAG* (ECJ 10/89) dealing with situations where different, independent, companies legally own the trademark to the same product. On the subsequent occasions where *Hoffmann La Roche* and *Winthrop* are cited, in 317/91, 71/94 and 379/97, *HAG* is also invoked. This is not, however, just a complicated exercise in tracing out the genealogy of a decision: it shows how the very grounds on which later disputes are based and the set of rules with which argumentation about them is organized is highly contingent on the resolutions reached in previous disputes. It is difficult for observers to even argue about them, without acknowledging these past precedents because they constitute the working assumptions on which litigants based their choices and suits. This is visible in *Upjohn v. Paranova* (ECJ 379/97), a fairly recent case in which the government of the UK, as observer, wanted to argue that trademark rules should allow a mark holder to prevent importation of a good with a similar trademark. It presented its objection by saying:

‘The proprietor of a trademark can rely on his property right in order to prevent an importer from marketing a product under an altered version of the trade mark used by the proprietor or with this consent unless it is necessary for the importer to use the amended version of the trade mark in order to allow the products in question to be marketed in the member state of import without adverse consequences.’

Essentially, the British government had to summarize and reiterate half the ECJ’s principles in order to even state the qualification that it wished to advocate.

### *Conclusions*

This paper has examined member state attempts to oppose judgments of the European Court of Justice and explores some reasons why they can be ineffective, even in disputes where conditions would seem to leave them particularly well equipped to counter the ECJ. Intellectual property rights disputes should constitute the

'hard' cases for the ECJ, where member states should be able to apply pressure to it, backed up by widespread disapproval of its case law in national ministries and clear treaty language supporting them, which makes their consistent inability to do so very striking.

Although much data preparation remains to be done, and it is hoped that later versions of this paper will present more systematic evidence in support of the contentions that are presented here, the paper has nonetheless tried to show some of the interesting implications of the IPR disputes to our understanding of ECJ – member state interaction. This set of cases highlights the importance of rapid litigation, organized and concerted strategies from litigants and the quick accumulation and institutionalization of precedent to the ECJ's capacity to disregard pressure from the member states. In such circumstances member states seem fairly ineffective at opposing the Court, even when they are largely agree that they disapprove of its case law. One reason for this could be that organizing a concerted attack on the Court is simply more difficult, in terms of coordination, than intergovernmentalist literature assumes. Getting a consolidated position and countering the court in time, before the next case has arisen appears to be a challenge for them, particularly when the process is driven by a group of resource rich and focused litigants. Moreover, after a more extensive set of judge made rules had been constructed and deployed in decisions, such pressure might nonetheless be ineffective.

Figure 1: Number of Annual References Concerning Intellectual Property Rights

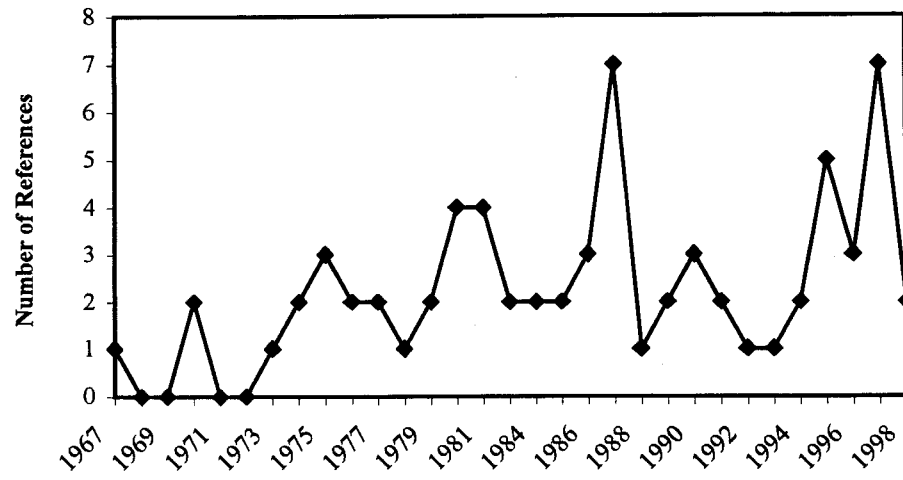
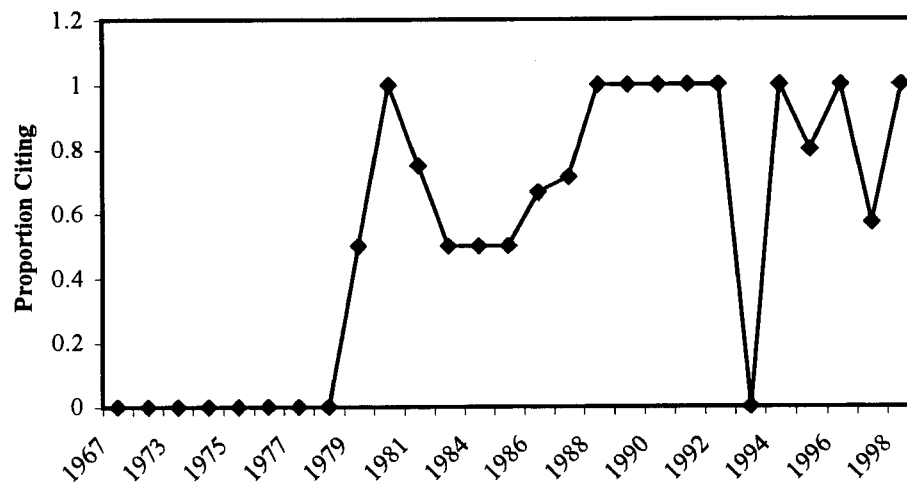


Figure 1: Proportion of Decisions in Intellectual Property Rights Disputes Citing Precedent



- Alter, K. (1998). "Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice." International Organization 51(1): 121-47.
- Alter, K. (2001). Establishing The Supremacy of European Law. Oxford, Oxford University Press.
- Alter, K. and S. Meunier-Aitsahalia (1994). "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision." Comparative Political Studies 26: 535-61.
- Alter, K. and J. Vargas (2000). "Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy." Comparative Political Studies 33(4): 452-482.
- Bentley, L. and B. Sherman (2001). Intellectual Property Law. Oxford, Oxford University Press.
- Burley, A. M. and W. Mattli (1993). "Europe Before the Court: A Political Theory of Legal Integration." International Organization 47: 41-76.
- Cornish, W. R. (1996). Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights. London, Sweet and Maxwell.
- Craig, P. P. and G. De Búrca (1998). EC Law : Text, Cases, and Materials. Oxford, Oxford University Press.
- Garrett, G. (1992). "International Cooperation and Institutional Choice: The European Community's Internal Market." International Organization 46: 533-60.
- Garrett, G. (1995). "The Politics of Legal Integration in the European Union." International Organization 49: 171-81.
- Garrett, G., D. Kelemen, et al. (1998). "The European Court of Justice, National Governments and Legal Integration in the European Union." International Organization 52: 149-76.
- Leith, P. (1998). Harmonising European Patent Laws: Why so little call for a European appellate system? Lawmaking in the European Union. P. P. Craig and C. Harlow. London, Kluwer Law International: 511-28.
- McCown, M. (2001). The Use of Judge Made Law in European Judicial Integration: Precedent Based Arguments in EU Inter-Institutional Disputes. European Community Studies Association Biennial Conference, Madison, Wisconsin.
- McCown, M. (2002). The Judge Made Law of the European Court of Justice. American Political Science Association Annual Conference, Boston.
- Rawlings, R. (1993). "The Eurolaw Game: Some Deductions from a Saga." Journal of Law and Society 20(3): 309-40.

- Scharpf, F. (1996). Negative and Positive Integration in the Political Economy of European Welfare States. Governance in the European Union. G. Marks, F. Scharpf, P. Schmitter and W. Streeck. London, Sage Publications.
- Stein, E. (1981). "Lawyers, Judges and the Making of a Transnational Constitution." American Journal of International Law 75: 1-27.
- Stone Sweet, A. and T. Brunell (1998). "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." American Political Science Review 92: 63-81.
- Stone Sweet, A. and J. Caporaso (1998). From Free Trade to Supranational Polity: The European Court and Integration. European Integration and Supranational Governance. W. Sandholtz and A. Stone Sweet. Oxford, Oxford University Press: 92-133.
- Tritton, G. (2002). Intellectual Property Rights in Europe. London, Sweet and Maxwell.
- Vintje, T. (1995). "Harmonizing Intellectual Property Rights in the European Union: Past, Present and Future." European Intellectual Property Review: 361.
- Weiler, J. (1994). "A Quiet Revolution: The European Court of Justice and its Interlocutors." Comparative Political Studies 26: 510-34.