Index

Absatzmarkt 205, 218, 223, 539–548, 560–563
abus de droit 435–437
acquiescence 335
acquis, European law 535
actio doli 34, 35
advertising
capacity See Werbekraft
comparative 340, 532–533, 549–550
hidden See advertising, subliminal
market See Werbemarkt
shock 369
subliminal 368, 549
Agreement on Trade-Related Aspects of
Intellectual Property Rights See TRIPS
Agreement
Akerlof, George A. 289
ALI Principles 228–232, 234–236
Alien Tort Statute (ATS) 464–478
alternatives
American Law Institute’s Intellectual
Property: Principles Governing
Jurisdiction, Choice of Law, and
Judgments in Transnational Disputes
of 2007 See ALI Principles
American Rice test 161–164, 522–525
antidilution See dilution
antisuit injunction 451
antitrust
antitrust/unfair competition merger 315–317
concurrence 563–565
international 220–225, 249, 250, 433–464, 486, 488, 496, 537
Apollinarisbrunnen judgment (Reichsgericht)
29–31, 55, 310–311, 326
applicable law (typology)
advertising, comparative 549–550
advertising, misleading (deceptive) 549–550
advertising, subliminal 549–550
antitrust/unfair competition concurrence 563–565
breach of contract, inducing 566–571
breach of statutory duties 565–566
bribery of a competitor’s employees 566–571
call for boycotting a market participant 566–571
cold calling 555–556
defamation 566–571
enticing away a competitor’s employees 566–571
falsehood, malicious/injurious 549–550, 566–571
geographical indications 551–553
harassment 553–554
initial-interest confusion 556–560
lottery, bundling of commercial offers with 553–554
passing off (English doctrine) 549–550
postsale communication/competition 549–550
postsale confusion 556–560
privacy, invasion of 555–556
product imitation 560–563
psychological pressure 553–554
spamming, e-mail 555–556
theft of trade secrets 566–571
trade name (work title) infringement 551–553
trademark blurring 556–560
trademark dilution 556–560
trademark infringement, confusion-based theory 549–550, 551–553
trademark infringement, non-confusion-based theories 556–560
applicable law (typology) (cont.)
trademark infringement, preparatory activity 551–553
trademark tarnishment 556–560
asymmetry of information 288–290
ATS See Alien Tort Statute
Ausstattung See trade dress
Auswirkungsort 495
Auswirkungsprinzip See effects principle
bad faith
registration 40
use 103, 153, 168, 226, 228, 506, 520
bait-and-switch scheme 345, 357, 558, See confusion, initial-interest
Baxter, William 418–421
Beale, Joseph 388
Begehungsort See Einwirkungsort
Berne Convention 259, 260
Berne Convention for the Protection of Literary and Artistic Works See Berne Convention
best law See better-law approach
better-law approach 257, 258, 420
bilateral tort See bilateral act
Blackstone
Commentaries 106
concept of property 91
Blackstone, William 299
blocking statutes 440
Bluntschli, Johann Caspar 385
blurring 350–353, 556–560
boycott 564, 568
breach of contract, inducing 566
breach of statutory duties 374–375, 496, 556, 565–566
Brewster, Kingman 442
bribery of a competitor’s employees 566, 570
Brown, Ralph S. Jr. 121, 123, 337, 342, 347
bull’s-eye approach 206
bundle of rights 134, 195, 230, 485
Callmann, Rudolf 156–159
cases analogous to trademarks See trademark, technical
cause of action, transitory 165–166, 242, 478, 521
Cavers, David 391
center of gravity 206
Chamberlin, Edward Hastings 121
characterization 214, 533–538
autonomous 534, 536, 555
Charming Betsy standard 452, 454
Chicago school of economics 123, 305
civilization (of international transacting and commerce) 383, 396, 431
claims against the world at large 300–301, 306, 308, 311, 312
Clark, John Maurice 278
classification See characterization
claw back judgment 440
CLIP Principles 228–232, 234–236
corner See harassment
Cohen, Felix S. 112–114, 120, 304–305
cold calling 360, 366, 555–556
collision-of-interests principle See marketplace, principle
collision-of-rights approach 262–264, 265–268
comitas approach 268–270
comitas gentium 383–384
comity
document of international comity 381–490
positive comity 462
commercial practice
aggressive 290–293, 360, 366
misleading 290–293
comparative-impairment approach 418
competition
concept of “economic competition” 275–285
dynamics of 278–285
horizontal 285–287, 309–314
integrated model 222, 224, 330, 361–365, 369–370
monopolistic 278
perfect 277
vertical 285–287, 309–314
workable 277–278
concurrency déloyale 16, 28
conflicts justice 388, 391
confusion
bystander 353
downstream 354
initial-interest 341–344, 353, 357–359, 556–560
point-of-sale 341, 353, 356, 556
status 356, 359
constructive citizenship (Bulova test) 527, 575
consumer
as a citizen 330, 363, 367–370, 379, 555–556
association 329, 336, 337, 365, 377, 541
decision making, limitations of 293–294
decision making, stages of 287–293
paradigm of the “informed consumer” 283
self-determination See consumer, sovereignty
sovereignty 284, 287, 293
content selection (choice-of-law) See jurisdiction selection
contra bones mores See morals and custom
conversion period (trademark litigation) 335
copyright law 107, 124, 142, 238–241, 247, 249, 252, 317–325
act-of-state doctrine 242
common law protection 246
conduct foundation 252
international 238, 239, 241, 242, 243, 244, 260, 267, 521
corruption 566
cosmopolitanism See global legal pluralism
costs
consumer search costs 124, 252, 288, 305, 343, 352, 514, 559
of reorientation See costs, of switching of switching 358, 359, 559, 560
country-of-origin principle 192
Currie, Brainerd 410, 418, 422, 478
cyberlaw 192, 262–264, 265–268
Dawn Donut doctrine 147
defamation 550, 566, 568
Derenberg, Walter 158
de-Savignization of choice of law 270
designations of origin See geographical indication
deterrence, inverse 462
Deutsch, Erwin 205
discriminatory application of regulatory norms 393, 472–474, 487, 489, 515, 524, 546
distinctiveness 350, 353, 356, 359, 558
droit idéal 397, 408, 430, 435–437
droits sacrés de la production et du travail 16
effects testing See effects principle
Einwirkungsort 207, 216, 495, 543
Einwirkungsprinzip See Einwirkungsort
Endemann, Wilhelm 25
enticing away a competitor’s employees 215–216, 566, 569–570
Entwicklungsbegünstigung, principle of 44
equity balancing 520
constructive trust 239
court of equity 79–84, 166
goodwill protection 461
international-individual equity 510–512, 514, 519
law and equity 78–4
market-based right 344–347
trademark register 323–325
Erie doctrine 77, 134–141, 144, 150, 467
espionage, industrial See theft of trade secrets
estoppel doctrine 105
expectations, of the parties See foreseeability of effects
extraterritoriality “domestic” 147–149, 246–247, 251–256
antitrust 437–455
Bulova test 159–164
common law goodwill extension (Steele progeny) 171–185
common law rights 128–134, 251–256
drawbacks 481–488
enforcement efficiency 481–488
equitable rights limitlessness 238–241
presumption against 244, 470, 475, 478
<table>
<thead>
<tr>
<th>Term</th>
<th>Page Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>conflicts principles (academic suggestions)</td>
<td>226–236</td>
</tr>
<tr>
<td>extraterritoriality</td>
<td>237–251</td>
</tr>
<tr>
<td>geographical indications (hybridity)</td>
<td>376–378</td>
</tr>
<tr>
<td>incentive structures</td>
<td>317–325, 342–344</td>
</tr>
<tr>
<td>international system of protection</td>
<td>60</td>
</tr>
<tr>
<td>natural rights conception</td>
<td>18</td>
</tr>
<tr>
<td>product imitation (“quasi IP rights”)</td>
<td>370–373</td>
</tr>
<tr>
<td>segmentation</td>
<td>484–486</td>
</tr>
<tr>
<td>substantivism</td>
<td>256–268</td>
</tr>
<tr>
<td>territoriality</td>
<td>237–251</td>
</tr>
<tr>
<td>uniformity</td>
<td>317–325</td>
</tr>
<tr>
<td>intent, of defendant</td>
<td>80, 81, 211–214, 217, 505–507, 517–518, 547–548</td>
</tr>
<tr>
<td>interest analysis (choice of law)</td>
<td>268, 411, 418–421</td>
</tr>
<tr>
<td>International News Service</td>
<td>110, 303, 310, 314</td>
</tr>
<tr>
<td>international-privatrechtliche Gerechtigkeit</td>
<td>See conflicts justice</td>
</tr>
<tr>
<td>IP rights</td>
<td>See intellectual property</td>
</tr>
<tr>
<td>ius commune</td>
<td>261</td>
</tr>
<tr>
<td>ius cosmopoliticum</td>
<td>396–398, 417, 479</td>
</tr>
<tr>
<td>Japanese Transparency Proposal</td>
<td>228–232, 234–236</td>
</tr>
<tr>
<td>Jessup, Philip C.</td>
<td>396–398, 409–410</td>
</tr>
<tr>
<td>Joerges, Christian</td>
<td>268–270</td>
</tr>
<tr>
<td>Joint Recommendation Concerning</td>
<td>See WIPO Recommendation</td>
</tr>
<tr>
<td>Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet</td>
<td>See WIPO Recommendation</td>
</tr>
<tr>
<td>Juenger, Friedrich K.</td>
<td>190, 256, 262</td>
</tr>
<tr>
<td>Jüngel, Friedrich</td>
<td>38</td>
</tr>
<tr>
<td>jurisdiction</td>
<td>diversity-of-citizenship 136</td>
</tr>
<tr>
<td>personal</td>
<td>55, 65, 171, 459, 472–474, 487, 524, 531, 574</td>
</tr>
<tr>
<td>universal</td>
<td>470, 477</td>
</tr>
<tr>
<td>jurisdiction selection (choice-of-law)</td>
<td>389, 391</td>
</tr>
<tr>
<td>Kahn, Franz</td>
<td>191, 491</td>
</tr>
<tr>
<td>Katzenbach, Nicholas de Belleville</td>
<td>186</td>
</tr>
<tr>
<td>Kauf im Ausland decision</td>
<td>See Gran Canaria</td>
</tr>
<tr>
<td>Kegel, Gerhard</td>
<td>391, 406</td>
</tr>
<tr>
<td>Kidd/Derringer doctrine</td>
<td>90–93, 127</td>
</tr>
<tr>
<td>Kindersaugflaschen doctrine</td>
<td>68–71, 207–208, 543</td>
</tr>
<tr>
<td>Kohler, Josef</td>
<td>15, 21–24, 34, 36, 37, 53, 57, 318</td>
</tr>
<tr>
<td>Konsumentensouveränität</td>
<td>See consumer, sovereignty</td>
</tr>
<tr>
<td>Kramer, Larry</td>
<td>418–421</td>
</tr>
<tr>
<td>Kronstein, Heinrich</td>
<td>393</td>
</tr>
<tr>
<td>Kummer, Max</td>
<td>308–309</td>
</tr>
<tr>
<td>laches</td>
<td>335</td>
</tr>
<tr>
<td>law merchant</td>
<td>396, 467</td>
</tr>
<tr>
<td>law of the protecting country</td>
<td>See lex loci protectionis</td>
</tr>
<tr>
<td>Leflar, Robert</td>
<td>257</td>
</tr>
<tr>
<td>legal certainty</td>
<td>45, 91, 324, 421, 435, 503</td>
</tr>
<tr>
<td>legal community of nations (Savigny)</td>
<td>See völkerrechtliche Gemeinschaft (Savigny)</td>
</tr>
<tr>
<td>lex causae</td>
<td>416</td>
</tr>
<tr>
<td>lex domiciti communis</td>
<td>71, 205, 256, 481, 531</td>
</tr>
<tr>
<td>lex fori</td>
<td>192, 214, 268, 404, 411, 419</td>
</tr>
<tr>
<td>lex lata</td>
<td>539</td>
</tr>
<tr>
<td>lex loci delicti commissi</td>
<td>64, 68, 222, 412, 567</td>
</tr>
<tr>
<td>lex loci protections</td>
<td>7, 9, 72, 74, 188, 195, 198, 203, 231, 494, 539, 551, 552, 557, 558, 560, 561</td>
</tr>
<tr>
<td>lex mercatora</td>
<td>261, 396</td>
</tr>
<tr>
<td>licensing agreement</td>
<td>335</td>
</tr>
<tr>
<td>limitation</td>
<td>335</td>
</tr>
<tr>
<td>lingua franca</td>
<td>267</td>
</tr>
<tr>
<td>Lobe, Adolf</td>
<td>56</td>
</tr>
<tr>
<td>Locke, John</td>
<td>107–108, 301</td>
</tr>
<tr>
<td>locus delicti rule</td>
<td>See lex loci delicti commissi</td>
</tr>
<tr>
<td>Lohengrin</td>
<td>“legal Lohengrin” 464, 476</td>
</tr>
<tr>
<td>loi d’application immédiate</td>
<td>389, 413</td>
</tr>
<tr>
<td>lottery, bundling of commercial offers with a</td>
<td>554</td>
</tr>
<tr>
<td>Lotus case</td>
<td>434–435</td>
</tr>
<tr>
<td>Lowenfeld, Andreas F.</td>
<td>443–445</td>
</tr>
<tr>
<td>Luhmann, Niklas</td>
<td>426</td>
</tr>
<tr>
<td>Madrid Agreement Concerning the International Registration of Marks</td>
<td>60</td>
</tr>
<tr>
<td>Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods</td>
<td>60</td>
</tr>
<tr>
<td>Magnus, Julius</td>
<td>38</td>
</tr>
<tr>
<td>Mancini, Pasquale Stanislao</td>
<td>385</td>
</tr>
<tr>
<td>Mann, Frederick A.</td>
<td>436</td>
</tr>
<tr>
<td>Mannington Mills balancing (antitrust)</td>
<td>See Timberlane balancing (antitrust)</td>
</tr>
<tr>
<td>market</td>
<td>analysis, technique and factors 504–505</td>
</tr>
<tr>
<td>disruption</td>
<td>564</td>
</tr>
</tbody>
</table>
market (cont.)

disturbance See market, disruption

language 289, 339, 340

market for lemons 289

market mechanism 310, 311, 330, 339, 348, 362, 365, 369, 370, 373

market mechanism, triangular structure 285–287, 370


merger of markets 545–548

marketplace

marketplace (effects) rule See marketplace, principle


market-related act 209, 214, 215, 315

Marktbehinderung and Marktstörung See market, disruption

Max Planck Institute’s Principles on Conflict of Laws in Intellectual Property of 2011 See CLIP Principles

McBee test 161–164

merchandising 127, 556

Merryman, John Henry 428

Minor, Raleigh C. 137


transnational goodwill misappropriation 152–156

Mohl, Robert von 15

monopoly 276

“plain monopoly” 80

monopoly phobia 113, 122

state-granted 9, 20, 62

morals and custom 33

mosaic approach 498

multilateralism 191, 195, 246, 251, 256, 269, 389, 393, 400, 414, 494, 521, 564

natural law 16, 18, 21, 106, 240

neminem laedere 313–314

neo-statutist theory 268

nerve-center approach 240–241, 258

Neumayer, Karl 413

Nims, Harry D. 150

noninterference, principle of 436, 438

nonintervention, principle of See noninterference, principle of

notice, constructive (Lanham Act) 145, 146, 148

Nussbaum doctrine 64–68, 70

Nussbaum, Arthur 256, 387, 481, 531

Nussbaum/Stahlexport doctrine See Nussbaum doctrine

oligopoly See monopoly

ordre public 409, 414

international 415–417

transnational 415

par condicio concurrentium 313, 374, 545

parasitism See misappropriation

Paris Convention 5, 60, 148, 152, 192, 193, 260, 312, 535

Paris Convention for the Protection of Industrial Property See Paris Convention

passing off 78–90, 113, 169, 326, 334, 349

“classical trinity” of passing off 364

English doctrine 364–365, 550, 562

patent law 16, 56, 59, 107, 124, 142, 237, 238, 247, 249, 252, 317–325, 379

common law protection 246

conduct foundation 252

international 59, 238, 242, 243, 244, 267

personality rights 15, 21–24, 27, 115, 157, 299, 307, 379

“upgrading” of rights 57

consumer’s “economic personality right” 367–370

detachment of trademark rights 95–99

immaterial goods (Immaterialgüter) distinction 318–319

privilege/personality dichotomy 32–39

worldwide scope of rights 53–57, 61

Pickett, Charles 120

place-of-business rule 65

place-of-conduct rule 65, 66

poaching of foreign employees See enticing away a competitor’s employees

polypoly See monopoly

Pound, Roscoe 300

praesumptio similitudinis 407

predictability, of effects See foreseeability, of effects

preparatory activity 70, 208, 543, 551

prescription See limitation

principle of good faith, public international law 437

principle of trademark promotion and fostering See Entwicklungs begünstigung, principle of

prisoner’s dilemma 420

Downloaded from https://www.cambridge.org/core. IP address: 54.202.195.117, on 12 Apr 2017 at 10:17:51, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316651285
privacy protection 360, 366–367, 379, 555–556
private attorney general 337, 448, 449, 457–463
private/public law distinction 245, 392, 411, 413
private law order 501–503
privilege See monopoly, state-granted
product imitation 306, 356, 370–373, 556, 560–563
propriété de son auteur 16
propriété industrielle 16
propriété intellectuelle See intellectual property
propriété littéraire et artistique 16
psychological pressure 360, 368, 553
qualification See characterization
Rabel, Ernst 537
Rappeport, Jack J. 206
realism, legal 76, 110–127, 304, 305, 388, 392
realist attack See realism, legal
Recht höherer Ordnung 41
recognition among the consuming public 46, 62, 253
regime of higher order and hierarchy See Recht höherer Ordnung
rent transfer 186
replication claim See advertising, comparative
Restatement (First) of Conflict of Laws 388
Restatement (Second) of Conflict of Laws 258, 390
Restatement (Second) of Foreign Relations Law 442
Restatement (Third) of Foreign Relations Law 390, 443, 445
Restatement (Third) of Unfair Competition 298, 312, 326, 549
rights analogous to trademarks See trademark, technical
root copy doctrine 238–240
rule of reason
jurisdictional 442–445
Timberlane/Wells Fargo 161, 162, 173
sales market See Absatzmarkt
samaritan, myth of the public samaritan 337
Sandrock, Otto 198
Scalia, Antonin 390, 452, 453, 467
Schechter, Frank I. 102, 115, 117–121, 350
Schechter, Roger E. 147–149, 246–247
Schricker, Gerhard 221
Selbstgenügsamkeit, of the trademark register 45
self-sufficiency of the trademark register See Selbstgenügsamkeit, of the trademark register
selling below production costs 563–565
separate attachment 413–415
shockvertising See advertising, shock
single-governing-law approach See substantivism
Sitte See morals and custom
Smith, Adam 279
soft law, principles of choice-of-law 225–236
Sonderanknüpfung See separate attachment
spamming, e-mail 366, 555
statutism 389
Stauffer doctrine 148
Steindorff, Ernst 257–258
Stigler, George J. 288
Story, Joseph 384, 400–402, 490
subjective right, civil law paradigm 305–309
substantivism 256–268
tarnishment 350–353, 556–560
telle quelle, acknowledgement of foreign rights 266
territoriality
“intrinsic” 248
“political” 248
civil law doctrine 193–203
of rights 53–60, 72, 128–134, 149, 190, 193–203, 229, 230, 238, 244–246
of rights, segmentation 484–486
quasi continental (US doctrine) 244–246
unfair competition law 64
Timberlane balancing (antitrust) 440–441, 450
trade diversion 88, 94–102, 126, 178, 182, 349
trade dress 32, 40, 46, 56, 230
trademark
“grounded intangibility of rights” 321–325
trademark (cont.)
“nonformalism and nonterritoriality” of rights 149–151
abandonment 105, 325
cancellation 325
coexistence 335
depropertization 329–331, 531–533
market-based right 102–110, 167, 186, 201, 324, 344–347
multifunctionality 49
proportionality 46–52, 78–84, 110–121, 126–127, 186–189, 190, 301–305
propertization, international 185–186, 265–268, 487–488
technical 84–90, 91–92
trademark-as-property paradigm 110–127, 187, 305, 318, 330, 342, 353, 553
universality of rights 53–60, 90–93, 128–134
upgraded right 36–39
transnational law, hybridity and universality 397, 409–410, 427, 429, 466–469
TRIPS Agreement 5, 192, 259, 260, 535
Troller, Alois 197, 198
Troller, Kamen 204
trust, constructive 239

Ulmer, Eugen 42–46, 50, 62, 201, 323, 326, 334, 344
unclean hands 335
unfair competition law
desocialization 329–331
socialization 50–52
trinity of purposes 224
universality of fairness standards 60–63

Uniform Domain-Name Dispute-Resolution Policy 261
unilateral conflicts rule See unilateralism
unilateralism 192, 493, 521–533, 536
unjust enrichment See misappropriation
unlawful scheme 164–169, 179

Vanity Fair test 161–164, 177, 508, 522, 523
Verkehrsgeltung See recognition among the consuming public
vested rights approach (Beale) 388
völkerrechtliche Gemeinschaft (Savigny) 402–406
Vorrangthese 328

welfare maximization 421–425, 473
well-known marks doctrine 152–156
Wells Fargo/Timberlane test 161–164
Weltrecht 397, 406–407, 410, 431
Wengler, Wilhelm 221, 223, 413
Werbeauftrag 42–44
Werbeversicherung 208, 218, 494–497, 539–548
Westphalian state 417, 426
Wettbewerbsstellung 308–309
WIPO Model Provisions on Protection against Unfair Competition 536
WIPO Recommendation 226–228, 233–234, 510–512
worldmark 156–159

Zitelmann, Ernst 386, 406–407, 410
Zollverein 14
Zünfte, System der Zünfte 10, 39
Zweigert, Konrad 413