

Intellectual Property Rights as Human Rights: An Analysis

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Abstract

Human Rights law and Intellectual Property Rights (IPR) law are entirely two different areas of law. Since their beginning, they grew isolated from each other. Neither of them infringed on each other's domains. Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows. The increasing importance of intellectual property rights has led to the need for clarifying the scope of human rights provisions protecting individual contributions to knowledge. A number of new challenges need to be addressed concerning contributions to knowledge, which cannot effectively be protected under existing intellectual property rights regimes. According to this view, IPR law infringes on the different areas of Human Rights law, especially when economic, social and cultural rights are concerned. Another view is that both IPR Law and Human Rights law can co-exist with one another. No reference to human rights was seen in the fundamental treaties of IPR law, such as the Paris Convention or the TRIPS Agreement. Thus, This article examines the different aspects of the relationship between intellectual property rights, human rights. It analyzes existing knowledge protection-related provisions in human rights treaties. It also examines some of the impacts of existing intellectual property rights regimes on the realization of human rights.

Keywords: Human Rights, Intellectual Property Rights, increasingly, TRIPS Agreement.

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INTRODUCTION

In the present day, world human rights norms have become rule of the day to measure the sustainability of cultures, religions, ideologies, and the practices of states, international organizations, and even corporations. The moral significance of and practical respect for human rights has grown so much that human rights are now described as a global religion. They have established a new standard for civilization. Just as raw materials and labour were key resources in the first industrial revolution, intellectual property is a central asset in information or knowledge based economy. The manner in which creative works, cultural heritage, and scientific knowledge are turned into property has significant human-rights implications.¹ Recently there is an emergence of discontentment, which is termed as the human rights paradox in intellectual property. “The allocation of rights over intellectual property has significant economic, social and cultural consequences that can affect the enjoyment of human rights”.² As a concept, knowledge covers vast ground and has multiple meanings. In the present day, the term ‘knowledge economy,’ is used to refer to the importance of knowledge as a contemporary commodity. We are living in a world in which the moral legitimacy of cultures, religions, ideologies, and the practices of states, international organizations, and even corporations is being measured against human rights norms.³ Intellectual property regimes have moved to the centre stage of trade regulation and global markets. The old capitalism was a capitalism of goods, factories and labour. But now factories and labour, even skilled labours are in abundant supply. The new capitalism is at its core about the control of information and knowledge. It is for this reason that issues concerning the design of intellectual property rights have become so important and pressing.⁴ Over the past two decades, there have been major changes at the municipal and international level, which necessitated a novel and pragmatic approach

¹Audrey R. Chapman, “Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)”, Copyright bulletin, UNESCO PUBLISHING, Vol. XXXV(July–September 2001), digital version available @<http://unesdoc.unesco.org/images/0012/001255/125505e.pdf>

²Statement by the Committee on Economic and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. Follow-up to the day of general discussion on article 15.1(c), Monday 26 November 2001, Human Rights and Intellectual Property. United Nations Committee on Economic, Social and Cultural Rights, E/C.12/2001/15, 14 December 2001.

³Abadir M. Ibrahim, International Trade and Human Rights: An Unfinished Debate, 14 German Law Journal 321-338 (2013), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1505>

⁴LutfunNahar, “Human Rights Perspective on the role of WIPO in Promoting Intellectual Creativity”.

for a broader understanding of intellectual property protection. In 1994, the agreement establishing the World Trade Organization (WTO) was adopted and as a part of it an agreement on the Trade Related Aspects of the Intellectual Property Rights (TRIPS) also comes into force. The TRIPS agreement laid down the uniform standards on the grant and enforcement of the Intellectual Property Rights (IPRs). The Globalization of the IPRs also simultaneously triggered the debate on the relationship between the human rights and the intellectual property, because many developing countries, particularly the least developed countries, are not in a position to implement the TRIPS standards in their jurisdiction without further compromising their development at the cost of human rights. The intellectual property rights are considered to be diametrically opposite to the human rights, concerned only with the economic returns without any social perspective. It is because the character of the intellectual property rights as compared to human rights is perhaps not fully appreciated so far. The Intellectual Property regimes are created with a social perspective seeking to balance between:

1. The moral and economic rights of the creator or the inventors in the form of patents,
2. With the wider interest and needs of the society.

The main justification which is given in support of patent is stated to be that those incentives and rewards to inventors and the creators' results in the benefits for the society. The human rights approach to the intellectual property takes what is often an implicit balance between the rights of the inventors and creators and the interest of the wider society within the intellectual paradigms and makes it far more explicit and exacting. Though the intellectual property rights have become contextualized in the diverse policy areas for example trade, culture and heritage, investment, environment, food security, scientific and technological progress. But despite of these growing linkages, the character of the intellectual property rights as human rights, as well as the relationship between the right to the intellectual property and other human rights have not been fully explored.

Thus the article is going to analyse some of the issues which are necessary to be tackled out to ensure a better understanding and the balance between the intellectual property rights and the human rights. Apart from this we will also be dealing with the issues ensuring the impact of TRIPS on the national legal frameworks in order to realize the human rights much adaptable to the existing intellectual property rights. This project also examines the extent to which the international intellectual property law and human right conventions addresses these controversial questions of the links between intellectual property rights and the human rights.

HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

The relationship between IP rights and human rights has been analysed through four different lenses. While there is little dispute between official reports and academic writings that Article 27 and Article 15 require a balance to be struck between individual rights and

public rights of access to science, there are critical differences on the foundational principles that are claimed to guide the balancing exercise.⁵ A large body of legal scholarship draws on Helfer's seminal analysis of the interface between human rights and IP rights. According to Helfer, the evolution of international law treaties at the beginning of the millennium disclosed two distinct approaches premised on "radically" distinct normative foundations of IP rights as either coexisting or in conflict with human rights. The "co-existence" view claims that the paradox and conflict between IP rights and human rights, is only apparent. Some argue that the conflict is illusory because IP rights, or some aspects of them,⁶ are fundamental human rights too, albeit of "weaker" weight than other rights. Others suggest that the normative content of the obligations prescribed by human rights instruments are so open-ended and general as to say very little on the impact of IP rights on the realization of other rights. By contrast, the "conflict" view argues that IP rights are not fundamental human rights but instrumental legal tools to further social and economic purposes. However, the so-called conflict view might arguably be more accurately described as the "primacy of human rights" view on the grounds that the consistent articulation of this view across a number of official reports and comments from different UN organizations in the past decade does not strictly maintain that IP rights cannot co-exist with human rights, but rather that whatever balance is struck between private and public interests in IP, "the primary objective and obligation of States is to promote and protect human rights." As Helfer himself notes, many of the documents and reports, while sharply critiquing TRIPS, also identify shared goals and points of communality between the two regimes and seek to articulate a human rights approach to TRIPS that

⁵Chapman, *supra* note 2; Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 *Minn. Intell. Prop. Rev.* 47 (2003), republished in 22 *Neth. Hum. Rts. Q.* 167 (2004) [hereinafter *Conflict or Coexistence*]; Peter K. Yu, *Reconceptualising Intellectual Property Interests in a Human Rights Framework*, 40 *U.C. Davis L. Rev.* 1039 (2006–2007); Estelle Derclaye, *Intellectual Property Rights and Human Rights: Coinciding and Cooperating*, in *Intellectual Property and Human Rights*, *supra* note 3, at 133; Reports of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the Secretary-General, adopted 14 June 2001, U.N. ECOSOC, Comm'n on Hum. Rts., 52nd Sess., U.N. Doc. E/CN.4/ Sub.2/2001/12, ¶¶ 10–15, 27–58 (2001) [hereinafter *Impact of TRIPS*]; The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner, *supra* note 15; UDHR, *supra* note 1; ICESCR, *supra* note 1

⁶See, e.g., Yu, *Reconceptualising Intellectual Property Interests in a Human Rights Framework*, *supra* note 37, arguing that Articles 27(2) and 15(c) reflect the existence of a fundamental human right "to the protection of interests in intellectual creations" as a "fundamental, inalienable and universal" entitlement. *Id.*; UDHR.

reconciles states treaty obligations. A closer look at the claimed contrast between the co-existence and conflict views discloses a spectrum of different and overlapping claims on the rationale, status, and relative weight of IP laws and human rights laws.

The remainder of this article seeks to cast a new light on the foundational questions beleaguering this field and an analysis of the philosophical ideologies and legal cultures of IP rights and patents through the juxtaposition of individual rights to the protection of intellectual creations in an article concerned with public rights of access to science in the text of the UDHR.⁵⁴ The remainder of this article revisits the original archived UN documentation on the history of the drafting of Article 27 and argues that the paradoxical compromise may be elucidated by reference to the underlying contrasting ideological perspectives on human rights and legal cultures of IP rights and patents. Sections III and IV set out the theoretical and cultural contexts for the analysis of the historical sources on the drafting of Article 27 discussed in Section V.

INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS AT A GLANCE:

Intellectual Property Rights as the name suggests are the rights given to an inventor or the creator as a reward:

1. For creating or inventing something new as a result of his own intellect and importantly
2. To benefit the society out of that invention.

The Human Rights are the rights which are given to the human being not as a matter of chance or choice but as a matter of his being a human. They are the rights ensuring the basic survival of the human beings.

Now, if we consider out the nature of Intellectual Property Rights with reference to the human rights then we found that in the human rights paradox:

1. IPR's are non-fundamental human rights
2. Open to state interference to fulfil human rights obligations

Thus, after these definitions we can easily progress forward in understanding the debate between the two as well as the solution of the debate between the human rights and the Intellectual Property Rights.

THE DEBATE BETWEEN THE HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS:

Human rights and intellectual property rights are, to a large extent, fields of law that have evolved independently. On the one hand, intellectual property rights consist of statutorily recognized rights, which provide incentives for the participation of the private sector in

certain fields and seek to contribute to technological development. Intellectual property rights, such as, patents are near monopoly rights. This monopoly is offered by society in return for certain concessions such as information disclosure and a limited duration of the rights granted. On the other hand, human rights are fundamental rights, which are recognized by the state but are inherent rights linked to human dignity. Different kinds of links between intellectual property rights and human rights can be identified. For example, patent laws recognize that there is a socio-economic dimension to the rights granted and that a balance must be struck between the interests of the patent holder and the broader interests of society. Intellectual property rights also have direct and indirect impacts on the realization of human rights. For example, intellectual property rights include economic and moral elements. The latter can be linked to certain aspects of human rights. Finally, human rights treaties recognize certain rights pertaining to science and technology. The links between intellectual property rights and human rights have been acknowledged for many decades, as exemplified in the science and technology related provisions of the Universal Declaration of Human Rights (Universal Declaration).⁷ Nevertheless, the main debates concerning the links between human rights and property rights focused for a long time on real property rights rather than intellectual property rights. The adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)⁸ and its implications for developing countries have fundamentally changed the nature of the debate concerning intellectual property rights and human rights.

Thus, the very basic debate is that how a balance to be maintained between the Intellectual Property Rights and the human rights because the smooth existence of both is required for the appropriate and rich economic and the social development of the society as a whole.

DISTINCTION BETWEEN IPR AND HUMAN RIGHTS

It is apparent that the drafters understand the tension between the analysis they put forward and the underlying human rights framework, which serves as a reference point. On the one hand, the draft brings in inventors within the scope of Article 15(1) c. On the other hand, the draft is at pains to attempt a distinction between the rights recognised under the Covenant and existing intellectual property rights. The draft seeks to emphasize the distinction between human rights and intellectual property rights regimes. Human

⁷Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Session. Resolutions, pt. 1, at 71, art. 27, U.N. Document. A/810 (1948), reprinted in 43 Am. J. Int'l L. 127 (Supp. 1949)

⁸Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, 15 Apr.1994, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]

rights are deemed fundamental, inalienable, universal entitlements while intellectual property rights are statutory rights granted by the state which are temporary, can be traded, and whose enjoyment can be curtailed. The draft General Comment further indicates that while intellectual property rights also protect business interests, human rights do not necessarily protect business interests. However, the draft does not set any boundaries between the rights of the individual author and the rights that may accrue to businesses under intellectual property rights. In the context of innovations protected by patents, for instance, it is becoming increasingly difficult to dissociate ‘individual’ inventors from institutions with which they are associated. The draft General Comment does not seem to take into account the fact that today, there are few, if any, patented inventions which are commercially exploited by the individuals which can be identified as ‘inventors’ from the point of view of patent laws. The Draft’s response is to provide that it is only the ‘basic material’⁹ Hannah Arendt, *The Origins of Totalitarianism*, 2nd (Cleveland: Meridian, 1958), pp.296–297. 207 interests’ of authors and inventors that are protected under the Covenant.¹⁰ This constitutes an attempt to distinguish the monopoly rights provided through intellectual property rights from the protection available under the Covenant. This is not a sufficient analytical response because in practice it is difficult to distinguish the material benefits of individuals having contributed to an innovation from those of a company exploiting the innovation.

CONCLUSION

The creation of a human rights framework for intellectual property is still in an early stage of development. During this gestational period, government officials, international jurists, NGOs, and commentators, many of whom have divergent views concerning the appropriate relationship between human rights and intellectual property, have a window of opportunity to influence the framework’s substantive content and the procedural rules that mediate relationships among its component parts. In this conclusion, we briefly sketch three hypothetical futures for the framework and explain why each of these predictions is both plausible and likely to be contested by states and non-state actors.

Traditionally, intellectual property regimes sought to balance the rights of creators with the interests of the public to have access to artistic works and the very existence of

⁹Hannah Arendt, *The Origins of Totalitarianism*, 2nd (Cleveland: Meridian, 1958), pp.296–297

¹⁰Section 42(c), Draft General Comment No. 18, Human Rights Committee, General Comment 18, Non discrimination (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)

intellectual property rights was originally justified on the grounds that incentives and rewards to artists and inventors result in benefits to society. However, current developments tend to weaken these balances and to skew the system in favour of a much narrower range of interests. Commercialization has changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism intended to encourage investment and protect the resources of investors. The privatization of the public domain reflects this transformation. Rules protecting the IPRs are usually highly specific and have very effective enforcement machinery. On the other hand, the human rights set out in international treaties seem vague, indeterminate, non-specific and unenforceable. It would be difficult to use Human Rights treaties to counter rights set out in TRIPS and other IP treaties.