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Intellectual Property and Human Rights

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Chapter 5

Intellectual Property Rights and Human Rights: Coinciding and Cooperating

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INTRODUCTION

The discourse on the interface between intellectual property rights (IPR) and human rights is relatively recent. The debate was sparked at the end of the 1990s with the adoption of resolutions by several international bodies, and since then, the literature on the topic has grown. The debate has centered on whether IPR and human rights coexist or are in conflict. The ‘conflict approach’

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sees human rights and IPR as fundamentally conflictual rights, so that the first must necessarily ‘win’ over the second. The ‘coexistence approach’ sees both rights trying to answer the same question, that is, where to strike the right balance between giving an incentive to create and innovate whilst insuring the public has sufficient access to such creations and inventions, although disagreeing over where to strike that balance. The majority of commentators have accepted or assumed that the two were in conflict and focused on the resolution of these conflicts. Moreover, some of this literature and the documents issued by the UN institutions remain at the general and/or political, evem demagogic level.

However, in order to determine the precise nature of the relationship between human rights and IPR in depth, one has to revert to the fundamentals of IPR and therefore their justifications and aims and then examine how the legislature has transcribed these aims. This analysis reveals two important findings. First, there is no intrinsic conflict between IPR and human rights (at least no more than between other human rights themselves, if any). This is because IPR are themselves human rights and for this reason, they share the same goals as other human rights (sections II–IV). To this end, the article gives concrete examples and lists the areas where such absence of conflict exists (section IV). However, in some (rare) cases, ‘real conflicts’ indeed occur because of an excess of IPR protection results either from the legislation or from its interpretation by judges, or both. What needs to be done in these situations is to curtail IPR which do not respect other human rights and find specific tests so that courts can rectify the excess and the right balance can be achieved (if this cannot be solved internally, within the intellectual property laws themselves, by legislatures). Second, human rights and IPR do not ‘simply’ coexist but in fact most of them coincide from the outset, that is, they have the same goal (for example, the protection of privacy, of property or freedom of speech) and as a result, in most cases, because of this similarity or identity of goals, they even ‘cooperate’ (section V). The article focuses on EU law and the four main IPR namely, copyright, patents, trademarks and designs.

II. INTUITIONS

It is not difficult to imagine how the world would be without human rights. The two world wars have amply shown what the result is. The last of the two triggered a universal awareness of abuses by the world nations of human rights and their commitment to avoid them at international and regional level by the signing of the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR) (1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)⁵ and the European Convention of Human Rights (ECHR) (1950).

But what would the world be without IPR? It is not difficult to imagine as some countries have lived in such a situation until very recently. To take but one example, how was the situation in the USSR and its other dependent republics and countries before the perestroika and the fall of the Berlin wall? With a planned economy and markets controlled by the state, trademarks did not exist, or rather there was only one (the state’s). Authors and artists were constrained in their creations because of political reasons. As to innovation, it took place and at an excellent level, but it was financed solely by the state and corresponded to, mostly, defense or broader political ends (nuclear energy, rockets, satellites, submarines and so on). Other aims were barely considered. But we do not even have to look at ex-communist countries to illustrate how a world without IPR looks like, a simple trip back in time in Western Europe before the advent of copyright and patent laws. Similarly does the trick where authors and inventors depended on private patrons or sovereigns. It is not a surprise that IPR came with revolutions. Hence, the link between and even inclusion of IPR within human rights. IPR are intrinsically linked to a free market economy and a democratic society. With copyright, authors finally obtained the right to earn money by themselves (through publication of their works independently) rather than waiting for the patron or sovereign only and being paid by him or her, restricting therefore his or her ability to criticize power. These times were also those where perpetual monopolies on inventions or even simply some common (not innovative) businesses were granted by the monarch to the very few he trusted. Intellectual property laws have abolished this state of play and allow everyone who creates or invents something to obtain a copyright or patent for it. Trademark law also allows a free market economy as no right can exist in descriptive and generic terms, thereby avoiding monopolies. Even if copyright and patents give exclusive rights which may sometimes confer a monopoly, the latter are always limited in time and scope, keeping competition alive. Micro-economists tell us that such competitive state brings dynamic efficiency and with it, constant


6. This spans from (at least) Roman times until the eighteenth century. A good example is the dependence of the poet Horace on Maecenas’s generosity, cited by Cornes, above fn. 1, at 143.

innovation. They also tell us that competitive markets and the innovation that ensues leads to social welfare. So even if IPR were not human rights, they would still be conducing of human well-being. And what do human rights try to achieve? Human well-being. Q.E.D. 10 there is no conflict between human rights and IPR. To that end, they both set rules so that human beings respect other human beings.

III. PHILOSOPHICAL UNDERPINNINGS

An analysis of the justifications for intellectual property protection confirms this intuitive supposition. A full-blown review of the several justifications for IPR is not repeated here as it has been many times explained in detail elsewhere. 11 In short, IPR, copyright, patents and designs can be justified in three different ways. First, according to the naturalist justification, 12 IPR are natural rights. Therefore, the author or inventor has both economic and moral property rights in his or her creation or invention as they are the fruits of his or her own labour. Although this justification is philosophical and therefore is not very detailed, it still acknowledges the fact that such rights must have some limits. 13 Second, according to the utilitarian justification, IPR are necessary in society because they contribute to the general well-being. In order to achieve this goal, property rights are given to authors and inventors as an incentive to create and innovate but some aspects must remain in the public domain to preserve future creations and innovations. The underlying idea, which can also be found in the US Constitution, is that patent and copyright are not ends in themselves but only tools to another greater end: progress. 14 The utilitarian justification has been further elaborated by the economics of law literature and more precise limits to IPR have been defined. 15 These are called 'economics of intellectual property' and are often classified as a sub-category of the utilitarian argument. The economics of intellectual property have detailed the limits to IPR. Finally, the most recent justification is by way of human rights. In a way, it may be said to be encompassed in the naturalist justification if human rights are deemed to be natural rights. This justification also implies limits although they are generally only sketched out in the international, regional and national legal instruments and start to emerge from the case law. In addition, as this justification classifies IPR as a human right, it reinforces IPR's welfare goal and at the same time, reveals that the human rights and utilitarian justifications have the same goal. Furthermore, as human rights all have equal rank, 16 they must all be balanced with one another and therefore all have intrinsic limits. IPR are no exception. A quick word should be said of trademarks. Their primary function is to guarantee the origin of products, i.e. that the same branded goods or services come from the same source, and therefore prevent confusion of consumers. Nowadays, an additional advertising function has been recognized to trademarks so that the trademark itself has value as such, as a 'lifestyle concept'. 17 Trademarks are therefore different from patents and copyrights as they are not granted to incentivize innovation but to prevent confusion and protect the trademark owner's goodwill. Nevertheless, they have limits as well (such as the prohibition of promoting products and services and misleading signs, limitation of infringement to use in trade and to use of a similar sign on similar goods or services) and thereby prevent monopolies.

From the above, it is clear that all these justifications and especially the economic and human-rights ones share the same underlying theme: there must be limits to IPR. For instance, the two last justifications entail that quotation, criticism and use for private and educational purposes should be possible. This shows that whatever the argument used to justify IPR, the specific IPR protection in question will by definition (intrinsically or internally) respect human rights. All IPR have internal, inherent limits from the outset that respect human rights. So there should not be any conflicts. 18 Perhaps, this finding (that IPR have limits) and the related

10. Quod erat demonstrandum, Latin for 'which was to be demonstrated'.
11. See e.g., Cornides, above fn. 1. For copyright in particular, see e.g., E. Derclaye, The Legal Protection of Databases: A Comparative Analysis (Cheltenham: Edward Elgar, 2000), Ch. 1, ss. 1 and authors cited.
12. The naturalist justification of IPR is inspired by Locke's Second Treatise on Civil Government of 1690.
14. Copyright and Patent clause, Art. 1, s. 1, clause 8 of the US Constitution which gives Congress the power to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. See also Cornides, above fn. 1, at 159.
17. Cornides, above fn. 1, at 145.
18. The yardstick Cornides, above fn. 1, at 159, proposes to use to is that patents and copyright aim to promote progress and development Accordingly, 'it may be assumed that, if legislation on intellectual property corresponds to this purpose, there can be no true conflict between intellectual property and policy objectives, such as development, public health, or the fight against hunger.'
set of rules boil down to the general jurisprudential or philosophical saying that no right should ever be absolute or "my freedom ends where yours begins". And this is also the case for human rights (for example, Articles 8 and 10 ECHR and 1 First Additional Protocol to the ECHR have limitations in their second paragraphs). Q.E.D. (Quod erat demonstrandum), once more. Most if not all the literature has so far not seen this point. Of course, a social problem and its solution in the law cannot be so easily equated with a mathematical equation and its solution. On the contrary, the law is full of nuances. This is why obviously this article does not stop here.

IV. THE MYTH DESTROYED: THERE IS NO CONFLICT BETWEEN IPR AND HUMAN RIGHTS

Before looking at the areas identified by authors as areas of so called "conflict", a few clarifications must be made. First of all, it is clear that rights on inventions and creations are human rights. This derives from Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. Although the UDHR is not

19. For instance, Chapman above fn. 16 at 867 who seems to imply that intellectual property law's main or sole goal is to maximize economic benefits. See also A. Sober, "Toward a Human Rights Framework for Intellectual Property", [2007] 40 U.C. Davis Law Review 971, 1013: "A third human rights framework for intellectual property proceeds from a very different premise. It specifies the minimum outcomes in terms of health, poverty, education, and so forth - that human rights law requires of states. The framework next works backwards to identify different mechanisms available to states to achieve those outcomes. Intellectual property plays only a secondary role in this version of the framework. Where intellectual property laws help to achieve human rights outcomes, governments should embrace it. Where they hinder those outcomes, its rules should be modified (but not necessarily restricted, as I indicate below). But the focus remains on the minimum levels of well-being that states must provide, with either appropriate intellectual property rules or other means" (emphasis added). When he says this, he respectfully fails to more clearly state that human rights and IPR have the same goal in fact, as IPR are a type of human right obviously, their goal is the same as all human rights. IPR, human welfare. C. Geiger, "Constitutionalizing" Intellectual Property Law: The Influence of Fundamental Rights on Intellectual Property in the European Union" [2006] 37 International Review of Intellectual Property & Competition Law 371, 379-381 does not see this either. For him, natural law is vague and the utilitarian justification reduces "creative activity to a sterile economic process" whereas many studies have shown that creators often do not act out of monetary purposes. This is why the human-rights justification for IPR seems to be "the solution" for this author in order to re-establish the long-gone equilibrium (see ibid., "Fundamental Rights, A Safeguard for the Coherence of Intellectual Property Law?" [2004] 35 International Review of Intellectual Property & Competition Law 268, "the balance in IPR has long ceased to be harmonious", although he admits that the balance is between "imposing harm internally than it is using human rights" (2006), at 389. Even if it can be said that in some countries (mainly for author's rights or civil law systems), "copyright has become an industrial right where inventors have become the protection" (ibid., at 381), this was the case from the beginning in certain copyright systems (common law countries). In addition, if some authors do not create for money, many still do live out of their intellectual efforts (authors and performers of music, writers, other artists, most if not all patents).

20. Art. 27 provides: "(1) Everyone has the right freely to participate in the cultural life of his community, to enjoy the arts and to share in scientific advancement and its benefits (strictly) binding, the ICESCR is. The remainder of the chapter will therefore focus on the ICESCR and the ECHR. When the ECHR has also provided for the same right as the ICESCR, the focus will be on the ECHR. Second, not only are creations but also inventions are classified as human rights. It appears equally from the latter two articles. What is the content of Article 15 ICESCR? It recognizes a number of distinct rights: everyone's cultural rights, everyone's right to benefit from scientific and technological development and everyone's right to benefit from individual contributions they make. In other words, it provides a framework within which the development of science and culture is undertaken for the greater good of society while recognizing the need to provide specific incentives to authors for this to happen.

Neither the UDHR nor the ICESCR dictate the level or modality of protection for material interests in intellectual productions. Hence, property rights are not mandated to protect intellectual endeavors. As a result, states have some latitude as to which legal form may be given to such inventions and creations. In addition, Article 17 UDHR's flexible drafting allows states to modulate their level of intellectual property protection (strong or less).

At European level, however, the European Court of Human Rights has recently clarified that IPR (at least copyright, trademarks, patents and even
applications for the latter two rights) are property rights falling under Article 1 of
the First Additional Protocol to the ECHR. 26

Even international agreements on IPR integrate human rights notions, which

can be said to come from the utilitarian justification and perhaps as well from
the human-rights justification for IPR. Article 7 of the TRIPS Agreement provides
that IPR must ‘contribute to the promotion of technological innovation . . . and in a
manner conducive to social and economic welfare, and to balance of rights and
obligations’. 27 Human rights other than IPR are also, at least implicitly,
recognized in Article 8(1) of the TRIPS which provides that: ‘Members may, in formulating or
amending their laws and regulations, adopt measures necessary to protect public
health and nutrition, and to promote the public interest in sectors of vital
importance to their socio-economic and technological development, provided that
such measures are consistent with the provisions of this Agreement’. 28 The
literature has derived from Article 8 that TRIPS must be applied in light of human rights laws. In
other words, when implementing TRIPS, states must respect their human-right
obligations. 29

As stated in the introduction, most commentators believe that IPR conflict
with human rights. It should first be noted that that no conflicts have been
identified at the level of treaty obligations. 30 Thus countries which have adhered to
both human rights and intellectual property treaties do not have conflicting
international obligations. It is now useful to summarize these alleged conflicts
by listing the different types of IPR and of human rights (section IV.B), then
analyze these relationships in more detail in order to disprove the presumption
that they are in conflict (section IV.B). Finally, areas where excessive IPR
protection leads to ‘real conflicts’ can be identified and remedies, discussed
(also within section IV.B).

Additional Protocol applies to intellectual property (para. 72). It also cited previous case law in that
direction: Smit & French Laboratories Ltd v. The Netherlands, No. 12635/87, Decision of 4 October 1990, Decisions and Reports (DR) 6/88, 69 (in relation to a patent); Melnychuk v. Ukraine (Dec.), No. 28745/03, ECHR 2005-IX (in relation to copyright). According to the court, not only trademarks but also an application for a trademark
is a possession because Antweiler-Busch owned a set of rights recognized under Portuguese law
that could only be revoked under certain conditions (para. 76).

27. An earlier proof of these inherent limits is found in the Copyright and Patent Clause of the II
Convent. See above fn. 14.

28. As the wording (‘may’) suggests, though, it is not an obligation on Members.

29. See S. Edwardson, ‘Reconciling TRIPS and the Right to Food’, in Human Rights and

30. Haugan, above fn. 1, at least between TRIPS and ICESCR as regards patents.

31. The terms ‘freedom of speech’ and ‘freedom of expression’ will be used interchangeably.

32. See below, s. IV.D.1.

33. As identified by Bickerton, above fn. 22, at 208 but not further explained (simply mentioning
possible patents on gene sequences and other life forms).
which dealt with the reproduction of ‘visual’ works (painting and film footage) in their entirety, courts have preferred copyright over freedom of speech, although it was not mandated by Article 10(2) of the ECHR. The Court of Appeal of England and Wales ruled, like the US Supreme Court, that it will be rare when freedom of speech will be needed as an external safeguard, but nevertheless left the door open and accepted that there may be some cases where it will need to apply. A prime example is that of *Hyde Park Residence v. Yeolland*, where a photograph or film is necessary rather than its description in words for example, to report current events.

Another ‘real conflict’ may occur between free speech and the European sui generis right for databases or “database right”. As a result of heavy lobbying by database producers, many aspects of the right are unbalanced and freedom of speech and the public’s right to information relatively restricted. A demonstration has been made and remedies proposed, elsewhere. Some have even argued that the database right should not be a human right because of its intrinsically economic character, and therefore other human rights should take precedence over database producers’ claims in case of a clash. Concurrently, the same imbalance occurred in 2001 in the Copyright Directive with some of the exceptions and with the imperfect mechanism allowing users to benefit from them when a work is


41. Above, fn. 40. In that case, the Court of Appeal could have decided differently and allow the reproduction but the outcome of this particular case can perhaps be understood because the circumstances of the publication (through of the film) weighed too much against the defendant.


44. E. Declaray, ‘Database sui generis Right: The Need to Take the Public’s Right to Information and Freedom of Expression into Account’, in *New Directions in Copyright Law*, vol. 3, ed. F. Macmillan (Cheltenham: Edward Elgar, 2007), 3–23; Declaray, above fn. 11, above fn. 22, 201. However, sui generis right databases were protected by copyright in the originality. As copyright protected those databases, it was not an issue whether database protection of material interests should not prevent the classification of a right into a human right. In human right, a legal entity will always derive its IPR from the actual human beings who created and P. Yu above fn. 2, 1129 (corporate entities could make the claim that their intellectual property rights derive from human beings, the damage done to their rights would jeopardize opportunities that the human beings receive through them for their creations).


36. See the international instruments on these limits, the idea/expression dichotomy (Art. 9, 10(3) Berne Convention and 3 TRIPS), term (Art. 7 Berne Convention) and corresponding national and regional instruments.


technologically protected (Article 6(4) of the said Directive). For discussions and remedies, the reader is referred to the abundant literature, although not much has been said yet in detail on the interface between technological protection measures (TPMs), anti-circumvention provisions and freedom of speech.47

Another area of ‘conflict’ between copyright and freedom of speech may be the non-protection by some copyright laws of immoral works (e.g., pornographic, fascist, racist, sexist).48 However, again this is only an apparent conflict because the absence of copyright protection does not prevent the person from creating such works in the first place. The only consequence is the absence of a right to prevent their reproduction.

IV.B.1.b Copyright and the Right to Privacy

An apparent conflict exists between the right of the photographer or film maker on their work and the right to privacy of the person photographed or filmed.49 This conflict does not exist because it is specifically acknowledged in Article 8(2) ECHR. It can also be said that under Article 1 of the First Additional Protocol, state may ‘expropriate’50 copyright holders in the general interest, here being the interest of individuals having their right to privacy respected.51 Additionally, it can be said that even if such conflict may be said to exist, it is minimal because the artist’s freedom to create is not endangered. He or she can find other subjects for his or her work. For instance, section 85(1) of the UK Copyright Act makes it clear that the person who commissions the taking of a photograph or film for private or domestic purposes has the right not to have the latter reproduced or shown publicly.52 A few exceptions to this right are provided in section 85(2), which correspond to some exceptions to copyright infringement (for instance if the work is incidentally included in another work). They restore the prevalence of freedom of speech (through the use of private images in a subsequent copyright work) when the breach on the right to privacy can be deemed minimal.

Sometimes, when copyright and private interests go hand in hand, they can however be said to ‘conflict’ with freedom of speech and that brings us back to the discussion above (section IV.B.1.a). It is neither against the right to privacy nor the right to property, as freedom of speech (Article 10.1 ECHR) and/or the public interest (Article 1.2 First Additional Protocol) may prevail. Some national copyright laws even have an implicit inherent limit which allows such disclosure (for example, the public interest defence in, section 171 of the UK Copyright Act). Again, there is only an apparent conflict between copyright and the right to privacy.

A ‘new’ type of ‘conflict’ has emerged recently, that between the use by copyright holders of technical protection measures (TPMs) to control access and use of their work and the right of users to their privacy.53 Some TPMs can indeed monitor who people privately read, listen to or view. Arguably, however, this has always been the case as rental shops and libraries also record what works have been rented or lent. However, it has never been an issue in the analogue world. The digital world has now changed this state of fact that much, at least at first sight.54 But even if it did, this would be an apparent conflict again because of the limits in Articles 8, 10 ECHR and 1 First Additional Protocol.

47. For bibliographies, see S. Dunolier, Droit d’auteur et protection des oeuvres dans l’univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres (Bruxelles: Larcier, 2005) and Derelaye, above fn. 11. See, however, ALAI Annual Congress 2006, above fn. 34.

48. This stems from Art. 17 of the Berne Convention, which allows Members to deny copyright protection to works on reason of public policy or morality. It provides: ‘The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control or to prohibit, by legislation or regulation, the circulation, production, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right’. See S. Rickinson, The Berne Convention for the Protection of Literary and Artistic Works (London: Kluwer & QMW, 1997), para. 9.2; S. Rickinson & J. Ginsburg, International Copyright and Neighbouring Rights, The Berne Convention and Beyond, 2nd ed. (Oxford: Oxford University Press, 2006), vol. I, 141, n. 13.88.

49. L. Gimeno, ‘Case Comment, Spain: Copyright and Privacy, B v. AM’ [1996] European Intellectual Property Review D360-361 (photograph); D. Van Engelen, ‘Case Comment, Netherlands: Copyright – Freedom of Speech versus Invasion of Privacy, M v. Bios Amsterdam BV’ [1997] Entertainment Law Review E91-92 (photograph); W. Roos, ‘Case Comment, Netherlands: Copyright: Right to Privacy and Portrait Right, Van Hesteren v. Ordsmond’ [1998] European Intellectual Property Review N146-147 (film). All these courts converge in holding that if the copyright owner publishes the photograph or communicates the film to the public without the consent of the person photographed or filmed, the right of privacy is too breach. Note that the arguably applies to all works (a French case has recognized it in the case of literary works as well; see L. Dreyer, ‘Case Comment, France: Copyright – Moral Rights versus Invasion of Privacy, Perbet v. Bungo’ [1997] Entertainment Law Review E83-84 (autobiography)).

50. It may not go as far as expropriation as the copyright holder retains the right to keep a copy of their work, but it may amount to interference with the peaceful enjoyment of possessions as it cannot exploit their work.

IV.B.1.c Copyright and the Right to Health

It is not copyright but the database right that may once more impact the right to health. Because the sui generis right’s internal limits are too narrow, the right to health may be often impeded, leading to a real conflict.

IV.B.1.d Copyright and the Right to Education

There is no conflict between copyright and the right to education, at least as provided in Article 2 of the First Additional Protocol to the ECHR. Firstly, the right to education arguably does not extend to include an obligation on states to provide for any type of education at their own expense. It is a right to access educational institutions and to obtain official recognition for the studies pursued. However, the right to education seems to require States to maintain certain standards in education and might be extended in the future. Article 13 ICESCR has been interpreted to require specific obligations from states. It includes availability, which means that teaching materials must be available. It also includes economic accessibility, i.e., education must be affordable to all. However, there is no conflict between copyright and the right to education again because of copyright’s intrinsic limits. The idea/expression dichotomy, the term and the exception for research and teaching allows states to respect the right to education. A problem may only occur if the teaching exception does not exist in the state in question (and it may happen as the Copyright Directive’s exception is not mandatory) and no other available source exists (the copyright gives the author a monopoly). Whilst this will be rare, it cannot be completely ruled out. In this case, there may be a real conflict and courts can use the right to education and/or competition law to force the right holder to license its copyright material. Finally, the database sui generis right arguably also clashes with the right to education, as its limits are not broad enough to accommodate the right (the exception for teaching purposes is optional and too restrictive).

56. It provides: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’
57. Ovey & White, above fn. 51, at 378.
59. Ovey & White, above fn. 51, at 380–381.
60. Ovey & White, above fn. 51, at 387.
63. For a discussion, see Derclaye, above fn. 11. Art. 9 of the Database Directive reads: ‘Member States may stipulate that lawful users of a database which is made available to the public

IV.B.2 Patents and Related Rights

IV.B.2.a Patents and the Right to Health

Are patents and the right to health really in conflict? First, the content of the right to health should be elucidated. The content of patent rights is assumed. The right to health stems from Article 25 UDHR which provides that “[e]veryone has the right to the enjoyment of the highest attainable standard of physical and mental health.” The basic elements of the right are availability, accessibility, acceptability and quality. This notion of highest attainable standard presupposes that the right is only progressively realized. The right also entails a duty to undertake measures to promote public health, prevent disease, and to eliminate other external causes of morbidity and mortality, reduce health inequalities and improve the underlying conditions of health. Thus violations of the right to health will include repeal of legislation or failure to adopt legislation that enables human beings to enjoy the right, or adoption of legislation which is manifestly incompatible with the right.

The argument for the conflict is that patent protection limits the enjoyment of the right to health because of the high cost of patented medicines. As with copyright, patent laws have intrinsic limits, which normally allow them to respect human rights. They are namely: excluded subject matter (for example, methods of treatments, discoveries, scientific theories, presentations of information), protection requirements (novelty, non-obviousness and industrial application), exceptions (private use, experimental purposes, farmer’s privilege) and term...
There are two counter-arguments to the assertion that there is a conflict between patents and the right to health. First, at the philosophical or justification level, the nature of the necessary incentive for development and progress demands some exclusivity. Otherwise, inventors would not innovate. In relation to the right to health, pharmaceutical companies would not develop new drugs as patents may grant a monopoly over a specific drug for a while, the price will generally be high, as a result of this monopoly. But even if the price may be high for a period of time (short-term), it does go down eventually with the expiry of the patent or sometimes even earlier if 'similar' inventions are invented 'around' the patent (lower prices in the long-term). This is the price to pay for innovation. If patent laws did not exist, prices would be cheaper but there would be fewer drugs as there would be less or no development of new drugs. Patents are therefore a necessary restriction on competition to enhance competition. This proves that if patents and the right to health do not cooperate, at least they coincide. Patents in the long run help improve the standard of health. In addition, as some have rightly stated, the price of drugs is not exclusively owed to patent protection but may also be dictated by unrelated factors such as the level of import duties, taxes, and local market approval costs. There is another reason why there is no conflict between patents and the right to health. Because the research and development (R&D) that lead to patents will only be undertaken privately if the patent holder can recoup its investment, such private research will not be undertaken for some types of rare diseases or diseases that occur in countries where the population cannot afford treatment. Thus, IPR is a necessity, but not the only, tool to serve the objective or public health. Political decisions have to be made to collect money to develop cures for rare diseases, so that the state or more generally public bodies (for example, research centres, universities) effectively conduct research on such diseases. However, if a patent law is over-protective (and some may be if they do not provide compulsory licenses in certain cases), then courts may use the right to health and/or competition rules to solve the conflict.

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73. Comides, above fn. 1, at 159 (“Even if there were benefits in the short term (e.g., the price for new medicines would fall sharply, there would be less innovation in the medium or long term. Hardly any new treatment would be developed by privately owned companies, and the development of new treatments would then depend upon public funding”). See also in the same vein H. Haugen, above fn. 1, at 100.


76. There is an exception for charities. But their work depends on private funding and the voluntary nature of the donations does not solve the problem of every disease on earth.

77. Comides, above fn. 1, at 164.

78. Art. 8(2) TRIPS already provides the possibility for Members to use competition law to public abuses of IPR.

79. Pinto, above fn. 43, at 219.

80. O’Day & White, above fn. 51, at 56.


82. Ibid.

83. Edwards, above fn. 29, at 383, 387.

84. Comides, above fn. 1, at 164.
UPOV Convention\textsuperscript{85} which allows farmers to reuse and exchange the seeds albeit not to sell them\textsuperscript{86} ensures that farmers can replant protected species of seeds without having to purchase new ones.\textsuperscript{87} Therefore, they have no adverse consequences on the right to food. As rightly expressed by S. Edwardson: ‘Plant variety protection can be implemented in a way that coincides, rather than conflicts, with a state’s obligation to realize and safeguard the right to food’ (emphasis added).\textsuperscript{88}

\textbf{IV.B.3 Trademarks}

\textit{IV.B.3.a Trademarks and the Right to Freedom of Expression}

As for copyright and patent, because of the internal limits within trademark laws (the distinctiveness requirement, the fact that there is only infringement if an identical or similar sign is used within the course of trade in connection with identical or similar goods) within Article 1(2) of the First Additional Protocol and within freedom of expression (Article 10 ECHR), there is only an apparent conflict between trademarks and freedom of speech.\textsuperscript{89} Similarly, no conflict occurs when a trademark is refused registration for reasons of morality or public policy. Again, this falls squarely within Article 10(2) ECHR.\textsuperscript{90}

Trademark owners may also prevail when freedom of speech is abused through, e.g., the defamatory use of the trademark (that is, when the mark is not used in the course of trade).\textsuperscript{91} Such cases do not raise conflicts as defamatory use itself

\textsuperscript{85} Union for the Protection of New Varieties of Plants Convention of 1961, last revised in 1991.

\textsuperscript{86} Edwardson, above fn. 29, at 388.

\textsuperscript{87} Corrêas, above fn. 1, at 165. Breitling-Kaufmann, above fn. 81, at 355 notes that IPR can suffer the development of mono-agricultural practices to the detriment of agrobiodiversity. Thus there is a potential problem with the right to food. See then notes that Art. 27(2) of TRIPS requires exception for the protection of ordere public or morality includes the protection of human, animal or plant life or health. We find it difficult to conceive that IPR may favor mono-agricultural practices as they encourage innovation and consequently, almost by definition, a growing number of new techniques and plant varieties. Only if the patentee has a monopoly could there be a problem in this respect.

\textsuperscript{88} Edwardson, above fn. 29, at 385.

\textsuperscript{89} See Richerson, above fn. 22, at 210 (trademark law copied over to patent law).

\textsuperscript{90} See e.g., s. 1(3)(c) of the UK Trade Mark Act 1994.

\textsuperscript{91} For the interpretation of the right to freedom of expression in the context of trademark law, see T. Mancini, ‘Freedom of Expression and Trademarks’ in M. Öztürk (ed.), Freedom of Expression in the European Union: A Casebook (European University Institute, 2014).

\textsuperscript{92} Par. 5 allows states to provide for protection even beyond Art. 6(2) i.e., when the sign is used other than for distinguishing goods or services and the use of the sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trademark.

\textsuperscript{93} Baud, above fn. 81, at 33.

\textsuperscript{94} Ibid., which reviews decisions in France, Germany and the UK.

\textsuperscript{95} In particular, the American Bar Association (ABA) (1984) ABA Business Section, cited by Baud, above fn. 91. "Freedom of Expression - The Proportionality of Criticism", provides a detailed analysis of the case law relating to freedom of expression in the context of trademark law. The case law that is relevant to the present discussion is the landmark case of \textit{Intellectual Property & Competition Law 357.}\textsuperscript{97} The means used by CNMRT were appropriate because of the campaign’s humorous approach and the public health objective. The case law relating to freedom of expression in the context of trademark law would mean that so long as organizations act in good faith and do not communicate false information, there is no breach of trademark law.

\textsuperscript{96} The damage caused to the reputation of the trademark was serious because of the public health concern about the use of tobacco.

\textsuperscript{97} See C. Geiger, ‘Trade Marks and Freedom of Expression - The Proportionality of Criticism’ [2007] International Review of Intellectual Property & Competition Law 357. For a comment, see C. Geiger, ‘Right to Freedom of Expression in the Framework of Intellectual Property Law’ [2007] International Review of Intellectual Property & Competition Law 317. The means used by CNMRT were appropriate because of the campaign’s humorous approach and the public health objective. The case law relating to freedom of expression in the context of trademark law would mean that so long as organizations act in good faith and do not communicate false information, there is no breach of trademark law.
businesses which very rarely cause death. As a real conflict could nevertheless occur if imagery milder than death is used. In this case, trademark law would be going too far as it would prevent almost any fair criticism of any (famous or not) mark.

**IV.B.3.b Trademarks and the Right to Privacy**

Is there a conflict between the right to privacy and trademark law if a person wants to register the name or likeness of someone as a trademark? As with copyright (see section IV.B.1.b), this is only an apparent conflict as Article 8(2) and/or 1(1) First Additional Protocol’s limits allow an encroachment of the right to privacy or trademark law in this case.

**IV.B.3.c Trademarks and the Right to Non-discrimination**

A real conflict seems to occur, however, in relation to the prohibition in the UK, which is supported by the UK courts and the ECI, for famous persons to register their own name as a trademark. This prohibition may be a breach of the celebrity’s human right not to be discriminated against (Article 14 ECHR). Arguably, such famous persons are discriminated on the basis of their personal status (this including social standing). Fiddes does not see any reason why there should not be a difference of treatment between famous and ordinary persons. The registry would argue ‘the use of his own name by a famous person would be seen by consumers as a description of the subject matter of the products to which it is applied’. But that is the only reason that seems to be found.

**IV.B.4 Designs**

As designs cumulate aspects of patents, trademarks and copyright, most of the comments made above would equally apply to design rights. Therefore, apparent conflicts could exist with the right to privacy (if someone wished the register the name or likeness of a person as a design) and the right to freedom of speech (as design right’s built-in limits prevent the protection of ideas and methods, require novelty and individual character, provide for exceptions and a limited duration). So far designs have not been influenced by the ECHR.

**IV.B.5 Conclusion**

The above analysis has shown that in the vast majority of cases, because of IPR’s inherent limits, there are no real but only apparent conflicts between IPR and other human rights. This explains the non-existent or scarce case law by the European Court and Commission on human rights. As for the national European case law, as has been seen, it mainly dealt with apparent conflicts, although some cases involved real conflicts.

The following quote from J. Sachs of the Constitutional Court of South Africa in a case involving the use of a trademark usefully summarizes what I call ‘apparent conflicts’ between any IPR and another human right:

> What is in issue is not the limitation of a right, but the balancing of competing rights. ... [It] would appear, once all the relevant facts are established, it should make no difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights. At the end of the day, this will be an area where nuanced and proportionate balancing in a context-specific and fact-sensitive character will be decisive, and not formal classification based on bright lines.

Thus in cases of apparent conflicts, the ‘conflict’ is normally already resolved internally (within the intellectual property laws). It is only when the legislature amnesties or severely restricts the natural limits of an IPR that there can be a real conflict (what the literature has called conflict).

So, if legislators do not go overboard, judges should not have to revert to the human rights as there should be no conflict. On the other hand, if the intellectual property

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100. See e.g., Paris Court of First Instance, 9 July 2004 [2004] 795, III PIBD 591; [2004] Communication Commerce Electronique comm. 110 (Areva v. Greenpeace). In this case, Areva, the French nuclear energy company, won against the use of death imagery by Greenpeace. The decision has nevertheless been recently overruled by the Court of Cassation (8 April 2002, available at http://www.legislativ.net) so that freedom of speech seems to be prevailing even in cases where the trademark owner’s business rarely causes death. Note however, that it may depend on the type of defendant who uses the trademark as the court notes specifically here the defendant acted in conformity with its goals, namely the general interest and public health.

101. As suggested by Pinto, above fn. 43, at 218.


103. Ibid., 351.

104. Ibid., at 352.

105. Ibid.
law in question is too protective, that is, when the IPR has been subverted or distorted, and its aims diverted so that it grants excessive protection, then judges can use human rights (and/or other laws such as competition law) as an external limit to curtail the overly broad intellectual property right. How must this balance be made? Clearly, when one right is abused to the detriment of the other (for example, when the use of freedom of expression is defamatory or when copyright prevents the communication of an entire work (perhaps only if the work is of such importance for the public to be adequately informed)\textsuperscript{110} for the purposes of reporting current events), the latter should simply prevail. Otherwise, when the conflict is more subtle, fine-tuning is necessary. It is not my aim to elaborate a test here but some principles should be kept in mind when such a test is crafted and applied. As has been rightly put, ‘the best balance is achieved when it is remembered that IPRs were originally created in order to secure societal purposes. [...] the type and level of protection afforded by any IPR regime must, to the greatest possible extent, facilitate scientific progress’.\textsuperscript{111} Also, one has to remember that IPRs are exceptions to the principle of freedom to copy and should therefore be interpreted restrictively at least in these types of conflict.\textsuperscript{112}

A final point should be made to emphasize the absence of conflict between human rights and IPR and in fact the overall beneficial effect of IPR for society. If the discourse of radical human rights lawyers was followed, then intellectual property protection should be abolished or severely diminished, such lawyers would in fact shoot themselves in the foot if not in the heart. Without IPR, or if IPR protection is lessened, other human rights would suffer considerably. The most striking example is possibly the right to health, as, without IPR protection, extremely few if any new drugs would be developed.

V. THE TRUTH REVEALED: IPR AND HUMAN RIGHTS COINCIDE OR EVEN COOPERATE

This section reveals the so far rarely and sometimes not yet analyzed areas where IPR and other human rights in fact work hand in hand. The analysis reveals that there is a coincidence and sometimes even more, a cooperation, between most IPRs and most other human rights.

\textsuperscript{110} For instance, if there is only one person that has photographed or filmed the assassination of a famous person (or their last moments, as in Hyde Park v. Yelena). Contrast this with the information of the public about a new exhibit (like in the Urrillo case, above fn. 39). In this case, it may be said that showing only parts of the paintings adequately informs the public. Arguably, Art. 5(3)(c) of the Copyright Directive caters for this as it does not restrict the use of the work to a substantial part. Accordingly, a substantial part of the work or the entire work can be used for the purposes of reporting current events.

\textsuperscript{111} Conotides, above fn. 1, at 167.


\textsuperscript{113} Art. 1 provides: ‘1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.


\textsuperscript{115} That means to sell, give, privately lend, but not rent or publicly lend the product.

\textsuperscript{116} The right to property does include the right to dispose of one’s property. Gvey & White, above fn. 51, at 347, citing Marks v. Belgium, Judgement of 15 June 1979, Series A, No. 31 [1979-1980] 2 ECHR 350, para. 63.
There are however, two exceptions to these areas of coincidence. There will be a real conflict in certain countries where the moral right of integrity gives to the author a (quasi) absolute right to object to the destruction of its work because in those countries, it is (almost) always seen as an attack on the honour or reputation of the author. The specific national law therefore favours copyright over property. The second is the right for the patentee to object to reconstruction of the product beyond repair. But this second exception is arguably an apparent conflict.

V.A.2 Copyright and the Right to Privacy

As some have noted, copyright and privacy rights have in fact some common origins, namely the doctrines on personality rights. There is no clearer proof that they sometimes coincide. In fact, as has been rightly stated, 'both attempt essentially to control the flow of information so as to safeguard certain values and interests'. It is no surprise therefore that they in some respects also cooperate. The moral right of divulgation or, if it is not recognized (like in the United Kingdom, for instance) the economic issuing right, implies that the author can choose to keep his writings private if he or she so wishes. In other words, an author has the right to keep his or her creations secret until he or she divulges them for the first time. A recent example is the dispute between HRH the Prince of Wales and a newspaper which reproduced parts of his private journals. In the United Kingdom, copyright can even palliate the absence of a 'proper' right to privacy. If the spoken words are recorded and are private conversations, and if they attract copyright (if they are sufficiently original), the author can prevent their reproduction and communication to the public on the basis of his or her copyright in his or her literary work even if he or she could not base an action in breach of confidence (that is, if the conditions of this action are not fulfilled, which often happens).


119. Bygrave, above fn. 52.

V.A.3 Copyright and the Right to Education

The right to education includes the safeguard of pluralism as 'the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions'. As has been seen above in sections II and III, copyright also allows this pluralism as it is linked to freedom of expression. If copyright did not exist, authors would only be funded publicly, thereby drastically reducing pluralism (as their works may have to fit in the State's or private patron's tastes). This shows one more area of coincidence or cooperation.

V.A.4 Copyright and the Right to Freedom of Thought, Conscience and Religion

As a similar area of coincidence or even cooperation is found between copyright and the right to freedom of thought, conscience and religion. As copyright is closely linked with freedom of expression and the latter allows a broad and varied expression of beliefs through writings and other copyright works, the three rights form an inseparable trio.

124. MacQueen, above fn. 52, at 367.

125. On this right see e.g., Salokannel, Strouel & Derclaye, above fn. 117.

126. Bygrave, above fn. 52, at 51.

127. Ibid.

128. At least in Europe, see Art. 2 of the First Additional Protocol to the ECHR. See Ovey & White, above fn. 51, at 381.
V.B  PATENTS

V.B.1  Patents and the Right to Freedom of Speech

There is coincidence and even cooperation between patent law and the right to freedom of speech. It is a mandatory requirement for patentees to disclose their invention. This is done through the publication of the patent application by the respective patent office(s). This condition is the price to pay to obtain a patent and the disclosure function of patent law is linked to the utilitarian goal of patent laws. In order to provide an incentive to innovate, a patent may be gained but in order not to hinder further invention, the invention must be disclosed to the public. Freedom of speech and the right of the public to receive information is therefore specifically furthered by patent law.

V.B.2  Patents and the Right to Health

As seen above in section IV.B.2.a, the two rights may be said to coincide.

V.B.3  Patents and the Right to Food

Similarly, as seen above in section IV.B.2.c, the two rights may be said to coincide.

V.C  TRADEMARKS

As seen above in section IV.B.3.a, the inherent limits of trademark laws generally preserve freedom of speech. In a similar vein, the Comparative Advertising Directive coincides with the right to freedom of speech.

V.D  IPR IN GENERAL

V.D.1  IPR and the Right to Development

The right to development has been recognized in the 1986 Declaration on the Right to Development but it is not binding. As IPR encourage development, they

129. Pinto, above fn. 43, at 219, noted that since commercial information contained in a patent must be disclosed to the world, it is unlikely that freedom of speech will influence patent law.

130. For a recent case applying Art. 10 ECHR to comparative advertising, see Red Dot Technologies Ltd v. Apollo Fire Detectors Ltd [2007] EWHC 1166 (Ch).

131. Available at <www.unichr.ch/html/menu/3b7/74.htm>, (last accessed 22 April 2008). Where Art. 1 provides that 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. In which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

132. Comides, above fn. 1, at 159.

133. Note that even though there is no ‘proper’ right to a clean and safe environment, environmental laws exist and they indirectly ensure that such a right is respected. For a discussion, see E. Derclaye, ‘Intellectual Property Rights and Global Warming’.

Chapter 6

Proportionality and Balancing within the Objectives for Intellectual Property Protection

Dr Henning Grosse Ruse-Khan*

INTRODUCTION

The principle of proportionality is a concept with different connotations: it has distinct functions and is employed in various environments. For example, it can be applied for the protection of human rights and fundamental freedoms to constrain the ways a state can exercise its power over its citizens. In this ‘classical’ case, the interference with a fundamental right affected must be proportional in relation to the legitimate public policy interests realized by the state measure. It can further serve as a general mechanism for the balance of interests: as a standard for judicial review, a tool to determine the scope of legal norms or as a limit on the power of

135. With particular reference to Professor Helfer’s three possibilities at the end of his 2007 article (above fn. 19, at 1015–1020), I do not think that human rights will, or indeed can, be used to expand IPR, at least not in Europe, because of the limits that the ECHR already sets. Human rights are currently already used ‘to impose limits on intellectual property’. It is done in the case of ‘real conflicts’, i.e., when intellectual property rights are used excessively and contrary to their functions. As to the third possibility (‘achieving human rights through intellectual property means’), as shown in sections II and III, it is what IPR always have tended to achieve right from the start. Therefore, I do not believe ‘it is too early to predict which of these three versions of the human rights framework for intellectual property, or others yet to be identified, will emerge as dominant’. The third possibility has always been there and this article has attempted to clarify and enlighten this. The second is happening more and should continue and the first should normally not happen at least in Europe.

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2. This can be further refined by requiring the state to pursue suitable or appropriate objectives, which it must implement in a way which necessary (that is, is least onerous to the citizen) and further not disproportionate or excessive in relation to the citizen’s interests affected.