

“An analysis of interrelationship between Human Rights and Intellectual Property Rights”

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ABSTRACT

Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly close. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.

The paper delves into the question whether there is a relationship between human rights and intellectual property right and if there is a relationship whether there is a conflict or coexistence between the two. The paper talks about how historically both Human Rights and Intellectual Property Rights were considered two different isolated branches of law though IPR being mentioned under various instruments including under Article 15 of International Covenant on Economic, Social and Cultural Rights and Article 27 of the Universal Declaration of Human Rights . And then further talks how this relationship was developed with the help of various instruments and realizing the relationship between the same. It also delves with the vague relationship between IPR and Indian Constitution.

Further the paper also talks about the relationship of IPR between human right of Right to Education. It also talks about relationship between Medical Patents and Right to Health.

Relationship of Human Rights and IPR have to be re-examined because of various impacts of human rights and IPR such as the right to health have become much more visible following the adoption of the TRIPS Agreement.

In view of the importance of science and technology in the twenty-first century, it is imperative to move beyond existing intellectual property rights when addressing the issue from

INTRODUCTION

Intellectual Property Rights and human Rights have evolved independently. On one hand, human rights are the rights which are fundamental for human existence and are recognized by states but are inherent rights to human existence. On the other hand, the intellectual property rights consist of statutorily recognized rights of the creators and inventors and provides incentives for participation and contribute to technological development.

This article explores the relationship between intellectual property rights and human rights. The relationship between the two have been ignored for long and has now been recognised by governments, judges, and scholars. In the last decade, international activities have begun to map the unchartered intersections between human rights and intellectual property rights. The relationship between the two has also been recognised also in various international venues like World Trade Organization, world Intellectual Property Organization, the committee on Economic, Social and Cultural Rights and the Human Rights Council.

The relationship between Human Rights and Intellectual Property Rights have been discussed in international instruments such as Universal Declaration of Human Rights and International Covenant of Economic Social and Cultural Rights etc. And there are two approaches for the linkage of the two fields, one talks about the coexistence between the two and other talks about the conflict between the two. This article analyses various human rights and intellectual property rights and tries to answer the question.

Historical Isolation of Human Rights and IPR

Human rights and Intellectual property rights that were once strangers are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property laws on the one hand and human rights law on the other.¹

Thought the linkage between the two field have been in seen in Universal Declaration of Human Rights (UDHR) the fundamental foundational document of human Rights Law

¹ Laurence R. Helfer, Human Rights and Intellectual Property: Conflict or Co-Existence?, 5 Minn. Intell. Prop. Rev. 47 (2003).

protects authors “moral and material interests” in their “scientific, literary or artistic production[s]” as part of its catalogue of fundamental liberties.² Also in the International Covenant on Economic, Social and Cultural Rights (ICESCR)³, which has now been ratified by nearly 150 countries. nations. For years, intellectual property remained a normative backwater in the human rights pantheon, neglected by treaty bodies, experts, and commentators while other rights emerged from the jurisprudential shadows.⁴ Also there have been no references of the human rights in major international intellectual property treaties such as Paris and Berne Conventions and TRIPS Agreement as well.⁵

The reason for the isolation between the two spheres was that the both the bodies were pre occupied with more important issues. In the years following World War II, the most important concern for human rights law was elaboration and codification of Human Rights mechanisms and enhancing the same. In the process the economic, social and cultural rights were least developed and has received attention only in the last decade.⁶ For the promoters of IPR, the focus on the gradual expansion of rights through periodic revisions to the Berne, Paris and other conventions, and later, the creation of a link between intellectual property and trade.

Several Catalysts also helped in expanding the intersection of the Human Rights and Intellectual Property regimes. Firstly the developments relates to the efforts made by industrialized nations to make their Intellectual Property Rights Stronger and by strengthening the intellectual property protection standards. These efforts which started in 1980s, led to inclusion of these protection and standards for intellectual property in the TRIPS Agreement of the WTO and subsequent negotiation of regional and bilateral trade treaties contain Intellectual Property rules that exceeds TRIPS standard.

² Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, art. 27, U.N. Doc. A/810 (1948).

³ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, arts. 15(1)(b) & 15(1)(c),

⁴ Audrey R. Chapman, A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science, Panel Discussion on Intellectual Property and Human Rights at 3 (Nov. 9, 1998)

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971, 1161 U.N.T.S. 31 [hereinafter Berne Convention].

⁶ Theodor Meron, Norm Making and Supervision in International Human Rights: Reflections on Institutional Order, 76 AM. J. INT’L L. 754 (1982).

Secondly, the changes in human rights law and inclusion of cultural rights of indigenous people, including traditional knowledge, increased the attention of human rights system to the adverse consequences of TRIPS.

International Instruments on Intellectual Property Rights and Human Rights

It is asserted that the relationship between the human rights and Intellectual Property Rights have been recognised by various human rights instruments of the United Nations.

First among the international instruments is the Universal Declaration of Human Rights, 1948.⁷

Article 17 and 27 of UDHR recognises the right to own a property. Article 17 of the UDHR states that everyone has the right to own the property and no one shall be arbitrarily deprived of his property. Further Article 27 of the UDHR state that everyone has the right to enjoy the arts and to share scientific advancements and benefits. And Article 27 clause 2 of UDHR further states that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Further Article 13 of the American Declaration of the Rights and Duties of the Man⁸ also states that, “He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author” and recognises the intellectual property right.

Article 15(1) of the UN International Covenant of Economic, Social and Cultural Rights (ICESR), 1966 has a similar provision to the UDHR provision. Article 15 (1) of ICESR⁹ reads that, The State Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life;(b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. “

⁷ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, art. 27, U.N. Doc. A/810 (1948).

⁸ American Declaration of The Rights and Duties of the Man, 1948.

⁹ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966.

In Europe, the right to property has been accepted as a human right since the adoption of the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰ Article 1 of the first Protocol

which provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions” has been analyzed on numerous occasions by the European Court of Human Rights. The European Union has gone further than the European Convention of Human Rights with the adoption of its Charter of Fundamental Rights. This Charter includes not only a right to property but also specifically provides that “[i]ntellectual property shall be protected.”¹¹

Also the US Constitution in Article 1, Section 8, Clause 8 also states that, “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.”

These international instruments recognise the link between the Human Rights and Intellectual Property Rights.

Human Rights Approaches to Intellectual Property Rights

There are two major approaches to the Human Rights – Intellectual Property Rights regime. The first approach reconciles the relationship between the two spheres as in conflict.¹² This approach appears in the United Nations Human Rights system in the 2000 resolution which states that, “actual or potential conflicts exist between the implementation of TRIPS Agreement and realization of economic, social and cultural rights.”¹³ This framing sees strong intellectual property protection as undermining – and therefore as incompatible with – a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights.¹⁴ 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

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature, 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 Sept. 1953);

¹¹ Charter of Fundamental Rights of the European Union, art. 17(2), 2000 J.O. (C 364)

¹² Laurence R. Helfer, Human Rights and Intellectual Property: Conflict or Coexistence?, 5 Minnesota Intellectual Property Rev. 47,48 (2003).

¹³ ECOSOC., Sub Commission on Promotion & Protection of Human Rights, Intellectual Property Rights and Human Rights, Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug, 17,2000).

¹⁴ I.d

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.”

The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts.¹⁵ In the United Nations framework, various instruments include statements from international instruments such as High Commissioner Report on TRIPS Agreement, which stated that “the balance between the public and private interests found under Article 15 of ICESR and Article 27 of UDHR – is one familiar to IPR”.¹⁶ This school views human rights law and intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.

Intellectual Property Rights and Indian Constitution

The Constitution of India does not recognise Intellectual Property as a “Property” directly and the recognition of the same in the Constitution is very vague.

The preamble of the Constitution recognises Economic Liberty which is one of the most important Liberty and to ensure the same the property system has been introduced. The term property includes both intangible and tangible property and thus definitely includes Intellectual Property. In the initial Constitution “Right to Property” was recognised under Article 19 (1) (f) as a fundamental right, but the same was repealed afterwards and was inserted under Article 300 A through 44th Amendment.

¹⁵ Supra. Note 8

¹⁶ Commissioner on Human Rights, Report of the High Commissioner on the impact of the Agreement on Trade- Related Aspects of Intellectual Property Rights on Human Rights, para 10-15, U.N Doc. E/CN.4/Sub.2/2001/13 (June, 27,2001).

Article 300 A merely reads that “ No person shall be deprived of his property save by authority of law.” Article 300 A also does not directly recognises Intellectual Property Rights.

In respect of Intellectual Property Rights Article 253 of the Indian Constitution plays a very important role and it mandates the recognition of the international aspect of laws, legislations, and agreements and empowers the Indian parliament to enforce the international treaties through law making process. It is because of this Article various international instruments in the intellectual property rights have been recognised in Indian laws.

Further, the mention of Intellectual Property system in the List I of 7th Schedule of the Indian Constitution further provide us with clues that Intellectual Property is indeed recognized by the Indian Constitution. Entry 12, 13, 14 has been rightly included in the List 1 of the 7th Schedule of the Indian Constitution and it talks about United Nations Organization, participation in the international conference and conventions and also to enter into agreements with foreign countries. Entry 49 of List I happens to be the specific one which has been totally and exclusively devoted to intellectual property system. Entry 49 recognizes only patents designs, copyright, trademarks and others.

Hence the Indian Constitution does not directly recognises the Intellectual Property Rights but indirectly recognises it, unlike US Constitution which directly recognises under in Article 1, Section 8 , Clause 8 and states that, “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.”

Intellectual Property Right and Right to Education

The right to education has been widely recognised under various international instruments such as UDHR, ICESR, CEDAW etc. Article 26y of United Declaration of Human Rights was the first of these instruments to announce a human right to education. Further the UNESCO Convention against the discrimination in Education was also adopted in 1960,¹⁷ also eliminates all form of discrimination in education. Article 13 and 14 of International Covenant of Economic, Social and Cultural Rights also contain human right to education.

¹⁷ Convention against Discrimination in Education, Dec.. 14, 1960, 429 U.N.T.S 93.

Also Human Rights Law includes numerous references to the provision of adequate textbooks and learning materials as a component of right to education as a human right. UNESCO in its report called “A Human Rights approach to Education for all” in 2007 described the “provision of schools, teachers, books and equipment” as a “fundamental prerequisite of education.”¹⁸

Copyright protection has always been extended to educational materials. Since its beginning, copyright law has been premised on the idea that the flourishing of private markets in copyright protected works will promote learning. In contrast, the human right to education imposes public law obligations on governments, including the provision of free educational materials. This may require reconsideration on relationship between right to education and Intellectual Property Rights.

The copyright law infringes or impedes the provision of learning materials in a manner that it is inconsistent with the International Human Rights obligations. It is contended by the promoters of the Intellectual Property Rights that the copyright creates private property rights in particular expressions, but ideas are left in the public domain for others to use. Copyright does not impede governments or private actors from starting their own textbooks in any area of school curriculum.

Medical Patents and Right to Health

In recent years, one of the most controversial debates has focused on the impacts of medical patents on the realization of the human right to health in developing countries.¹⁹ Article 12 of ICESR²⁰ states the protection of right to “enjoyment of the highest attainable standard of physical and mental health” It includes the provision of essential drugs in primary healthcare.²¹ Accessibility of medicines and their affordability are two central components of the right to health.

Medical patents have direct impacts on accessibility and affordability. They have the potential to improve access by providing incentives for the development of new drugs as well as to restrict access because of the comparatively higher prices of patented drugs. In practice,

¹⁸ UNESCO, A Human Rights Based Approach to Education for all, 56 (2007).

¹⁹ James Thuo Gathii, Rights, Patents, Markets and the Global AIDS Pandemic, 14 Fla. J. Int'l L. 261 (2002).

²⁰ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966

²¹ World Health Organization, Primary Health Care: Report of the International Conference on Primary Health Care 2, 4 (1978)

access to drugs is governed by a number of factors. Their price is one important factor. Therefore, the fact that patented drugs are nearly always more expensive than generic drugs is a relevant consideration. Other factors that influence access include situations where there is only limited competition between generic producers, local taxes, and mark-ups for wholesaling, distribution, and dispensing.²² Improving access can thus not be limited to bringing prices down through competition but must also include further measures such as public subsidies, or price control measures.

Fostering better access to drugs can be approached from the point of view of medical patents or the right to health. The central issue is that the realization of human rights must be judged according to the level of implementation among the most disadvantaged. The issue is not, therefore, whether certain countries can afford patent rights, but whether the poorest in any given country stand to benefit from the introduction of medical patents.

Conclusion

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 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. Preserving the public domain is important because it serves as a resource for future creators and as raw material for the market place of ideas. Human rights and Intellectual Property rights, especially patent right regime, are two branches of law that have overcome their initial shyness of each other and are now becoming increasingly intertwined by the day. These two disciplines have developed in virtual isolation from each other for several decades. However, during the past few years, there have been a plethora of international standard setting activities, which have begun to explore the common objectives of patent law on the one hand

²² Joint Report of the WHO, UNICEF, the UNAIDS Secretariat and Médecins Sans Frontières: Sources and Prices of Selected Drugs and Diagnostics for People Living with HIV/ AIDS (2002).

and human rights law on the other. IPRs have now spread throughout the world by virtue of an intrinsic network of bilateral, regional and multilateral treaties as already discussed in this work. Extensive use of such rights has resulted in varying impacts on human rights. An integral component of intellectual property, patents assumed the global importance only during the 20th century. The IPRs consist of the whole array of contrasting rights. Many of them are statutory and they are protected for varying periods. Human rights, on the other hand, mean those basic rights and freedoms to which all humans are entitled, like the right to life and liberty, freedom of thought and expression, and equality before the law, those basic standards without which people cannot live in dignity.

Although the debates within the WTO and WIPO will surely be contentious, trade and intellectual property negotiators should embrace rather than resist opening up these organizations to human rights influence. Allowing greater opportunities for airing a human rights perspective on intellectual property issues will strengthen the legitimacy of these organizations and promote the integration of an increasingly dense thicket of legal rules governing the same broad subject matter. Such integration will also allow national and international lawmakers and NGOs to turn to the more pressing task of defining the human rights-intellectual property interface with coherent, consistent, and balanced legal norms that enhance both individual rights and global economic welfare.