1. General introduction

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1. INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS: RELATED ORIGIN AND DEVELOPMENT

It may be said that intellectual property law and human rights law share a related origin. Both stem from Western European societal developments starting in the nineteenth, if not already in the eighteenth century. The indicated societal developments were of three kinds. The first was the rapid industrialization and economic growth that affected countries unevenly and that was underpinned to a large extent by scientific, technological and cultural innovations. The second was a growing divide between the countries affected by

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1 In what follows I use intellectual property law as a generic term referring to the legal system with regard to intellectual property rights, being rights with regard to the commercial and non-commercial use of information.

Until far into the twentieth century it was customary to refer in this respect to industrial and intellectual property rights. Industrial was used to cover trade-related areas like patent law, designs law and trademark law; intellectual was used to refer to culture-related copyrights. Particularly since the conclusion of the WIPO Treaty in 1967 it is conventional to use the term intellectual property to refer to both industrial and intellectual property rights. Note that this terminology is broader than the one used in Article 1(2) TRIPS A. Taking into account that information is a rather diffuse term, having different meanings depending on the relevant context, it is used here as a generic term for the subject-matter of intellectual property rights. Comp. ITU, World Summit on the Information Society, Geneva 2003-Tunis 2005, Document WSIS-03/Geneva/DOC/5-E 12 December 2003 in combination with ITU, Declaration of Principles, Document WSIS-03/Geneva/DOC/4-E 12 December 2003. Comp. Drahos (1999), p. 1.

these trends, and those that were left outside these developments. The third was a sustained expansion of international commerce that was promoted by economically dominant countries.³

That which indeed may be called modern intellectual property law was shaped not earlier than the second half of the nineteenth century is illustrated and evidenced by the Paris Convention (PC) of 1883 on industrial property law and the Berne Convention (BC) of 1886 on copyright law.⁴ It is equally true that the second half of that age saw the breakthrough of various forms of social emancipation – general support for self-determination without any distinction as to race or sex, as well as the broad promotion of social, economic and political rights for everyone – legally speaking laying the fundamentals of modern human rights law.⁵

³ Comp. Dutfield and Suthersanen (2008), p. 6. In this respect it is noteworthy that the expansion of trade relates not only to commerce in ipr-protected products and services but also (and today even increasingly so) to commerce in the iprs themselves (either by transfer or by licence).

⁴ See Grosheide (1986); Firth (1997); Dutfield and Suthersanen (2008). It is of note that at this early moment in the history of modern intellectual property law for different reasons not all leading industrial countries of the time immediately joined either union: for example, the USA did not join the PC until 1887, Germany not until 1903; the Netherlands did not join the BC until 1912, the USA not until 1989.

⁵ The indicated societal developments were driven by a combination of the dominant ideological and political considerations at that time. Most of the outcomes can be largely ascribed to the socialist movements of the time. See Ishay (2004), p. 155:

If socialists were responsible for the first emulation of a supranational authority to resist either the aggressive politics of states or their colonial enterprises, their position also represented the first historical assertion that all humans, regardless of wealth, gender, race, or age, were entitled to both political and social rights. In this respect, they broadened the narrow definition of universalism they inherited from the Enlightenment, articulating a broad commitment to enhance simultaneously, rather than selectively, the rights of slaves, children, women, homosexuals, and Jews.

See also (with a focus on copyright law) Grosheide (2008), pp. 410–11:

(…) two interconnected phenomena would interfere with this steady process in the last quarter of the 20th Century:
1. the changed relationship between the industrialized and the non industrialized world,
2. the changes in the hidden code of the industrialized world, in particular the evolution from the industrial era into the information era. (…) The following new societal and paradigmatic components of the hidden code will prove to be determinative: the development of technology, the expansion of the possibilities to communicate, the creation of the welfare state and the related increase in cultural participation, the dominance of ideological utilitarianism, short-term compromise politics and an instrumental approach to the law.
In addition, not only do intellectual property law and human rights law have a related origin, but the same can be said of their development, particularly during the twentieth century, as can be illustrated by the legislative history of the Universal Declaration of Human Rights (UDHR) of 1948 and that of the TRIPS Agreement of 1994 (TRIPS A). All this despite the fact that, dogmatically speaking, intellectual property law, by addressing primarily private parties, is of a private law character, while human rights law, addressing primarily states, is of a public law nature.

It appears, however, that in spite of the fact that the two domains of law are both rooted in the indicated societal developments, from their beginning and over the years they have evolved largely separately, from being not interrelated at all into a rather problematic relationship.

Two opposing views have been proposed in this respect. The first view maintains that intellectual property law and human rights law are in fundamental conflict since the legal protection of individually held intellectual property rights is considered to be incompatible with communally-based human rights. In that, so to speak, hierarchical perspective, human rights are seen as legal instruments to limit and restrict the execution and enforcement of intellectual property rights. In other words: human rights are perceived as a countervailing force against intellectual property rights. Strategically, this view is often used during international trade negotiations in order to weaken the position of the developed world. In order to overcome the consequential tension between the two, it is suggested in this first view that human rights should always prevail over intellectual property rights.

The second view holds that intellectual property law and human rights law are compatible since they pursue the same aim. In this, so to speak, equal footing view, intellectual property rights are in fact embodied in the human rights system. In other words: human rights law is seen as the fundament of intellectual property law. This view requires, on the one hand, a definition to be given to the appropriate scope of protection for private monopoly power to create and invent and, on the other, at the same time ensuring adequate access to intellectual products for the public at large. However, at the same time it follows from the compatibility of intellectual property rights and human rights that a balance should be struck between protection and access. How to do that is a real challenge.
As will be discussed in the following sections of this general introduction, taking account of the indicated situation in the light of these two opposing views, any attempt at trying to reconcile the one view with the other raises many questions. In trying to come to terms with these questions, I will follow the approach that is generally taken in the various contributions bundled in this book, focusing on those questions that consider the status of intellectual property rights as human rights. It suffices in these introductory remarks to mention only some of these questions. Are human rights universal or culturally defined? Do any legal consequences follow from the fact that dogmatically (at least from a civil law perspective) intellectual property law belongs to the domain of private law and human rights law to that of public law? Are all intellectual property rights, seen from a human rights perspective, of the same ranking? Construing intellectual property rights as human rights implies construing them as absolute rights – is executing any of these absolute rights acceptable even if it is at the expense of society at large? Can human rights such as intellectual property rights be held by corporate identities? How should a proper balance be found between the protection of intellectual property rights and access to intellectual products protected by them? Is the debate about the human rights qualification of intellectual property rights equally relevant for the developed world and the developing world?

As a consequence I will not principally discuss the tension or even the conflict that may arise between human rights and intellectual property rights, offering such interesting questions as whether human rights can block the execution of intellectual property rights or whether it is possible to legally force an owner of an intellectual property right to actually execute its right. See for an example of the first situation the Dutch Scientology case; Court of Appeal of The Hague, Case No. 99/1040, Chamber M C – 5, Mediaforum 200310, pp. 337–42 (no copyright infringement by the defendant who published copyright-protected documents without the permission and against the will of the copyright owner based upon the human right of freedom of speech, that is, the right to be informed), and for an example of the second situation the British Ashdown v Telegraph Group Ltd case; [2001] EWCA Civ 1142, [2001] 3 WLR 1368 (human rights arguments served the purpose of making it possible for a third party to use works that were kept secret by the copyright owner and as a consequence were not already lawfully disseminated to the public), see Karnell (2004) and Yu (2007a). Another, again copyright-related, example can be found in the application of human rights law as a weapon against globalisation, that is, the Americanization of cultures, see Porsdam (2007). See for an alternative perspective Grosheide (2008) (copyright law is not the appropriate legal instrument to promote cultural diversity and to protect cultural identity). For a view from the perspective of patent law see Prove/Kothari (2000) (the TRIPS A has raised serious human rights concerns such as the restriction of access to patented pharmaceuticals for citizens of developing countries).
In order to come to terms with these and other related questions, this general introduction will proceed in the following order. Section 2, offering a brief account of the status of intellectual property rights in the actual international regulation of human rights law as well as of the status of human rights in the actual international regulation of intellectual property law, will be followed by Section 3 in which these international regulations will be analysed in the light of their appreciation and estimation in the legal literature. It follows from this order of things that there will occasionally be some overlap between Sections 2 and 3. The general introduction ends with some concluding observations in Section 4. As a whole, this general introduction may be read as a guide to the different views exposed in the contributions that have been collected in this book.

2. THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS IN THE ACTUAL INTERNATIONAL REGULATIONS

Taking account of the relationship between intellectual property rights and human rights can best be done by placing intellectual property law in the context of its recent history. Following the generally accepted main view, the protection of modern intellectual property rights at an international level can roughly be divided into three periods: the territorial period, the international period, and the global period.10

The territorial period is dominated by national law, that is, the principle of territoriality: intellectual property rights do not extend beyond the national territory where the rights have been granted in the first place. This period runs from the end of the eighteenth century and during the greater half of the nineteenth century. It is marked by bilateralism, that is, the conclusion of bilateral agreements between national states. This bilateralism was important in as far as it contributed to the recognition that an international framework for the regulation of intellectual property law had to be developed.11 The international period is characterised by a growing interest in cooperation between national states in the domain of intellectual property law. This period in fact saw the introduction of the required international framework with the establishment of

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11 See Sherman and Bentley (1999); Bentley and Sherman (2004). What is here called bilateralism is sometimes called unilateralism referring to the fact that it is the legal regime of a particular nation state which counts. See also Okediji (2003–2004), suggesting that the actual need for intellectual property law policies may lead to a swing of the pendulum back to bilateralism.
the PC and the BC. The global period that is still running today can be marked by the constant efforts made to transform the existing international framework for intellectual property law into a real form of harmonised interstate regulation that would fit the growing international commercial interdependency of the developed world.12 Sticking to the territoriality principle and maintaining the possibility of binding their signatories led to all sorts of reservations by the member states, so that the international harmonization of intellectual property law under the PC and the BC did not progress very quickly. In that last perspective it is of note that the corridor from the international period to the global period saw, next to various revisions of the PC and the BC, a proliferation of international intellectual property regimes leading to harmonisation in specific areas.13

What becomes clear from this brief overview of its historical development is that modern intellectual property law was introduced primarily out of economic considerations. Indeed, intellectual property law was mostly made for doing business. By its very nature it is mainly policy-driven, time and place-bound trade law. This is not contradicted by the fact that also cultural

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12 It is of note that, as rightly stated by Dutfield and Suthersanen (2008), p. 22, (the histories of these agreements make evident that despite the fact that in each case their bringing into being had much to do with the activism of IP owners and legal practitioners, neither their direct nor underlying purposes were the same. The Paris Convention was about helping inventors and trade mark and industrial design owners to get wider geographical protection, but cannot really be seen as a means to bind the catcher-uppers to standards of the leaders with respect to substantive IP law.(…) Much the same can be said to apply to the Berne Convention, which again was primarily a response to the strong commercial interests of copyright owners in securing protection in foreign markets. However, over time the Berne Convention came to differ markedly from the Paris Convention in that it increasingly dealt with more substantial rules (…). A second reason why the Berne Convention represents a much more cohesive international architecture of rules is that copyright interests are very ably presented not only by the publishing and entertainment industries, but also by collecting societies.

objectives have always been part of intellectual property law. This equally holds true for industrial property law and copyright law, bearing in mind that since their encoding in the BC in 1928, copyright law also, and next to economic rights, grants so-called moral rights to right owners which underlines the cultural objectives of the latter. As will be seen later, this moral rights aspect plays an important role in the discussion on the relationship between copyright law and human rights law.

It seems that recently the primary economic character of intellectual property law has been underlined by the TRIPS A. This is at present the most prominent international legal instrument aiming, as far as possible, to overcome the still existing lack of substantive law harmonization in the global period, set in the key of law enforcement. For that reason, somewhat more attention will now be paid to the TRIPS A.

The international intellectual property system has always been driven, to some extent, by trade concerns. However, the recent incorporation of intellectual property within the apparatus of the World Trade Organization, along with other social and economic developments, has caused the rapid evolution of the international intellectual property system. The contours of that system are now quite different than when the system first took shape in the late nineteenth century. Yet, appreciating the important role of trade institutions in changing the intellectual property system should not distract commentators from other developments that are now effecting the creation of international intellectual property norms equally. In particular, private ordering activities have the capacity to regulate extensive international activity, and to do so without full public scrutiny.

See also Drahos (1999).

See generally on TRIPS A, Blakeney (1997), Gervais (2003), Correa (2007). The TRIPS A of 1994 entered into force in 1995. The TRIPS A has been characterized by its designers as a prerequisite for the worldwide stimulation of innovation and creativity, and as a consequence thereof as an essential legal instrument for human progress. I share the view of Dutfield and Suthersanen (2008), p. 7, that ‘(i)t is unlikely that history or economic analyses can prove beyond doubt that having an IP system is better than not having one, or vice versa’. See already in the same sense Plant (1934). However, as observed by Gervais, p. 47, the TRIPS A being ‘the strongest normative vector in setting intellectual property policy (...) and it (being) unlikely that TRIPS norms will be diluted in the Doha Round, it would seem to be pragmatically justified to take TRIPS as a given quantity in the policy equation’. I do not discuss in this context the latest development (at the end of 2007) in this respect: the Anti-Counterfeiting Trade Agreement (ACTA), a multilateral intellectual property trade
What, then, really induced the developed world to set off on the making of the TRIPS A? In order to answer this question, it is of note that from the 1960s onwards gradually the awareness spread in the developed world that intellectual property rights regimes had to cope with at least two major changes, one of a technological, the other of an economic nature. All this whereas, as already indicated, and seen from an international perspective, the global period became dominated by growing interstate commercial interdependency. This state of affairs instigated the desire to come to a more elaborate international legal instrument with regard to the granting and the protection of intellectual property law.

The technological change mainly followed from the progressive development of computer technology, offering new products bearing their properties on their face and simultaneously available everywhere and for everyone. In reaction to this change, already from the 1980s onwards in the developed world concerns were voiced by policymakers and academics that producers in competing countries, alongside consumers, could copy the new technologies too easily because of their vulnerable nature. Therefore, those concerned asked for a new approach towards the extensive free-riding which, following from the then liberal view of foreign trade, was tolerated in the international period, but which was felt to be increasingly counterproductive. With regard to the legal consequences, this led to a governmental and scholarly appraisal of these new technological products as being possibly protectable subject-matter and, related to that, the creation of new hybrid semi-intellectual property rights like that in software and chips.

The economic change can be labelled as a swing towards neo-liberalism, characterized by privatization, deregulation and the elimination of the concept of public good, sublimized in the supremacy of the market rule.16 Interestingly, however, it appeared that this swing towards neo-liberalism

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16 See Maskus and Reichman (2004).
fitted very well into the indicated turn towards the granting of new intellectual property rights, as advocated by policymakers and academics. Obviously, the granting of new intellectual property rights leads to more protection and in that sense it is the opposite of providing for more access. Besides, such a development may have – and in this case did have – as a side-effect an increase in claims for stronger protection of intellectual property rights over the whole range. So the situation that resulted therefrom may be called rather ambiguous. For, on the one hand, neo-liberalism promotes free access, but, on the other, it creates new intellectual property rights favouring overall protectionism.\textsuperscript{17}

And, indeed, what happened was the gradual revision of trade law to strengthen the protection of owners of intellectual property rights, not only in relation to the new subject-matter but over the whole range.\textsuperscript{18} With respect to international trade it now became a matter of urgency to break away from the old unilateralism, guided by national policies and practices, towards a real multilateralism as the dominant method of dealing with matters of intellectual property law. All this was also lobbied by a group of big US-based internationally operating companies and supported by their counterparts in the EU, Japan and Switzerland.\textsuperscript{19}

The TRIPS A which finally resulted from all of this is undoubtedly primarily instigated by economic reasons. This state of affairs is also reflected in the early commentaries from both the developed and the developing world. Both sides emphasized that negotiating the treaty required concessions to be made and that, as a consequence, seen from their respective perspectives, no optimal result was attained. But their evaluation of that result was quite opposite. The developed world being satisfied overall, the developing world generally feeling economically trapped by the developed world. It is interesting, however,

\textsuperscript{17} Comp. Maskus and Reichman (2004), p. 2: ‘We find it ironic that, as tariffs, quotas, and often formal barriers to trade are dismantled, there has been a strong push to re-regulate World technology markets.’

\textsuperscript{18} See Braithwaite and Drahos (2000); Sell (2003); Merlin-Bennett (2004); Hveem (2007).

\textsuperscript{19} It suffices here to observe that in the words of Musungu and Dutfield (2003), p. 10:

(t)he permissive nature of the rules under the WIPO regime and the lack of an enforcement mechanism is what led key industry players in the USA, in particular, to conclude that the organisation had failed to secure for them the appropriate levels of intellectual property protection around the world and to argue for a shift to the General Agreement on Tariffs and Trade (GATT). In the 1980s, the strategy of the USA and its major industries was therefore aimed at shifting the intellectual property regulatory focus from WIPO to the GATT which would permit the use of trade remedies to enforce intellectual property standards.
that some ten years later in retrospect things appear to be evaluated somewhat differently.\textsuperscript{20}

Of course, this firstly follows from the fact that legal instruments, once introduced, tend – so to say – to develop a life of their own. So, it may well be that provisions that at first seemed to have a clear meaning need interpretation with the course of time. A good example in this context is the interpretation of Articles 7 and 8 TRIPS A that was requested by the TRIPS Council in 2001 in order to define the relationship between intellectual property rights and access to essential medicines.\textsuperscript{21} A later evaluation that differs from a previous one may, secondly, very well follow from unexpected effects which a legal instrument appears to have. A good example here seems to be the reported qualification of the TRIPS A as a failure by Bruce Lehman, who headed the United States Patent and Trademark Office (USPTO) during its negotiations and who initially called its outcome a victory. A failure, he calls it in retrospect, because in his view the treaty opened US markets to overseas manufactured goods and destroyed the US manufacturing industry.\textsuperscript{22} In the meantime similar dissatisfaction concerning the TRIPS A had already led the developed world to impose the so-called bilateral TRIPS-plus agreements on the developing world.\textsuperscript{23}

But not only from the perspective of the developed world have second thoughts been formulated with regard to the success of the TRIPS A, the same is somewhat surprisingly true from the perspective of the developing world. For it appears that a feeling of being economically trapped (and not taking account of the occasionally imposed TRIPS-plus standards) is countered by the often proved unexpected beneficial outcomes of the policy flexibilities that have been introduced in the TRIPS A with an eye on the interests of the developing world.\textsuperscript{24}

\textsuperscript{20} See the reports on the TRIPS Agreement ten years on, International Conference on the 10th Anniversary of the WTO TRIPS Agreement, Brussels, 24 June 2004 at which Lamy (2004) observed that most panellists agreed that, by and large, the balance struck in TRIPS was correct. See for a more nuanced view Musungu and Dutfield (2003) and Maskus and Reichman (2004).

\textsuperscript{21} See Gathii (2002).


\textsuperscript{23} Deplored by most panellists at the anniversary conference mentioned in footnote 20, considering it unfair that developing countries were sometimes put under pressure to adopt substantive TRIPS-plus standards that are not adapted to their level of development. At present the indicated discontent in the developed world seems to be the driving force behind the proposed Anti Counterfeiting Trade Agreement, http://jamie.com/2008/06/02/the-proposed-anti-counterfeiting-trade-agreement-acta-glocal-policy-implications/.

\textsuperscript{24} See Kamperman Sanders in Gervais (2007), p. 170, stating that:
It is here that a shift to the human rights perspective of intellectual property law becomes apparent. Interestingly, although the reported dissatisfaction with the TRIPS A is still about economics and fits well in Lamy’s characterization of the TRIPS A as a good economics framework, this feeling appears to coincide with recent voices that can be heard to the effect that economics are no longer the only or even the primary driving force behind intellectual property law.25 Of particular interest in this respect is the question whether the qualification of intellectual property rights as private rights, that is as a subcategory of property rights generally, means anything at all. A related but different question is what other relation may exist between the two categories of rights. In answering both questions, it seems appropriate to investigate whether any of the existing international legal instruments on intellectual property law as well as human rights law sheds any light on them. In Section 3 I will come back to these questions in order to see what legal doctrine has to offer in this respect.

To start with the PC and the BC: these conventions are silent on human rights. This is understandable in retrospect, since at the time of the establishment of these treaties human rights were not an issue. However, later adaptations do not refer to them either, which raises the question whether those concerned with keeping the international intellectual property law system up to date ever thought of relying on human rights law for that aim.26 For a positive answer to that question reference can be made to at least one document: the Solemn Declaration of the BC member states in 1986 asserting that copyright

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26 With the exception of moral rights in copyright law, I did not find much on the reason why later adaptations do not refer to human rights in the literature. For the moment I will leave it at that and the observation that the reason why requires further study. See Ricketson and Ginsburg (2006).
is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their country and in all other countries of the world.\textsuperscript{27} But a solemn declaration was all that the BC community committed itself to. In fact, an investigation over the years into human rights references in the catalogue of international intellectual property law instruments leads directly to the TRIPS A. It appears, then, that also in this treaty no provision \textit{expressis verbis} refers to either any human rights law instrument or to any human right in particular. But references to human rights (law) could be said to be found in the Preamble, if one is prepared to accept intellectual property rights being a (sub-)category of property rights generally. If so, then in the Preamble the ‘whereas’ that recognizes intellectual property rights as private rights may be mentioned here. From that it would follow that intellectual property rights fall under the protection of property as laid down in Article 27 Universal Declaration of Human Rights and Article 1 First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1952 (First Protocol ECHR). But even these references to the right to property provide only for a small human rights basis, since no other key international human rights instruments refer to the right to property.\textsuperscript{28}

\textsuperscript{27} Comp. Peifer (2008), p. 685:

The natural law approach in our time has been elaborated to become a human rights approach. We are no longer discussing whether national law has to accept authors’ rights as something pre-existing to the State. States are moving toward a system of human rights whose protection is granted on the basis of international understanding.

Of course, it may be argued that the inclusion of moral rights in Article 6bis BC in 1928 is an indication of human rights thinking in the BC community. Comp. Rigamonti (2006); Grosheide (2009).

\textsuperscript{28} Comp. van der Vyver (1996), p. 468:

The absence of any reference to the right of (private) ownership in the key human rights covenants sponsored by the United Nations Organization and which are taken to constitute the bill of rights of the international community of states – i.e. the International Covenant on Economic, Social and Cultural Rights, 1966 – except for a provision in the later document prohibiting discrimination against children on the basis of property or birth, is therefore particularly conspicuous.

So, instead of referring to the right to property, sometimes another reference is made: that to Article 15.1 (a) (b) (c) International Covenant on Economic, Social and Cultural Rights (ICESCR) establishing everyone’s right to take part in cultural life (a), to enjoy the benefits of scientific progress and its applications (b) and to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (c) as a human right. This provision was indeed presented in 2000 as a basis for a human rights qualification of intellectual property rights by the UN Committee on Economic, Social and Cultural Rights (CESCR).29 It is well understood that this provision should be read in the light of the drafting history of Article 27 UHDR which, according to some, already reflects a human rights approach to intellectual property rights.30 However, following Chapman the drafting history underscores four points: the relatively weak claims of intellectual property as a human right, the interrelationship of the three provisions of Article 15, human rights considerations imposed conditions on how to protect intellectual property rights, and the lack of a conceptual foundation for the interpretation of intellectual property rights as human rights.31

Studying Article 15 ICESCR more in particular the following can be said. The rights granted under a and b were said to converge with the objectives which are contained in the WTO Agreement to which the TRIPS A is an annex, as well as with Article 7 TRIPS A which put emphasis on the public interest rationale of intellectual property law protection.32 As to Article 15.1(c) the CESCR argued that the TRIPS Agreement, including the pre-existing IP conventions incorporated into it, also seeks to give effect at the multilateral level to Article 15.1(c) of the ICESCR. The approach taken in 2000 started a long process of reflection within the CESCR for the time being ending in 2005.

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30 See, among others, Morsink (1999), Chapman (2001), also pointing to Article 13 American Declaration on the Rights and Duties of Man 1948 which refers to the protection of moral and material interests as regards inventions as well as literary, scientific or artistic works.
32 This is done in the document mentioned in footnote 2. Article 7 TRIPS A states that:

the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
with its General Comment No. 17 on Article 15.1(c) in particular. Although the General Comment does not directly refer to TRIPS A, it is here worth quoting its paragraph I, Introduction and Basic Premises sub. 2 in the light of the statements of the 2000 document: ‘In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by Article 15.1(c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.’ In addition, sub. 3 opens as follows: ‘It is therefore important not to equate intellectual property rights with the human right recognized in Article 15.1(c)’. Previously in sub. b it was stated that their human rights character distinguishes the entitlements of Article 15.1(c) and other human rights from most legal entitlements recognized in intellectual property systems.

Against this background it is somewhat confusing that the General Comment’s terminology, although clearly in line with the terminology of Article 15, closely relates to what may be called ipr-speak. This terminology is for instance used in paragraph 9, defining what is to be considered as any scientific, literary or artistic production within the meaning of Article 15.1(c). But when it comes to interpreting the meaning of the phrase ‘benefit from the

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33 CESCR, General Comment No. 17 (2005) – The right of everyone 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 (article 15, paragraph 1 (c)), of the Covenant, Doc. E/C.12/GC/17, 12 January 2006, prepared by rapporteur Eibe Riedel in his Draft General Comment No. 18 (2004). The General Comment was issued with a view to assisting member states’ implementation of the Covenant and the fulfilment of their reporting obligations.

34 See note 32, above. See on the Committee’s reasoning Anderson and Wager (2006); Policy Brief 3 (2006). It is beyond the focus of this contribution to go into the details of the clarifications by the CESCR with respect to implementing the ICESCR. See also Cullet (2007).
protection’ in this respect, paragraph 10 holds that the protection under Article 15.1(c) need not necessarily reflect the level and means of protection found in present copyright, patent or other intellectual property regimes (…).\(^{35}\) Further, it is of note that whereas the CESCR qualified intellectual property rights as human rights in 2000, it did not take into account the fact that the TRIPS A recognizes that intellectual property rights are private rights, and that the General Comment takes their private law character as a basic premise. Then it is worth considering that the General Comment consequently stresses in many instances the obligation of member states to implement Article 15.1(c) in their domestic laws. This makes clear that the ICESCR is not directly applicable in national law. It follows from the foregoing that in the CESCR’s estimation of the relationship between intellectual property law and human rights law as articulated in the ICESCR, particularly its Article 15.1, this relationship is of a public law character and has a twofold aim. First, it is up to the member states to implement the ICESCR in their domestic laws. Secondly, it is up to the owners of intellectual property rights to exercise these rights in conformity with these implemented human rights. The reported finding comes as a surprise in the light of the 2000 resolution adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, noting that actual or potential conflicts exist between the implementation of the TRIPS A and the realization of economic, social and cultural rights. The resolution affirms that the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right, subject to limitations in the public interest. Reminding all governments of the primacy of human rights obligations over economic policies, it declares that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.\(^{36}\)

\(^{35}\) This confusing terminology may well be the reason why Helfer (2004) in my mind seems to acknowledge intellectual property rights as human rights despite the clear rejection of that categorisation in paragraph 3 of the General Comment. See in this respect also Section 3. Comp. idem Beiter (2008), pp. 717–20.

\(^{36}\) Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Fifty-second Session, Agenda item 4, E/CN.4/Sub.2/2000/7, adopted on 17 August 2000 2000/21. This resolution is supported by Chapman (2001) but is contradicted by Anderson and Wager (2006) (among other things stating that the TRIPS A represents an effort to provide an essential constitutional framework for the regulation of international markets) – see more on
In addition, it seems appropriate to say something more about the state of affairs concerning human rights in both the Council of Europe (CE) and the European Union (EU). As far as the CE’s Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the First Protocol (FP) thereto are concerned, they are silent on intellectual property. As rightly stated by Cullet it is apparent that no in-depth analysis of the place of intellectual property protection in the context of the Convention has been undertaken. This is, for instance, indicated by the fact that the Commission and the Court have simply assumed that existing intellectual property rights constitute the property rights over science, technology, and culture (which need to be protected in the context of the Convention) without considering the impacts that this has over the realization of other human rights.\(^{37}\) And whereas the European Commission of Human Rights (ECHR) has on many occasions analyzed Article 1 FP with regard to a person’s peaceful enjoyment of his possessions, there are only a few decisions dealing with intellectual property law.\(^{38}\) A similar approach can be found in the decisions of the European Court of Human Rights (ECtHR). Mention should be made here of the recent Anheuser-Busch v Portugal case.\(^{39}\) This case concerned the concept of possessions, equated with property rights, in the first part of Article 1 Protocol No. 1, as applied with respect to a trademark application. According to the ECtHR such an application, being recognized under Portuguese law as a set of property rights, is indeed a possession in the sense of the Protocol, even though such application could be revoked under the applicable law. However, this decision seems to be incorrect in at least one respect by recognizing a corporation (not an individual) as the owner of a human right.\(^{40}\) With respect to the EU mention can be made of the recently adopted Charter of Fundamental Rights (ChFR). Article 17(2) ChFR specifically provides that intellectual


\(^{38}\) See for example, ECHR, App. No. 12633/87, 60 (Smith Kline and French Laboratories v The Netherlands), Dep. & Rep. 77, 79 (1990), recognizing a patent right as a property right in the sense of the ECHR.

\(^{39}\) See for example, ECtHR 11 January 2007, www.ipt.nl (IEPT20070111) in the case of Anheuser-Busch v Portugal (Budweiser), considering, among other things, that a legitimate expectation of obtaining an asset may qualify as a possession in the sense of Article 1 FP, that this article applies to intellectual property as such, and that a trademark application is in fact a possession (in this case a set of proprietary rights recognized under Portuguese law, even though they could be revoked under certain conditions).

\(^{40}\) See in the same sense Helfer (2008), to which I will return in Section 3.
property shall be protected.\textsuperscript{41} However, as is again correctly stated by Cullet, the Charter falls short of introducing a human right to intellectual property rights because it is addressed to institutions of the European Union rather than right holders.\textsuperscript{42}

Finally, and for the sake of good order, mention should be made of the fact that worldwide the constitutional or related legislations of many countries (often in conjunction with guaranteeing the freedom of and participation in cultural life) pay attention to acknowledging and securing the promotion and protection of creativity and innovation in various ways, for example by stating that the expression of intellectual, artistic, scientific and communication activities is free, without any censorship or licence (Article 5 (IX) of the Constitution of Brazil), or the right to ownership of creative and intellectual property is protected by law (Article 43 of the Constitution of Slovakia).\textsuperscript{43} However, all these provisions grant human rights status to the indicated cultural expressions with regard to the vertical relations between state governments and their citizens, not with regard to the horizontal relations between citizens. But it is equally true that for example, in the European context, national courts under the circumstances, also in cases of intellectual property law, have applied the ECHR horizontally.\textsuperscript{44}

From the foregoing the following findings can be inferred.

Taking account of the actual governing international human rights instruments no specific mention is made of intellectual property rights per se, albeit that some of them refer to objectives and objects of protection which concur with the objectives and objects covered by intellectual property law proper. But even if it may be true that, seen in this perspective, intellectual property rights, being considered as private rights fall within the scope of human rights protection, in order to judge the legal consequences thereof the following should be taken into consideration.

First, human rights law belongs to the legal category of public law. In that capacity it concerns primarily the so-called vertical relations between states

\textsuperscript{41} Charter of Fundamental Rights of the European Union, 2000 J.O. (C 364) 12.
\textsuperscript{42} Cullet (2007), p. 411. Reference could also be made in this respect to the Preamble to the Information Society Directive (Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29 EC, para. 3) providing that ‘(t)he proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law, and especially of property, including intellectual property, and freedom of expression and the public interest’.
\textsuperscript{43} See for other examples Article 34 of the Czech Charter of Fundamental Rights; Article 42(2) of the Portuguese Constitution; Article 44(1) of the Russian Constitution; Chap. 2, Sec. 19 of the Swedish Constitution.
\textsuperscript{44} See on this Geiger (2006) sub. II (A)(b).
and citizens, and not (and if so, only indirectly) the so-called horizontal mutual relations between citizens. With regard to international instruments of human rights law *mutatis mutandis* the same is true: they address primarily affiliated states, not the citizens of these states. This state of affairs is important, since most of the questions concerning the applicability of human rights in relation to intellectual property rights are raised with regard to horizontal relations. It is of note in this respect that since the second half of the twentieth century, which saw the spread of international human rights instruments, it has been increasingly advocated that these instruments not only charge contracting states with duties of care to ensure the adequate protection of, for example, material and immaterial property, but that these instruments, if not explicitly then implicitly, express the view that, even in the absence of existing domestic law, individuals are given a direct claim against government authorities so as to grant them (and against fellow citizens to ensure respect for) a right to create. Secondly, by their very nature human rights are generally considered to be universal, that is, they exist independently of their implementation in positive law. However, it seems to be also accepted in legal doctrine and legal practice that two categories of human rights should be distinguished: fundamental human rights (for example, the prohibition of slavery) and non-fundamental human rights (for example, the right to property). The endorsed view in this respect depends on whether one follows a positivist or a naturalist approach. This distinction is not without consequence, since

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45 Mention should be made here of a recent tendency labelled as the *constitution-alisation of private law*, present particularly in German law, according to which human rights should indeed also reign in horizontal relations. See Barkhuijsen and Lindenbergh (2006). See for an application of this doctrine to intellectual property law Geiger (2004).


47 Falk (1992), p. 44:

The positivists consider the content of human rights to be determined by the texts agreed upon by states and embodied in valid treaties, or determined by obligatory state practice attaining the status of binding international custom. The naturalists, on the other hand, regard the content of human rights as principally based upon immutable values that endow standards and norms with a universal validity.

It goes without saying that the whole concept of human rights taken either way is a fruit of Western thinking which does not concur in every respect with non-Western thinking. See for an Asian view the Report of the Regional Meeting for Asia of the World Conference on Human Rights, UN Doc. A/Conf.157/PC/59 (7 April 1993), available at http://www.unhchr.ch/html/menu5/wcbangk.htm. However, it is beyond the scope of this introduction to deal with that aspect; see on that Human Rights in Cross-Cultural Perspectives from which source Falk’s essay is taken.
it adds to the generally agreed margin of appreciation which states have when applying internationally consolidated human rights law, the possibility of state interference with respect to non-fundamental human rights. 48 Thirdly, human rights are addressed to individuals, not to corporate entities.

These findings can be represented, from a dogmatic point of view, in the scheme hereunder:

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<thead>
<tr>
<th>Human Rights Characteristics</th>
<th>Intellectual Property Rights Characteristics</th>
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<td>• public law</td>
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<td>• ex persona</td>
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<td>• universal</td>
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<td>• individual rights</td>
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<td>• material interests (but moral rights may be involved)</td>
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<tr>
<td>• unlimited term</td>
<td>• limited term (but sometimes renewable)</td>
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3. THE RELATIONSHIP BETWEEN INTELLLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS IN THE LEGAL LITERATURE

The aim of this Section is to offer a bird’s-eye account of the actual positions taken in legal writing with regard to the debated human rights status of intellectual property rights. In doing so, I will generally distinguish some authors who take a more positive and some authors who take a more negative view in this respect. It will not come as a surprise that the positions taken concur with those represented by the various contributors to this book. 49 It seems appropriate to

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48 Schermers (1988). See for a different view Geiger (2006) and Flinterman (in this book) (stating that all human rights are of the same ranking). See for an analysis of the debate in terms of the distinction between first generation human rights (that is, civil and political rights) and second generation human rights (that is, economic, social, and cultural rights) Yu (2007a), p. 1074.

49 The brief nature of the account relates to both the presented survey itself as well as to the literature which has been taken into account, the latter since this literature over the last 25 years or so has become rather abundant. However, it is claimed that the referenced legal writings provide a fair insight into the pros and cons of the debate.
start this account by giving some attention to works that approach the relationship at issue from a structural point of view.

In his article on the origin and development of the universality of intellectual property rights Drahos takes as a general point of reference that today’s legal theory accepts that the existence (and exercise) of some rights presupposes the existence of other rights, some of which are foundational in securing the feasibility of claiming other types of rights. According to Drahos property law as it developed in the course of time into a human right, has that indicated presupposed function and as a consequence has become foundational for today’s information society, vesting a secure non-arbitrary property right environment. In Drahos’ view the rights created through the enactment of intellectual property laws fit well in that property right environment and can be called instrumental rights, ‘(i)deally’, he writes, ‘under conditions of democratic sovereignty, such rights should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights.’ However, as Drahos explains, the history of intellectual property does not square with this ideal. It has as much to do with powerful elites using such privileges to obtain economic rents for themselves as it has to do with parliaments working on behalf of citizens to design rights that maximize social welfare. All this leads Drahos to the following conclusion: ‘Viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.’

In conclusion, it may be said that, according to Drahos, whatever their legal nature may be, intellectual property rights are instrumental in promoting and protecting human rights, for which aim they need to be implemented into domestic law.

Also instrumental is the approach taken by Okediji, who reaches the following conclusion in her study on the limits of development strategies at the intersection of intellectual property and human rights: ‘I conclude that human rights can be used instrumentally to deflect the moral appeal of certain affirmative rights of intellectual property holders, e.g. by justifying compulsory licenses for public health, or requiring national exceptions to copyright laws in the interests of freedom of expression.’ According to Okediji:

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51 Drahos (1999).
52 Drahos (1999).
(g)iven the strong justification for the free trade ideal as the improvement of national welfare through open access by non-citizens into local-markets, notwithstanding adverse effects on local industries, mandatory intellectual property regulation embedded in the multilateral trade system and human rights appear to have much more in common, at least structurally in the global context, than ever before.

Earlier the author expressed her view that in this respect the TRIPS A, with its mandatory provisions and the requirement of oversight by an international dispute settlement system, has brought the international economic system much closer to the conceptual foundations and assumptions of the human rights framework.54

Interestingly, when Okediji speaks of instrumentality it is with regard to human rights in their acknowledged function of tempering the execution of intellectual property rights. The reference that is made to the TRIPS A may be interpreted as pointing to the supposedly built-in checks and balances in that treaty with an eye to general interest issues such as those addressed by human rights law.

Dinwoodie has pointed in this respect to lawmaking stemming from what he calls private ordering activities. He mentions the following two examples, both of which are taken from the domain of copyright law: online contracts and digital rights management. According to Dinwoodie, it is no longer only state law that shapes the system of intellectual property law, but private initiatives do so as well.55 What Dinwoodie’s analysis illustrates is that apparently private practice can go, and in fact does go, beyond at least non-mandatory intellectual property law in order to serve the needs of today’s information society. It underlines that under the TRIPS A – see its Preamble – intellectual property law is still part of private law and, as a consequence, is a tool for ordering private relations. However, in that same function intellectual property law is subordinate to international and national public law, such as human rights law and competition law.56

If this instrumental view may be characterized as a middle position concerning the relationship between intellectual property law and human rights law, the following authors can be seen as the representatives of a more outspoken position. These positions all concentrate on the interpretation of Article 27 UHDR and Article 15.1(c) ICESCR.

It is argued by Chapman in a series of articles that Article 27(2) and Article 15.1 recognize the intellectual property claims of authors and inventors, linking them to the right to participate in cultural life and to the enjoyment of the

benefits of scientific progress. In her analysis of the impact of these international human rights instruments, the participating States are under an obligation to develop intellectual property rights regimes that have an explicit human rights orientation. Executing this obligation is not without consequences since a human rights approach differs from a narrowly economic interpretation of intellectual property rights in various respects, for example implying respect for the material as well as the immaterial (moral) interests of authors and inventors, acknowledging that the author or inventor can be an individual as well as a group or community, and contributing to the promotion of cultural diversity. In that perspective it becomes clear that intellectual property rights are not first and foremost economic commodities, but have an intrinsic value as an expression of human dignity and creativity. Recognizing intellectual property rights as human rights raises the crucial question of how to balance these rights with other human rights. In Chapman’s view any understanding of intellectual property rights as human rights is lacking in the WTO and as a consequence thereof in the TRIPS A.

Again in a series of articles Helfer and Yu have taken similar positions to that taken by Chapman.

Placing the relationship between intellectual property law and human rights law in a historic context, Helfer observes that it was the human rights community that first took notice of intellectual property law. Two events, Helfer states, caused intellectual property to be placed on the agenda for human rights lawmaking. The first was an emphasis on the neglected rights of indigenous peoples. The second was the consequence of linking of intellectual property and trade through the TRIPS A. Taking account of the two opposing views with regard to the respective domains of law, as already indicated in Section 1: a conflict approach and a co-existence approach, Helfer states that the tension between them is not likely to be resolved at any time soon. On the contrary, since in his view this tension is likely to have at least the following four distinct consequences for the international legal system: an increased incentive to develop soft law human rights norms (a), a paradigm shift granting to users a status conceptually equal to that of owners and producers of intellectual property (b), the articulation of the ‘maximum standards’ of intel-

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57 Chapman (1998), (2001), (2002), underlining that prior to the coming into existence of the UDHR in 1948 ip claims, cultural life or scientific development was not considered to be covered by human rights law. See for a view that closely concurs with that of Chapman, Riedel (2004).
58 See for another view Anderson and Wager (2006) (the promotion by the WTO of well-functioning (inter)national markets is a necessary and inevitable consequence of concern with human rights).
60 Helfer (2003), p. 57.
lectual property protection (c), an articulation which will depend on how human rights norms are received in established intellectual property lawmaking venues such as the WIPO and the WTO (d).\textsuperscript{61} From this Helfer concludes as follows: ‘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 influences. 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.’\textsuperscript{62} In a later publication Helfer offers to that aim a – what he calls – human rights framework for intellectual property.\textsuperscript{63} Such a framework in his view can be built upon the human rights approach of intellectual property rights which in his reading is taken in the CESC\textsuperscript{r}’s General Comment No. 17, analysed in Section 2. According to Helfer such a framework should encompass a rule of equality between domestic and foreign owners of intellectual products ‘(…) including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for “disadvantaged and marginalized groups”’.\textsuperscript{64} Introducing such a framework in Helfer’s view would have as its most striking consequence that it would substantially diminish the ability of States to restrictively regulate intellectual property rights.\textsuperscript{65} It is of note that by pointing at the aspect of the legitimacy of the involved NGOs, Helfer brings a new element into the debate.

Like Helfer’s studies, Yu’s recent comments have as their primary aim to introduce a human rights framework for intellectual property rights. Particularly his response to – as he puts it – ten common questions about intellectual property law and human rights is worth mentioning in this respect. In his response Yu also takes as his starting point the juxtaposition of the two views on the relationship between intellectual property law and human rights law. To the extent that human rights and intellectual property rights serve similar goals, he writes, the development of a human rights framework can only be beneficial, because it will promote and reinforce the underlying goals of these

\textsuperscript{61} Helfer (2003), pp. 57–61.
\textsuperscript{62} Helfer (2003), p. 61.
\textsuperscript{63} Helfer (2006–07).
\textsuperscript{64} Helfer (2006–07), p. 15.
\textsuperscript{65} Helfer (2006–07), p. 16. In Helfer (2008) it is argued that according to his reading a similar approach to intellectual property rights as is presented in General Comment No. 17 can be found in the decisions of the ECrtHR (it thus seems plausible that the ECHR has an understanding of intellectual property’s place in the European human rights system, even if it has not thus far articulated a theory to justify this placing).
two sets of rights. To the extent that human rights and intellectual property rights are in conflict, however, the framework is urgent and necessary. The fact that there are limited or no conflicts in other areas does not mean that the existing conflicts are unimportant. Moreover, as intellectual property rights continue to expand, the expanded rights are likely to pose conflicts in other unforeseen areas.66 According to Yu conflicts can possibly be avoided by taking a non-uniform view of intellectual property rights. In doing so, first, one should accept that not all intellectual property rights can be considered as human rights. For example, trademarks, works made for hire, employee inventions, neighbouring rights, and database rights should not be acknowledged as human rights. The same is true for intellectual property rights held by corporate identities.67 Secondly, one should make a distinction between – what Yu calls – the human rights attributes and the non-human rights attributes of intellectual property rights. Indeed, an emphasis on the human rights attributes of intellectual property rights is likely to further strengthen intellectual property rights, especially in civil law countries (because of their protection of moral rights, FWG):

(…) The development of a human rights framework for intellectual property therefore may result in what I have described elsewhere as the undesirable ‘human rights ratchet’ of intellectual property protection. Such a development would exacerbate the already severe imbalance in the existing intellectual property system and would ultimately backfire on those who seek to use the human rights forum to enrich the public domain and to set maximum limits of intellectual property protection.68

He adds, however, that since the existing international human rights instruments have recognized only certain attributes of existing intellectual property rights as human rights, there will not be much of a problem if we clearly delineate which attributes of intellectual property rights would qualify as human rights.69 In Yu’s view it is further quite feasible that also indigenous peoples will benefit from a human rights approach to intellectual property rights since the right to protection of interests in intellectual creations (by the international human rights instruments, FWG) is not as biased against non-Western countries and traditional communities as some might have thought.70

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It appears that Yu brings in particular the following two important aspects into the debate: the human rights status of intellectual property rights (not all of them should be given this status); and the distinction between the human rights and non-human rights attributes of those intellectual property rights that in principle are given a human rights status.

Again a somewhat different approach has been offered by Geiger. His suggestion is to apply the recently developed, particularly in Europe, theory of the constitutionalisation of private law in this respect. Referring to the signs of an over-accentuation of the economic aspect which can be found in actual intellectual property law, he argues that ‘constitutionalizing’ intellectual property could represent an effective tool to check these tendencies of overprotection and to help this field of law recover the legitimacy that it seems to have lost.71 According to Geiger such an approach is without problems since fundamental rights and human rights ‘(…) offer a synthesis of the bases of natural law and utilitarianism and represent the values from which intellectual property law developed’.72 In his reading Articles 8 (privacy) and 10 (freedom of expression) of the UCHR as well as Article 1 (property) of the First Protocol should be interpreted as constituting a fair balance between the interests of right owners and society at large, based upon the foundation of natural law by acknowledging an exploitation right and a ‘droit moral’ for the creator; ‘(…) the utilitarian foundation, because this acknowledgment has the promotion of intellectual variety and the spreading of culture and science throughout society as goal’. In sum, according to Geiger fundamental rights would serve not only as a guideline for the application of IP law, but also for a reorganisation of IP law in the future.73

Seen in that perspective, the constitutionalization of intellectual property rights means that in as far as national legislation does not already protect intellectual property rights on the constitutional level, the courts should nonetheless interpret intellectual property laws in the light of fundamental rights.

So it appears that in Geiger’s view it is not so much the intrinsic human rights character of intellectual property rights themselves that leads to a balanced framework as well as the evaluation of these rights in the light of constitutional values.

Finally, with regard to the positive view of the human rights quality of intellectual property rights, it is worth mentioning Gibson. Departing from the view that intellectual property law is a tool rather than an end to be valued in

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itself, she raises the point that intellectual property law is about the right to benefit. Taking account of the fact that General Comment No. 17 identifies the right to benefit as a human right, she arrives at the following conclusion with regard to the status of intellectual property law. ‘Since the right to benefit’, she writes, ‘is identified through the intellectual property system, (t)herefore, any “right to benefit” will be administered by the intellectual property system. Thus, although the General Comment establishes that intellectual property rights are not human rights, nevertheless, by the very fact that the intellectual property system has been established as the primary means by which to access this “benefit”, intellectual property rights are in effect aligned with human rights.’

The accent which Gibson lays on the right to benefit is intriguing in the light of the material and immaterial interests which intellectual property law is said to protect as well as with an eye on benefit sharing which is promoted by those who oppose the expansion of intellectual property law with regard to, among other things, the objects of protection, the prerogatives of right owners and the term of protection.

For a more nuanced or even negative consideration of the human rights status of intellectual property rights, the following authors can be mentioned: Drahos, Ostergard, Cullet – a nuanced view; Deazley and Ranjan – a negative view.

Drahos, as already mentioned, takes a sceptical view particularly because of what he indicates as the intrinsic legal-systematic properties of human rights law on the one hand, and intellectual property law on the other. Intellectual property rights, he writes, are universally recognized but that does not make them universal human rights, since they depend on a legislative declaration, are for a limited period of time, do not belong to all human beings, and not all intellectual property rights protect the personal interests of their originators.

Ostergard starts his analysis of the question whether intellectual property is a universal human right with the following assumption. ‘Given the ever-widening acceptance of a right to protection of intellectual property (IP), one might assume that there is at least implicitly an equally broad and agreed upon ration-ale or justification for this right.’ According to Ostergard, that rationale or justification can indeed be found in Article 27 UDHR. However, despite this recognition as a human right, the UN’s position on intellectual property rights and its duty to carry out agreements promoting universal IP protection are incompatible with other important goals, particularly the

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75 Drahos (1999).
76 Ostergard (1999), p. 156.
promotion of human physical well-being. Arguing that today’s intellectual property law system should be reconsidered with regard to the relationship between the developed world and the developing world, in view of the interest of the industrialized countries in improving the living conditions of the latter with an eye on both expanding their potential markets for intellectual goods and the duty to bring aid to those countries, Ostergard ascertains that ‘(i)n fact, what is called into question is the position that IP is a guaranteed universal human right (…)’. This leads Ostergard to conclude that the indicated position of the UN could be detrimental to the developing nations. By promoting stronger protection of all IP, the developing nations will be placed at a more severe disadvantage, both in developing policies to sustain economic growth and in the increasingly competitive global markets. As a consequence thereof Ostergard proposes that it should be accepted that some human rights may take priority over other human rights, in this case the right to physical well-being over intellectual property rights.

So, quintessential for Ostergard’s argument is the hierarchy of human rights which he promotes.

In many ways Cullet’s considerations concur with those of Drahos and Ostergard. His starting point is that although in the light of their separate development the actual link between intellectual property rights and human rights is still tenuous, this does not imply that there is no connection between human rights and intellectual contributions. This connection is particularly seen in Article 15.1(c) CESCR which is said to recognize intellectual contributions in general without making any special reference to one or the other category of existing intellectual property rights. Cullet stresses, however, that the link between the two categories of law has been discussed almost exclusively in human rights forums, intellectual property rights instruments having never directly addressed the impacts on the realization of human rights. Having also taken account of other regional and national human rights instruments with regard to intellectual property rights (such as the EU Charter of Fundamental Rights), Cullet concludes that there remains uncertainty concerning the place of intellectual contributions in a human rights framework for at least three reasons:

First, while it can be argued that the material interests of authors have nothing to do

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77 Ostergard (1999), p. 175.
82 Cullet (2007), pp. 414; 429.
with a human rights framework. (…) Second, conceptual and practical debates concerning the place of intellectual contributions in a human rights context have usually failed to take into account the multi-dimensional aspects of a provision like Article 15(1) of the Covenant. (…) Third, the material and moral interests of holders of intellectual property rights such as patent holders are more than adequately covered by intellectual property laws and treaties in place.83

In line with Ostergard’s concerns is what Cullet presents in his final appreciation of the actual realization of human rights in the context of the execution of intellectual property rights, particularly in the developing world since the establishment of the TRIPS A. Cullet indicates two main challenges here.

First, the increasingly visible impacts of certain types of intellectual property rights on the realization of human rights needs to be addressed by ensuring that measures are taken to protect everyone who is likely to be negatively affected by strengthened intellectual property rights standards. Second, the broader question of the place of science and technology in a human rights framework needs to be further considered. (…) A human rights perspective on knowledge contributions that is not bound by intellectual property rights treaties and laws constitutes a basis to rethink the position of bodies of knowledge, which cannot be protected at present.84

It is ominous that Cullet does not expect much in this respect from either the WIPO or WTO. These two institutions neither have any specific mandate to consider human rights issues nor do they show any definite inclination to address human rights implications of the legal regimes they put forward.85

Three points of Cullet’s view may be underlined: the fact that the recognition of intellectual property rights as human rights may have counter-productive effects, the suggestion to develop new systems of law in order to protect knowledge and technology, and the lack of trust in the WIPO and WTO as the vehicles for building a human rights framework for the execution of intellectual property rights.

Although taken from the same perspectives as that of the previous authors, an even more negative view is offered by Ranjan. Construing intellectual property rights (IPR) as human rights, he argues, implies construing the right to enjoy monopoly right and rent as a human right even if it is at the expense of society at large. This goes against the very basis of Article 15.1 that talks of striking a balance. Moreover, there is the dominant view that IPR and human

rights are incompatible, that is, that there is a conflict between IPR and human rights as the former gets in the way of countries enforcing the latter. 

So, what Ranjan fears is the ratchet effect of recognizing intellectual property rights as human rights. 

The most radical stance in my view in this respect is taken by Deazley when referring to the EU Charter of Fundamental Rights and English case law like the Ashdown decision. What is being suggested here, he writes with regard to copyright law, is that the conceit and language of intellectual property as a natural property right has provided one of the key foundations for the rampant expansionism which is the story of copyright law throughout the twentieth and into the twenty-first century. 

Articulating the position of the user Deazley ends his appreciation as follows: 

Both historical and theoretical analyses suggest that the logical manner in which to discuss intellectual property is not that the user (or the state on behalf of the user) should have to articulate, defend and pay for every action which encroaches upon the author’s property, but rather that the author or owner (or the state on behalf of the same) should have to articulate and defend every monopoly use of the intangible good which encroaches upon the public’s freedom to engage with that intangible good.

The reported reading of the referenced reflections in legal writing on the relationship between intellectual property rights and human rights leads me to the following conclusions. 

First, both the protagonists and the sceptics of linking these two domains of law (in vertical as well as horizontal relations), share the view that this cannot be done without reshaping the existing (international and national) intellectual property law because of the apparent tensions between the two in the light of their respective political justifications and their legal dogmatics (that is, the subject and object of protection). Secondly, the governmental intervention which is needed in this respect – again a shared view – should focus upon an instrumental approach, aimed at introducing what is called a human rights framework for the execution of intellectual property rights. However, instrumentality is proposed in two different ways. On the one hand, it is said that human rights law should be instrumental with regard to the execution (that is, the restriction) of intellectual property rights; on the other hand, it is said that intellectual property law should be instrumental with regard to the implementation of human rights. The first approach may be indentified as giving horizontal effect to human rights the second approach seems to require an internalization
of human rights into substantive intellectual property law. Next to governmental intervention, attention is required for the possibilities of private ordering. This may be the more interesting in view of the fact that at the same time doubts have been uttered with regard to what can be expected from the WIPO and WTO as mediators in this respect. Thirdly, of interest is the proposal to apply what is called a human rights hierarchy in order to avoid certain negative consequences of giving intellectual property rights a human rights status. Particularly interesting in this light is the suggestion to take a non-uniform approach to intellectual property rights when introducing such a human rights framework, distinguishing between intellectual property rights that either do or do not qualify as human rights. By doing so, it is said, also some of the negative effects (for example, stressing the human rights quality of intellectual property rights stands in the way of access to patented medicines) can be overcome. But at the same time granting a human rights quality to intellectual property rights under the circumstances may contribute to the protection of cultural expressions. It is even suggested that supporting the developing world in increasing its economic abilities is equally economically beneficial for the developed world. However, doubts about the possibility of overcoming just that rachet of uplevelling intellectual property rights to human rights in the relationship between the developed and the developing world appears to be one of the reasons why some object to that approach. Even the intermediate position of the UN is questioned here. An even more restrictive view is taken by those who argue that given the way actual substantive intellectual property law is shaped, a proper account has already been given to whatever human rights-like aspect may be required in the execution of intellectual property rights.

As already indicated at the beginning of this section, the above tour d’horizon of the legal literature with regard to intellectual property rights in their relation to human rights concurs in many ways with the contributions that are bundled in this book. Even the rather extreme absolutist view taken by Smiers in his contribution to this book comes close to the position taken by Deazley. Further, it appears that both the positive and the negative approach towards linking intellectual property rights and human rights are represented in this book. It is of interest in this respect that particularly those authors writing on patent law (Brinkhof, Cooper-Dreyfuss, Gordon) tend to reject linking patent law with human rights law. However, this is on different grounds such as patent law being based upon a justification other than that of human rights law. This is with the notable exception of Van Overwalle, however, who together with most of those writing on copyright law (Matthews, Waelde and Brown) underline the interface between intellectual property law and human rights law.
4. CONCLUDING OBSERVATIONS

With reference to the findings of Section 2 and the conclusions of Section 3 this final section can be rather brief.

Indeed, as has been seen in Section 2, no mention or even reference to human rights is made in any binding international legal instrument (for example PC, BC, TRIPS A or WCT). The same is true for national legislation on intellectual property law. And although it may be argued that some international human rights instruments do deal with intellectual property rights (such as the UCHR, ICESCR, ECHR, EU Charter, Culture Convention), this involvement is mostly – and with the exception of Article 17(2) EUCH – written in an indirect way, thereby obliging the contributing states to promote and protect the creative and innovative output of their citizens. Case law handed down by any international or national court reflects the same position. If in the international arena any action is taken at all, it is by the UN and UNESCO, not by the WIPO or WTO.

What seems to be most striking in this respect, however, is that one has witnessed in the last ten to fifteen years an emerging real debate on the relationship between intellectual property law and human rights law which is taking place between the respective epistic communities of either domain of law. This is particularly true with regard to the application of human rights law with respect to the execution of intellectual property rights. But it equally concerns the human rights status of intellectual property rights which is the focus of this introduction. Mention is made in that respect of building a human rights framework for (the execution of) intellectual property rights. Obviously and taking into consideration the different characteristics of intellectual property rights and human rights, this cannot be done without quite fundamentally reshaping intellectual property law as it stands today, which requires interference by the WIPO and/or the WTO, if not cooperation with UNESCO. Less drastic than fundamentally reshaping intellectual property law is of course expanding the way in which human rights law may be applied horizontally, that is, with regard to the execution of intellectual property rights between private parties. Doing this may well contribute to vesting a proper and adequate balance between the two domains of law if it would be allowed, on the one hand, to distinguish between fundamental and non-fundamental human rights, and, on the other, not giving a human rights status to all intellectual property rights.

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