5. Introduction

Jerzy Koopman*

1. INTRODUCTION

Intellectual property law regimes have increasingly proliferated during the past decades. One of the results thereof is that they touch upon more and more aspects of human life. It has become obvious that intellectual property law regimes have a profound impact on all sorts of human activity across national, disciplinary and cultural boundaries around the world. Intellectual property increasingly affects cultural, scientific, technological, and commercial exchanges and, thereby, steers and (re)directs courses of action in and among those realms. Whereas economic, cultural, scientific and technological circumstances, preferences and governmental policies may press for such proliferation – may envision positive outcomes thereof – downsides begin to be observed as well. These downsides may vary in kind and in effect, and may be brought about by the workings of different intellectual property regimes as well. They may concern topics as disparate as the deprivation of biological and cultural diversity; the decline of accessibility of information; and a decrease in accessibility of health care products and so forth. Looked at from an overall societal and legal perspective, it may thus not be considered surprising that human rights come into play. At the turn of the millennium, the UN Sub-Commission on Human Rights even held that "[t]here are . . . conflicts between the intellectual property rights regime . . . and international human rights law . . ."1 Hence, the emergence of a so-called human rights paradox in intellectual property law – the theme of the CIER conference of which this book is one of the tangible, rich outcomes.

Economic policies – and economic instruments that should incorporate them, such as intellectual property law regimes – may lead to a cyclone of societal effects, which may (perhaps necessarily) be the subject of human rights law. Therefore, these policies and instruments should allegedly be

* Jerzy Koopman is a PhD-student at the Centre for Intellectual Property Law (CIER), Molengraaff Institute for Private Law, Utrecht University and works as life science law counsel in Amsterdam.

approached from those perspectives – and thus human rights law – as well. The paradox central to the CIER conference may relate to a primary, underlying social and governmental paradox that surely supersedes legal interests and complications, but forms the broader context therefor instead. This underlying paradox was accurately pin-pointed by Sonia Gandhi in her 2007 Nexus lecture in Tilburg, the Netherlands: ‘Growth without equity tends to destabilize societies, while equity without growth simply cannot be sustained.’ The manner in which ‘things’ are so interrelated – yet at the outset appear contradictory – is necessarily manifested in the human rights paradox in intellectual property law too.

In this Part, the human rights paradox in intellectual property law is made apparent and explored at what may be called its regulatory basis – that is the legislative effect of human rights law on intellectual property law. The central focus thus is whether – and if so, to what extent – human rights law affects the legislative formation of intellectual property law regimes, such as patent law and copyright law, and thereby determines their regulatory make-up and workings.

The legislative effect of human rights law on intellectual property law may be conceived of in both a positive and negative manner. The most initial and fundamental positive effect of human rights law on the legislative formation of intellectual property law may perhaps become apparent from the formation per se. It may be proposed that several human rights pertaining to the individual’s social, cultural and economic being, capacity and status may be given legal and practical effect by the provision of proprietary rights, such as copyright and patent rights. Hence intellectual property rights as human rights themselves. However, the positive influence of human rights law on the formation of intellectual property law regimes could also appear at a later stage of legal formation and then have very specific substantive implications. This may be the case when certain provisions are explicitly incorporated in intellectual property regimes so as to give hands and feet to a certain human right. An example thereof within many copyright laws could arguably be the provisions pertaining to moral rights, which may be related to a host of human rights that hinge on the dignity of human individuals. An example of a positive influence of human rights law on the legislative formation of patent law may be found in compulsory licence provisions that seek to provide a leeway for patents’ exclusionary effects for the benefit of healthcare and medicine. Conversely, the negative impact of human rights law on the formation of intellectual property law may be more implicit than the aforementioned examples. The negative impact may lead to restrictions and limitations as to, for example, the object that may be deemed fit to be protected under one or the other intellectual property law regime. The formulation and definition of central notions – such as copyright law’s ‘work’ or patent law’s ‘invention’ – may
derive from, among other things, the recognition and effect of human rights. Human rights that demand the recognition of and respect for the individual’s proprietary (or other kind of) interest in his or her ‘works’ or ‘inventions’ may lead to inherent limitations to what other individuals may subsequently consider their respective ‘works’ and ‘inventions’, and which may so be the subject of one or the other intellectual proprietary regime. All of these (rather randomly selected) introductory examples reflect upon the effects of human rights law on the legislative formation of intellectual property law regimes.

The contributions in this Part specifically address, albeit from different pretexts and angles, varying regimes of intellectual property law, and with different goals. This Part so presents a rich diversity in knowledge, explorations and ideas about the topics concerned, and provides the reader with an excellent opportunity to inquire and learn about them.

In Chapter 6, ‘Is copyright fit for the 21st century? No!’, Joost Smiers approaches some of the issues with regard to copyright law. His firm conclusion that copyright law as it is should be eliminated rests on an exposé of the effects on cultural life and activities of the current legal system. It is argued that the workings of this system severely and negatively affect cultural diversity in its broadest meaning and relevancy, and thus need to be replaced by alternative regulations. This should enhance the flourishing of cultural diversity.

Duncan Matthews’ chapter, ‘Intellectual property rights, human rights and the right to health’ provides analyses of the tensions between intellectual property rights and the human right to health. Intellectual property rights are assessed as human rights themselves and, furthermore, the human right to health is addressed as a possible tool to facilitate access to medicines. Moreover, the implications of the latter right for intellectual property rights are analysed with regard to pharmaceutical product patents, and with a concrete illustrative focus on anti-retroviral medicines and HIV/AIDS in Brazil and South Africa. It is ultimately concluded, among other things, that the human rights discourse may lead to real improvements with regard to the topic at hand. Human rights based approaches may provide leeway for developing countries, if they are able to use these rights to their best advantage. It is finally suggested that developed countries and others should formulate intellectual property law regimes that assist developing countries to do so as well.

In Chapter 8 ‘On patents and human rights’, Jan Brinkhof approaches the topic through close analysis of specific human rights provisions that may relate to the establishment of patent law regimes, as well as by examination of relevant case law. After having addressed the historical legislative context of patent law regimes, certain arguments supporting the view that patent law may be a human right are examined, and a detailed overview is given of human rights provisions that may perhaps bolster those views. Particular attention is
given to the First Protocol to the European Convention on Human Rights. Relevant case law of the European Court of Human Rights is analysed in this respect as well. The same applies to the Charter of Fundamental Rights in Europe. Finally, a holding of the Enlarged Board of Appeal of the European Patent Office as to the meaning of a particularly relevant human right, which may allegedly render a patent right a human right is reiterated and assessed. The author concludes, however, that the human rights provisions that may appear relevant in this respect do not provide sufficient legal basis for the conclusion that patent rights are human rights. It is proposed that patent law should merely be understood as an instrument of economic policy, rather than one of human rights law.

Wendy Gordon’s chapter ‘Current patent laws cannot claim the backing of human rights’ scrutinizes the argument that patent law can be based in human rights from a legal-positivist perspective. Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights, which requires protection of interests of ‘authors’ of scientific productions, is particularly addressed. Key is the envisioned nature of ‘authorship’, which is interrelated to the make-up and workings of, mostly, the US patent regime. It is generally suggested that divergences in the historical formation of said human rights provision and intellectual property law regimes render it unlikely that the latter may be based on the former. Specific patent law requirements and their application appear to support this view. They do not give effect to article 15.1(c) of referenced Covenant. One can for example think of the manner in which rights may (not) be conveyed (e.g. determination of inventorship) or may be forfeited beforehand (e.g. by certain pre-application disclosures). Also the fact that many patentees are corporate assignees, which may principally be deprived of the human right at hand, is emphasized. It is so observed that current patentees may be deprived of said human right, whilst ‘authors’ that are endowed therewith may be irrelevant for patent law purposes. Ultimately, it is concluded that article 15.1(c) of the Covenant does not support a conception of patent rights as a human right.

It is a pleasure to urge you – the reader – to commence reading the aforementioned chapters. They constructively, congruently and concisely contribute to a highly important, dynamic, timely debate on the complicated interaction between human rights law and intellectual property law. Enjoy!
Copyright law and patent law: to its recognition – differing views