10. Introduction

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The third part of this book on the nexus between intellectual property rights and human rights regards the effects of human rights provisions as restricting the scope and the exercise of intellectual property rights.

The process of globalisation and liberalisation of trade is of great importance in the fight against poverty and the improvement of access to food and medicines. The development and the production of these essentials is increasingly controlled by economic interests that are protected by intellectual property rights. At the same time, the development of new technology, new media and uses of these media has resulted in a fast forwarding of adaptation of legislation to secure interests by intellectual property right holders. The access to these media and the information communicated by these media is the cause of an increasing digital divide, in which economic interests decide the access to and the content of the new media economy. A third aspect is the complex relationship between (representatives of) indigenous communities as holders of traditional cultural expressions and traditional knowledge, and the agricultural, pharmaceutical and creative industries that are in search of new sources of information. The question today is how to reconcile these interests in international legislation and regulate recognition and remuneration for these original communities.1

All of these developments have made it necessary to rethink the scope of intellectual property rights and the balance between private and public interests.

The codification of both intellectual property rights and human rights finds its justification in arguments based on a utilist perspective as well as a rights based perspective. The rights based perspective has a focus on the codification of the protection of the inherent dignity of every person and his personal

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1 See on the status of work on the protection of traditional cultural expressions done by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore WIPO/GRTKF/IC/12/4(a),(b),(c), Issued 6 December 2007.
sphere, and the protection of his personality rights. This perspective is reflected in the concept of just reward for all efforts made in the creation of artistic and scientific works and the knowledge, skills and funds that contribute to new inventions and investments.

The utilist perspective, on the other hand, emphasises the effects of the codification and allocation of rights. In a human rights discourse the focus is on the promotion of welfare for all and the contribution to a democratic society, whereas intellectual property rights are considered as economic tools that may serve as an incentive to further create, invent or invest, and thereby contribute to the public interest.

In intellectual property rights these values have been internalised, as the legislation recognises limitations and exceptions to the allocation and exercise of intellectual property rights. From the start in the nineteenth century codification of intellectual property rights in international law, a distinction is made between the rights pertaining to the fruits of creativity in the Berne Convention and the results of industry in the Paris Convention. These Conventions provide the core content of obligations in the TRIPS Agreement, regulating the Trade-Related Aspects of Intellectual Property Rights.2

The Berne Convention reserves protection for creative works from the moment they have come into existence, but leaves the ideas on which they are based freely available. This protection is only allocated for a restricted period of time, and provides for exceptions and limitations in national legislation to permit certain uses of protected works which have already been lawfully made available to the public without permission of the right holder. Also, the moral rights of the author are given protection, although it remains the prerogative of the national state to choose to grant this protection (Article 6bis).

The Paris Convention concerns the protection of industrial rights, and provides intellectual property rights to patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, as well as the obligation for the countries of the Union to secure effective protection against unfair competition and dishonest trade practices (Article 1; Article 10bis). After a procedure of filing and registration, the duration of protection of intellectual property rights and therefore the

exclusivity of the exploitation of the commercial exploitation of the objects of these rights is limited. In recognition of his personal contribution, the inventor has the right to be mentioned as such in the patent (Article 4ter). Importantly, the Paris Convention allows for compulsory licenses for patents to prevent the abuse of exercise of patent rights (Article 5.A.2). Also, a country may deny the registration of a trademark or have it invalidated when it can be considered to be contrary to morality or public order (Article 6 quinquies B.3).

Human rights are instrumental in providing external limitations to the exercise of intellectual property rights. International law on human rights as codified in the UN Universal Declaration on Human Rights\(^3\) stakes out a protected sphere, in which fundamental rights and freedoms are not to be violated. Further enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Social, Economic and Cultural Rights (ICSECR)\(^4\) human rights contain the obligation of national states to respect, protect and fulfil the right to participation in cultural life, to benefit from scientific progress and to benefit from the moral and material interests in a work of which he is the author (UDHR Article 27; ICCPR Article 27; ICSECR Article 15). Many understand this to be a right to the protection of intellectual property, although there is debate on whether this human right to the protection of intellectual property is identical to today’s intellectual property as protected under the TRIPS regime.\(^5\) While the focus of human rights is on the protection of individual rights, the 2007 UN Declaration on the Rights of Indigenous Peoples proclaims that indigenous peoples have the right, as individuals as well as a collective, to the full enjoyment of human rights in international human rights law (Article 1).\(^6\)

Contributing to the realisation of these human rights and relevant to the exercise and enforcement of intellectual property rights are instruments like the Convention on Biological diversity,\(^7\) the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries\(^8\) and in normative instruments by other UN specialised agencies like UNESCO in the Convention on the Protection of Intangible Heritage of 2003\(^9\) and the

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\(^3\) United Nations Declaration on Human Rights 1948.

\(^4\) Both Conventions were adopted in 1966, and entered into force 1976.

\(^5\) See also the contribution by Brinkhof, J. ‘On Patents and Human Rights’ (Chapter 9 of this volume).

\(^6\) UN Doc. A /61/ L.67. The Declaration was adopted by the UN General Assembly in September 2007.

\(^7\) The Convention on Biological Diversity was adopted in 1992, entered into force 1993.

\(^8\) The International Labour Organisation adopted this Convention in 1989, entered into force 1991.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.\textsuperscript{10}

In the first of the following three chapters, Charlotte Waelde and Abby Brown report a recent expert’s discussion on a fictitious copyright case, in which the University, as copyright holder, refuses publication of a study on historical facts, and thereby acts against the wishes of the author to publish his text and the public interest in the access to this new information. In search of the outcome that would best serve the public interest, Waelde and Brown first discuss the potential of the internal limitations to the exercise of the copyright of the University. Next, the external limitations by the exercise of freedom of expression, and also the balance with the right to the protection of the property rights, are evaluated. Emphasis is given to the potential role of auxiliary instruments of competition law and contract law, and their influence on the exercise of intellectual property rights.

The next chapter by Geertrui Van Overwalle concentrates on patent law as a tool to foster both private and public interests, by stimulating economic expansion and technological progress. The paper postulates a normative claim in patent law, as it seeks to make a reassessment of the notion of public interest. This deconstruction leads to ‘a mosaic encompassing ordre public, morality, public security, protection of the consumer, health safety, protection of public health, and the protection of the lives of persons, animals and plants’.

Van Overwalle sees human rights reflected in public interest considerations on human dignity and the right to food that are limiting the existence of patent rights. At the same time human rights are reflected in the right to informed consent and the right to protection and remuneration to holders of traditional knowledge that burden the existence of human rights. As for the exercise of patent rights, the right of access to public health, to education and research, and to information call for a full account of human rights considerations.

The following chapter by Charles McManis also emphasises the common moral foundation of intellectual property rights and human rights. His paper presents an emerging human right of individual holders of traditional knowledge and/or genetic resources to give consent and receive equitable remuneration for the use of such knowledge and resources by others as well as a proposal on how this right could be accommodated in existing legal regimes. This analysis leads to the conclusion that the existing intellectual property regimes should be adapted and the TRIPS Agreement should be modified to include the requirement of a disclosure of origin and evidence of prior informed consent to use information that is obtained from holders of traditional knowledge and/or genetic resources.

In these chapters we may detect three main ideas. The first is that we should realise that shared values of human dignity and legal certainty are underpinning both human rights and intellectual property rights. The second is the importance of human rights provisions in their role as a limitation to the exercise of intellectual property rights. And third is that intellectual property rights should adapt to the steady development of an increasing body of international public law that enables both individuals and communities to protect their interests against appropriation and misuse of knowledge and information triggered by economic interests of intellectual property rights holders.
Copyright law and patent law: to its enforcement – differing views