

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Mapping the Global Interface

This book analyzes the interface between intellectual property and human rights law and policy. The relationship between these two fields has captured the attention of governments, policymakers, and activist communities in a diverse array of international and domestic venues. These actors often raise human rights arguments as counterweights to the expansion of intellectual property in areas including freedom of expression, public health, education, privacy, agriculture, and the rights of indigenous peoples. At the same time, creators and owners of intellectual property are asserting a human rights justification for the expansion of legal protections.

This book explores the legal, institutional, and political implications of these competing claims in three ways: (1) by offering a framework for exploring the connections and divergences between these subjects; (2) by identifying the pathways along which jurisprudence, policy, and political discourse are likely to evolve; and (3) by serving as a teaching and learning resource for scholars, activists, and students.

Laurence R. Helfer is the Harry R. Chadwick, Sr., Professor of Law at Duke University School of Law, where he codirects the Center for International and Comparative Law and is a member of the faculty steering committee of the Duke Center on Human Rights. He has authored more than 50 publications and has lectured widely on his diverse research interests, which include interdisciplinary analysis of international law and institutions, human rights, and international intellectual property law and policy. He is the coauthor of *Human Rights* (2d ed., 2009) and the author of *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments* (2004).

Graeme W. Austin is a Professor of Law at Melbourne University and Victoria University of Wellington. Until 2010, he was the J. Byron McCormick Professor of Law at the University of Arizona. He has lectured on intellectual property law in a variety of settings and is an elected member of the American Law Institute. He has published widely on the topic of intellectual property, including in the *Law Quarterly Review* and the *International Review of Intellectual Property and Competition Law*. He is coauthor of *International Intellectual Property: Law and Policy* (2008).

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

Human Rights and Intellectual Property

Mapping the Global Interface

LAURENCE R. HELFER

Harry R. Chadwick, Sr., Professor of Law

Duke University School of Law

GRAEME W. AUSTIN

Professor of Law

Melbourne University

and Victoria University of Wellington



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface
Laurence R. Helfer and Graeme W. Austin
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521711258

© Laurence R. Helfer and Graeme W. Austin 2011

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data
Austin, Graeme.

Human rights and intellectual property : mapping the global interface / Graeme
W. Austin, Laurence R. Helfer.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88437-2 (hardback) – ISBN 978-0-521-71125-8 (pbk.)

1. Intellectual property. 2. Intellectual property (International law) 3. Human
rights. I. Helfer, Laurence R. II. Title.

K1401.A98 2011

346.04'8--dc22 2010031359

ISBN 978-0-521-88437-2 Hardback
ISBN 978-0-521-71125-8 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for
external or third-party Internet Web sites referred to in this publication and does not guarantee that
any content on such Web sites is, or will remain, accurate or appropriate.

Contents

<i>Preface</i>	<i>page xi</i>
1. Mapping the Interface of Human Rights and Intellectual Property	1
1.1. <i>Thematic Overview and Introduction</i>	1
1.2. <i>The International Human Rights System: A Substantive and Institutional Overview</i>	3
A. The U.N. Human Rights Treaty System	5
B. Mechanisms for Protecting Human Rights under the U.N. Charter	14
1.3. <i>The International Intellectual Property System: A Substantive and Institutional Overview</i>	16
A. Types of Intellectual Property	16
B. Rationales for Intellectual Property	18
C. The International Institutional Framework	24
1.4. <i>Historical Isolation of the Human Rights and Intellectual Property Regimes</i>	31
1.5. <i>Catalysts for the Expanding Intersection of the Human Rights and Intellectual Property Regimes</i>	34
A. International Intellectual Property Protection Standards and Enforcement Mechanisms: Reactions and Counterreactions	34
1. Pressure by U.S. Intellectual Property Industries to Expand Intellectual Property Protection Standards and Enforcement Mechanisms	35
2. The Shift from WIPO to GATT to TRIPS	36
3. The Impact of TRIPS and the Rise of TRIPS Plus Treaties	39

vi	Contents
	4. Access to Knowledge and the New Politics of Intellectual Property 43
	B. New Developments in Human Rights 48
	1. The Rights of Indigenous Peoples and Traditional Knowledge 49
	2. Conflicts between TRIPS and Economic, Social, and Cultural Rights 52
	3. The Human Rights Obligations of Transnational Corporations 57
	4. The Human Right of Property and Corporate Intellectual Property Interests 61
	1.6. <i>Competing Conceptual Frameworks for Mapping the Interface of Human Rights and Intellectual Property</i> 64
	A. Conflict 65
	B. Coexistence 73
	C. Beyond Conflict and Coexistence 81
	2. The Human Right to Health, Access to Patented Medicines, and the Restructuring of Global Innovation Policy 90
	2.1. <i>Introduction</i> 90
	2.2. <i>Background on the HIV/AIDS Pandemic and Access to Antiretroviral Drugs</i> 92
	2.3. <i>The Human Right to Health and the Emerging Right of Access to Medicines</i> 98
	A. Justifications for and Critiques of the Human Right to Health 98
	B. The Normative Development of the Human Right to Health and of Access to Medicines 105
	2.4. <i>Patent Protection for Pharmaceuticals and Revising the TRIPS Agreement to Enhance Access to Medicines</i> 119
	A. An Overview of TRIPS Patent Provisions Relating to Access to Medicines 119
	B. Recent Examples of Compulsory Licenses to Promote Access to Medicines 127
	2.5. <i>Human Rights Approaches to Closing the “Global Drug Gap” Created by Patented Pharmaceuticals</i> 140
	A. Are Patents a Barrier to Access to Medicines? 142
	B. Human Rights Contributions to Closing the Global Drug Gap 144
	C. Implications for Other Intellectual Property Rights 169

Contents	vii
3. Creators' Rights as Human Rights and the Human Right of Property	171
3.1. <i>Introduction</i>	171
3.2. <i>Definitional Issues</i>	173
3.3. <i>Drafting History of UDHR Article 27 and ICESCR Article 15(1)(c)</i>	176
3.4. <i>General Comment No. 17: An Overview</i>	188
3.5. <i>Domestic Law Reform and Creators' Human Rights: Three Case Studies</i>	199
A. Limiting the Reproduction Right for Musical Works	200
B. Restricting the Scope of the Derivative Work Right	203
C. Resurrecting Copyright Formalities	206
3.6. <i>The Human Right of Property</i>	212
4. Rights to Freedom of Expression, to Cultural Participation, and to Benefit from Scientific Advancements	221
4.1. <i>Introduction</i>	221
4.2. <i>Rationales for the Right to Freedom of Expression</i>	222
4.3. <i>International, Regional, and Domestic Law Sources</i>	227
4.4. <i>Rights to Participate in Culture and to Benefit from Scientific Progress</i>	233
4.5. <i>Intersections between Freedom of Expression and Intellectual Property</i>	242
A. Copyright	243
1. The First Amendment to the U.S. Constitution	243
2. Article 10 of the European Convention on Human Rights	259
B. Trademarks	283
1. The "Essential Function" of a Trademark	286
2. Freedom of Expression and Trademark Doctrine	290
C. Patents	312
5. The Right to Education and Copyright in Learning Materials	316
5.1. <i>Introduction</i>	316
5.2. <i>The Right to Education: Justifications and Rationales</i>	320
5.3. <i>The Right to Education in International Law</i>	326
5.4. <i>The Provision of Learning Materials and the Human Right to Education</i>	332
5.5. <i>Copyright in Textbooks and Learning Materials</i>	335
5.6. <i>Other Impediments to the Provision of Learning Materials</i>	349

viii	Contents	
	5.7. <i>Mapping the Interface between Copyright and the Right to Education</i>	357
6.	The Human Right to Food, Plant Genetic Resources, and Intellectual Property	364
6.1.	<i>Introduction</i>	364
6.2.	<i>The Evolution of the Right to Food and of Intellectual Property Protection for Plant-Related Innovations</i>	366
	A. The Right to Food	366
	1. Justifications for and Critiques of the Human Right to Food	366
	2. The Normative Evolution of the Human Right to Food	371
	B. Intellectual Property Protection for PGRs	379
	1. Justifications for and Critiques of Intellectual Property Protection for PGRs	379
	2. The Evolution of Intellectual Property Protection for PGRs	381
	a. Plant Variety Protection	382
	b. Patent Protection for Plant-Related Innovations	386
	3. Legal Rules and Policy Objectives in Tension with Intellectual Property Protection for Plant-Related Innovations	390
	a. Farmers' Rights	390
	b. Regulating Access to PGRs in Nature and in Global Seed Banks	393
	c. "Biopiracy" and Intellectual Property Protection of Raw Plant Materials	394
6.3.	<i>Specific Controversies Involving the Right to Food and Intellectual Property Protection for PGRs</i>	400
	A. The Response to Expanding Intellectual Property Protection for PGRs in the United Nations Human Rights System	400
	B. Genetically Modified Seeds and the Right to Food in India	409
	1. The Protection of Plant Varieties and Farmers' Rights Act, 2001, and the Seeds Bill, 2004	409
	2. Constitutional Protection of the Right to Food and the Review of India's 2008 Report to the Committee on Economic, Social and Cultural Rights	415

Contents	ix
7. Indigenous Peoples’ Rights and Intellectual Property	432
7.1. <i>Introduction</i>	432
7.2. <i>International Human Rights Law Relating to Indigenous Peoples</i>	438
7.3. <i>Human Rights, Self-Determination, and the Protection of Indigenous Peoples’ Intellectual Property</i>	447
7.4. <i>Indigenous Peoples’ International Initiatives Relevant to Intellectual Property</i>	457
7.5. <i>Intellectual Property Protections for Traditional Knowledge and Traditional Cultural Expression</i>	461
7.6. <i>Individual and Collective Interests in Indigenous Cultural Productions</i>	483
7.7. <i>Intersections between Indigenous Human Rights and Intellectual Property Issues</i>	496
8. Conclusion	503
8.1. <i>The Unavoidable Intersection of Human Rights and Intellectual Property</i>	504
8.2. <i>Assessing Existing Proposals to Reconcile Human Rights and Intellectual Property</i>	506
8.3. <i>Toward a Human Rights Framework for Intellectual Property</i>	512
A. <i>The Protective Dimension of the Framework</i>	513
B. <i>The Restrictive Dimension of the Framework</i>	516
<i>References</i>	523
<i>Acknowledgments</i>	539
<i>Index</i>	543
<i>Cases Discussed (Selected)</i>	550

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

Preface

The key terms in this book's subtitle – “mapping,” “global,” and “interface” – reflect our approach to analyzing the relationship between human rights and intellectual property.

Consider first the cartographical trope, “mapping.” It is possible to envision intellectual property law and human rights law as the product of the gradual accretion and spread of international and domestic laws and institutions. The terrain of international intellectual property law was the first to emerge. Initially the subject of discrete bilateral agreements between sovereign nations, its modern form came to be established with the two great multilateral intellectual property treaties from the end of the 19th century: the Paris Convention on industrial property (1883) and the Berne Convention on literary and artistic works (1886). The international human rights regime emerged more recently, with the founding of the United Nations after World War II, and, in particular, the adoption of the Universal Declaration of Human Rights (1948).

From these beginnings, the terrain occupied by both issue areas has expanded significantly in substantive reach, in prescriptive detail, and in geographic scope. In the intellectual property context, the international law relating to patents illustrates this point. At the end of the 19th century, the desirability of domestic – let alone international – patent protection was a matter of sharp debate, even among industrialized nations. For this reason, the Paris Convention contains few substantive rules – although its national treatment and international priority rules for patent registrations were important achievements – and (like the Berne Convention) it has no effective enforcement mechanisms.

Today, in contrast, international intellectual property law imposes a significant and detailed array of substantive and enforcement obligations. The Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which came into force in 1995, obliges member states to recognize patents

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

in all fields of technology (subject to transitional arrangements for developing nations). TRIPS also dictates the standard by which domestic law deviations from international patent rules are to be tested, and it sets forth detailed requirements in areas such as domestic enforcement procedures. Perhaps most significantly, noncompliance with TRIPS can trigger meaningful sanctions, as a result of the treaty's integration into the international trade regime now administered by the World Trade Organization. That body, through its dispute settlement system, also contributes to the development of international intellectual property norms, along with a number of other key agencies, most notably the World Intellectual Property Organization (WIPO). The expansion of international patent law did not stop with TRIPS. International norms continue to emerge and develop as a result of multilateral, regional, and bilateral agreements. A potentially important new initiative, the Anti-Counterfeiting Trade Agreement (ACTA), is currently being negotiated. If adopted, ACTA will shape international intellectual property rules and enforcement mechanisms in a range of different contexts.

The space occupied by the international human rights regime has also grown significantly since its inauguration in the middle of the 20th century. The Universal Declaration gave birth to two foundational treaties that entered into force in 1976 – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The Covenants, together with the general comments, case law, and recommendations of their respective treaty bodies, and the decisions of regional human rights courts and commissions, have significantly bolstered the prescriptive force of human rights law. A particularly noteworthy development has been the widening acceptance of social, economic, and cultural rights that, until the 1990s, remained mostly underdeveloped, particularly in the West. New recognition of the human rights of groups has also emerged – commitments that are especially important to the world's indigenous peoples.

In terms of enforcement, the most important activities are occurring at the regional and domestic levels, especially in Europe but also in the Americas and other regions. National courts increasingly adjudicate human rights treaties directly or draw upon international norms when construing national constitutions and statutes. At all levels, multiple review mechanisms and judicial bodies shape human rights law through their investigative and interpretive activities. Indeed, one critique of the international human rights regime is that it suffers from a surfeit of rules, institutions, and decision makers that risks weakening the system as a whole.

As a result of these and related developments, the respective terrains of both the human rights and intellectual property regimes have grown significantly and the intersections between them have expanded. There now exists a

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

Preface

xiii

broad range of legal, social, political, practical, and philosophical issues that straddle both fields. These intersections are evolving rapidly, requiring a new conceptual cartography to help map the changing landscape.

We explore a number of these intersections in this book. To continue with the patent example introduced earlier, consider the human right to the highest attainable standard of health in the light of the protection of pharmaceutical patents. Many nations once denied patents for new drugs on public health grounds; today, TRIPS obliges member nations to recognize and enforce patents in all fields of technology, including medicines. As a result of these countervailing legal commitments, government agencies, international organizations, and civil society groups must engage with the disciplines of both human rights and intellectual property to develop effective, just, and enduring responses to public health crises and to identify new mechanisms for harnessing private innovation to serve the wider social good. This is already occurring as a growing number of actors typically concerned with human rights issues are becoming engaged in intellectual property issues and (although perhaps to a lesser extent) vice versa.

This discussion also underscores the salience of the term “global” in the book’s subtitle. State and private actors in legal regimes have long recognized the inadequacy of purely domestic responses. In the human rights context, the atrocities of the Second World War engendered a commitment to the idea that sovereign nations cannot be the sole arbiter of the fundamental human entitlements. The founders of the United Nations and the drafters of the Universal Declaration recognized that human rights must be bolstered by international institutions and international legal obligations. In the intellectual property context, both private firms and governments have long recognized that effective responses to piracy and counterfeiting, and, more recently, the protection of genetic resources and indigenous knowledge, cannot be adequately addressed at the domestic level. In addition, there now exist important feedback mechanisms in intellectual property lawmaking, whereby norms developed at the international and domestic levels mutually influence each other.

As we discuss in Chapter 1, the existence of *any* meaningful engagement between the two areas of law is a relatively recent phenomenon. Scholars and policymakers in each regime are only beginning to recognize areas of mutual concern. Because law is shaped by human agency, the way in which human rights and intellectual property intersect is not an inevitable or pre-determined process. The actors who engage with the legal and social policy issues to which both regimes are relevant have a large measure of discretion in determining the character of this interaction. Will there be a seismic clash, a rupturing of tectonic plates, as the two areas move ever closer together and

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

finally collide? Or will the engagement be carefully considered, nuanced, and accommodating? Our preference is for the latter kind of engagement, and one of the aims of this book is to provide the substantive materials and original analytical content to help others to explore the intersections between the two regimes in a productive and coherent fashion.

These considerations also explain the use of the term “interface” in our subtitle. The most familiar use of the term is in the computing context. It denotes mechanisms for conjoining distinct or contrasting elements and systems: software and hardware, or interfaces between operating systems. Human rights and intellectual property exhibit distinctive systemic characteristics. For the most part they have evolved independently – although, as we discuss in Chapter 3, there is an often-overlooked set of human rights obligations that recognize the rights of creators in their artistic and scientific works – and have been shaped by different sets of actors in distinct institutional contexts and informed by divergent analytical traditions. A key aim of the book, suggested by our use of the term “interface,” is to provide a structure for dialog and engagement between these two – hitherto largely separate – systems.

To that end, Chapter 1 offers a conceptual overview of the relationship between human rights and intellectual property, as well as a brief summary of each area of law. The latter will be useful for readers less familiar with the traditions and substance of one or both areas. Chapter 1 also explores different ways that the relationship between human rights and intellectual property has been understood by scholars and in different legal and policy contexts. The chapters that follow develop the latter theme and present “case studies” of several distinct controversies. Chapter 2 considers the right to health and patented pharmaceuticals; Chapter 3 addresses the human rights associated with certain types of creative activity; Chapter 4 examines the rights of freedom of expression and cultural participation and the right to benefit from scientific progress; Chapter 5 explores the right to education and the potential tensions with copyright protection in learning materials; Chapter 6 examines the human right to food in the context of intellectual property protections in plant genetic materials; Chapter 7 considers the claims that have emerged in the context of indigenous peoples’ struggles for recognition of their rights in respect of traditional knowledge and other forms of cultural production. In a final chapter, we offer a fuller exposition of our own framework for conceptualizing the most productive connections between the human rights and intellectual property regimes.

The decision to defer the exposition of our conceptual framework until the Conclusion in part reflects the genesis of this book. Several years ago, one of us developed a law school course entitled Human Rights and Intellectual

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

Preface

xv

Property. Partly because of the novelty of the topic, no teaching materials existed, a gap that endures today. Teaching the course was a very fulfilling experience. The course brought together students from an array of different backgrounds and with a range of different interests – not only intellectual property and human rights, but also international trade and indigenous peoples' law and policy issues. The course invited these groups to engage with each other across the intellectual, heuristic, and, sometimes, cultural divides that had informed their thinking about the various issues to which human rights and intellectual property are relevant – issues that we consider at greater length in the case studies in each chapter of this book. The aims of the course included introducing students to the substantive laws, policies, and institutional frameworks of both human rights and intellectual property. But a more ambitious aim was to invite students to develop their own conceptions of how the two areas might interact. Although we have our own views on how the contours of the interface might be mapped, as a pedagogical matter we believe that readers' engagement with this topic will be richer if they are also encouraged to form their own views as to how this might be achieved. Hence our decision on the placement of the final chapter.

These concerns also reflect the thinking behind our use of the term “mapping” – the present participle form of the verb. Engagement between the two areas of law is a dynamic and evolving process, one to which we hope this book will contribute. But we labor under no pretension that this work is by any measure complete. We look forward to engaging with the responses – including, we imagine, rigorous critiques – that this text might invite.

Our aspirations for the book also extend beyond the classroom context. We hope that it will contribute to the emerging scholarship in the field and to the policy debates that are beginning to occur in both regimes. Here we offer a personal anecdote. When we first entered law teaching in the 1990s, human rights and intellectual property were separate components of our respective research agendas. Our decision to focus our scholarly efforts in these two discrete areas was highly unusual. In fact, a senior colleague counseled one of us to choose one field and abandon the other, warning that there was little benefit – and potentially much risk – in attempting to develop expertise in two such different and unrelated fields. The response offered by the recipient of this well-meaning advice was to acknowledge the lack of substantive connections between the two legal regimes, but to counter that there was much to be learned by interacting with different communities of scholars, government officials, and civil society groups, who rarely, if ever, interacted directly with each other.

More than a decade later, much has changed. When we now explain to colleagues and students that our research explores the intersections between

Cambridge University Press

978-0-521-71125-8 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

Frontmatter

[More information](#)

xvi

Preface

intellectual property and human rights, the usual response is a gleam of recognition and a question or two – most often about patented medicines and HIV-AIDS, but increasingly about freedom of expression and online technologies or the moral rights of artists. We are hardly alone in exploring these issues. As we indicated earlier, growing numbers of civil society organizations now include both human rights and intellectual property in their mandates, often specializing in subissues such as patents and the right to health, access to knowledge, or the intersection of human rights, intellectual property, and development. And the global network of commentators and journalists who write about the interface of the two fields is expanding, as revealed by the numerous and diverse entries in this book's extensive References.

For law students, as well as students in cognate disciplines, such as political theory and international relations, much of the value of the book may lie in the extensive Notes and Questions that follow the analysis of each substantive topic. These sections invite the kind of deep engagement and interrogation of substantive issues and conceptual frameworks that characterize university-level instruction, at both undergraduate and graduate levels. We also hope that this book will be useful in other contexts and for other actors, including government officials, international organizations, activists, and civil society groups. To that end, discussions of substantive topics often are followed by Issues in Focus. These sections perform a number of functions, including summarizing recent developments and highlighting emerging issues. By deploying a range of different analytical techniques and materials, we hope that the book can be used by, and will be useful for, a wider range of constituencies.

Finally, we would like to acknowledge the many scholars who have contributed to the writing of this book with comments and criticisms. They include Barbara Atwood, Molly Beutz, Jamie Boyle, Audrey Chapman, Graeme Dinwoodie, Maureen Garmon, Toni Massaro, Ruth Okediji, and Peter Yu. We are also grateful for the help of several research assistants, including Laura Duncan, Eric Larson, Lisa Lindemann, María Méndez, Casey Mock, Pedro Paranaagua, Meryl Thomas, and Amy Zavidow. Erin Daniel provided invaluable assistance in obtaining permissions to reproduce copyrighted materials. Last, but by no means least, are the unswerving dedication and patience of our respective partners, David Boyd and Bryan Patchett, the acknowledgment of whose manifold contributions is itself a reflection of hard-fought human rights struggles.

Laurence R. Helfer
Durham, North Carolina, USA
December 2010

Graeme W. Austin
Wellington, New Zealand