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978-0-521-88437-2 - Human Rights and Intellectual Property: Mapping the Global Interface

Laurence R. Helfer and Graeme W. Austin

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Chapter 1

Mapping the Interface of Human Rights and Intellectual Property

1.1. Thematic Overview and Introduction

This book explores the relationship between human rights and intellectual property. Long ignored by both the human rights and intellectual property communities, the relationship between these two fields has now captured the attention of government officials, judges, activist communities, and scholars in domestic legal systems and in international venues such as the World Intellectual Property Organization, the United Nations Human Rights Council, the Committee on Economic, Social and Cultural Rights, the World Trade Organization, the World Health Organization, and the Food and Agriculture Organization.

Widespread recognition of the relationship between human rights and intellectual property has a relatively recent vintage. Little more than a decade ago, few observers acknowledged the existence of such a relationship or viewed it as more than marginally relevant to the important issues and debates in each field. For participants in the human rights movement, the 1990s was a heady and hopeful period. In rapid succession, the world experienced the end of the Cold War, the birth of new democracies, the widespread ratification of human rights treaties, and the use of U.N.-sanctioned military force in response to widespread atrocities. These events, coming in quick succession after decades of political conflict, seemed to herald an “age of rights”¹ and an “era of humanitarian intervention.”² For the international intellectual property system, the 1990s was a time of rapidly expanding rules and institutions. In terms of norm creation, the shift of intellectual property

¹ LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

² Michael Ignatieff, Editorial, *Is the Human Rights Era Ending?* N.Y. TIMES, Feb. 5, 2002, at A25.

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lawmaking from the World Intellectual Property Organization (WIPO) to the General Agreement on Tariffs and Trade (GATT) to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³ made patents, copyrights, trademarks, and trade secrets central, if controversial, components of the global trading system.⁴ In the private sector, the emergence of new industries such as biotechnology and new modes of distribution such as the Internet increased the salience of new forms of intellectual property protection and new ways for intellectual property owners to enforce their economic interests.⁵

The first decade of the twenty-first century, by contrast, has seen increasingly high-profile and contentious debates over legal and political issues that arise at the interface of human rights and intellectual property. These debates are attempting to map the boundaries of this new policy space and to define the appropriate relationships between the two fields. Some governments, courts, public interest NGOs, and commentators view intellectual property protection as implicating potential violations of the rights to life, health, food, privacy, freedom of expression, and enjoyment of the benefits of scientific progress. At the same time, corporations and other business entities are invoking human rights law in an effort to strengthen intellectual property protection rules.

The increasing number of social, economic, and legal contexts in which both intellectual property and human rights are relevant are creating new, and as yet unresolved, tensions between the two regimes. Both international human rights agreements and the growing network of multilateral, regional, and bilateral trade and intellectual property treaties impose international law obligations on nation states. Consider a few examples:

- Most countries must protect pharmaceutical patents; yet they are also required to protect the rights to life and health.
- Plant breeders' rights limit what farmers can do on their land, such as whether they can save and exchange seed; yet human rights law also provides for a right to adequate food.
- Certain types of intellectual property protection impose limitations on traditional agrarian practices that are themselves recognized in international human rights instruments.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [TRIPS Agreement].

⁴ FRIEDRICH-KARL BEIER & GERHARD SCHRICKER (Eds.), *FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW* (1996).

⁵ See, e.g., Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001).

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- Some indigenous communities invoke intellectual property rights as vehicles for preserving their ways of life and protecting their cultural and economic heritage – a subject also regulated by international human rights instruments.
- Copyright laws have the potential to implicate rights to freedom of expression and education, and even the right to associate with others.
- Trademarks, as a 2005 decision of the Constitutional Court of South Africa confirms, have the potential to impede expressive freedoms.⁶

This chapter introduces these developments and provides a conceptual framework for analyzing the competing arguments of government officials, courts, civil society groups, and scholars. We explore the major fault lines along which the intersection of human rights and intellectual property currently runs, fault lines whose specific geographical features we explore in subsequent chapters of this book. To lay the groundwork for this more in-depth analysis, we first provide an introduction to the international human rights system and the international intellectual property system, including their substantive legal rules and domestic and international institutions. Readers familiar with either or both of these topics may consider skimming or passing over these sections. The next chapter analyzes the events that caused the two formerly distinct regimes to intersect in increasingly complex ways. We conclude with an evaluation of alternative approaches for analyzing the relationship between the two fields.

1.2. The International Human Rights System: A Substantive and Institutional Overview

The idea that individuals can turn to international law to protect their fundamental liberties is a fairly recent development. While there are antecedents to the modern human rights movement, such as the law of state responsibility for injuries to aliens and prohibitions on slavery, only in the last six decades have national governments devoted significant attention to establishing international legal rules and institutions to protect the rights of all human beings. The horrors of the Nazi Holocaust provided the impetus for these developments. Confronted with unambiguous evidence of atrocities on a massive scale, the victors of the Second World War resolved to overturn international law's prevailing presumption that abuses committed by a nation state against its citizens and within its borders were the concern of that state alone.

⁶ *Laugh It Off Promotions CC v. S. Afr. Breweries Int'l (Finance) BV* 2005 (8) BCLR 743 (CC) (S. Afr.). A discussion of this decision appears in Chapter 4.

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During the ensuing decades, the international human rights system broadened and deepened by focusing on two principal tasks: (1) articulating and refining a catalog of “rights” and “freedoms” that merited international protection, and (2) establishing international institutions and monitoring mechanisms to ensure that governments actually respected those rights and freedoms.

Governments achieved the first objective by drafting nonbinding declarations and, later, legally binding covenants, conventions, treaties, and other international agreements to protect individual rights and, in a few cases, group rights. The freedoms and liberties contained in these documents included a broad spectrum of civil, political, economic, social, and cultural rights. Over time, many of the rights articulated in these declarations and international agreements became embedded in national constitutions, legislation, administrative regulations, and judicial decisions.

This penetration of international law into domestic law had two important consequences. First, it helped to buttress claims that human rights were protected as customary international law – the general practice of states that is accepted as law.⁷ Second, national incorporation made it possible to protect individual rights, and to seek redress for their violation, within domestic legal orders – at least in those states in which open political systems and independent judiciaries provided meaningful opportunities to challenge government action.

The possibility that individuals could receive domestic remedies for international human rights violations was a major conceptual shift in international law. But human rights advocates understood that governments would often be unwilling or unable to police their own conduct. As a result, a second objective of the human rights movement was to establish international institutions to ensure that governments were in fact respecting the rights that they had pledged to protect in treaties and in customary law.

Not surprisingly, many governments were reluctant to submit their conduct to the scrutiny of new and untested international institutions, and they resisted proposals to create a single international court or monitoring

⁷ Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.2 (1987). International lawyers draw upon numerous sources to prove consistent state practice that is followed out of a sense of legal obligation (*opinion juris*). Many of these sources are international, such as diplomatic exchanges, treaties in consistent form, and the resolutions of intergovernmental organizations. However, international lawyers also rely on domestic sources, such as national constitutions, laws, and high court decisions, as important evidence of custom.

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mechanism to review all allegations of human rights violations. As a result, human rights institutions evolved in a decentralized, piecemeal fashion as new treaties were adopted. The result, sixty years later, is a dizzying array of international courts, tribunals, commissions, committees, working groups, and special rapporteurs, each of which reviews only a subset of the entire corpus of international human rights law.

A comprehensive discussion of these diverse international institutions would require an entire book in itself. However, for purposes of analyzing the intersection of human rights and intellectual property, it is important to understand the basic functions of two distinct parts of the international human rights system, both of which operate under the umbrella of the United Nations: (1) the Universal Declaration on Human Rights, the two International Covenants that grew out of the Declaration, and the “treaty bodies” that monitor the behavior of the governments who have ratified one or both of the Covenants; and (2) the mechanisms and procedures established under the authority of the United Nations Charter and falling principally within the jurisdiction of the U.N. Human Rights Council.

A. The U.N. Human Rights Treaty System

The two articles excerpted below describe the evolution of human rights within the United Nations and explore the content and structure of the U.N. human rights treaty system.

Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2–3, 5–6 (1988)

II. The United Nations Charter

A. Birth of Fundamental Principles

The international law of human rights as we know it today is a post–World War II phenomenon.... The need for international legal norms and institutions addressing human rights violations became apparent in the 1930’s and 1940’s. As early as 1941, President Franklin D. Roosevelt called, in his famous “Four Freedoms” speech, for “a world founded upon four essential human freedoms,” namely, “freedom of speech and expression,” “freedom of every person to worship God in his own way,” “freedom from want,” and “freedom from fear.” Roosevelt’s vision became the clarion call of the nations that fought the Axis in the Second World War and that founded the United Nations....

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B. Human Rights Principles of the United Nations Charter
 The United Nations Charter is both the constitution of the Organization and a legally binding multilateral treaty. Article 1, paragraph 3 of the Charter declares that one of the purposes of the United Nations is “to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” The obligation of the Organization for achieving these purposes is set out in Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In Article 56 the Member States “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

Although these Charter provisions created only weak and vague obligations, they were very important from a legal point of view: they transformed human rights, once only a matter of domestic concern, into the subject of international treaty obligations. As such, human rights could conceptually no longer be considered exclusively within the domestic jurisdiction of the Member States of the United Nations...

III. The International Bill of Human Rights

When the United Nations Charter was being drafted in San Francisco in 1945, various smaller countries attempted to append a bill of human rights. This effort failed, but its proponents extracted a promise that the drafting of such an instrument become the first order of business of the United Nations. The promise was kept. But it was soon recognized that there was no agreement on what should be included in a bill of rights.... [T]he Member States decided to proceed in stages.

The first stage of this drafting process proved relatively easy; by 1948 the United Nations had proclaimed the Universal Declaration of Human Rights. The second set of documents – the International Covenants on Human Rights – took eighteen years to draft. They entered into force ten years later in 1976...

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A. The Universal Declaration

The United Nations Charter internationalized human rights; but the Universal Declaration of Human Rights has become the centerpiece of the international human rights revolution. The Declaration is the first comprehensive statement enumerating the basic rights of the individual to be promulgated by a universal international organization. As such, it ranks with the Magna Carta, the French Declaration of the Rights of Man, and the American Declaration of Independence as a milestone in mankind's struggle for freedom and human dignity. Its debt to these great historic documents is unmistakable. "All human beings are born free and equal in dignity and rights," proclaims Article 1 of the Universal Declaration, and Article 28 adds "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized...."

The Declaration's list of civil and political rights includes the right to life, liberty, and security of person; the prohibition of slavery, torture, and cruel, inhuman, or degrading treatment; the right not to be subjected to arbitrary arrest, detention, or exile; the right to a fair trial in both civil and criminal matters; the presumption of innocence and the prohibition against the application of *ex post facto* laws and penalties. The Declaration recognizes the right to privacy and the right to own property. It proclaims freedom of speech, religion, and assembly. The Declaration acknowledges the right to freedom of movement and provides in Article 13 that everyone has the right to leave any country, including his own, and to return to his country. Important political rights are proclaimed in Article 21 of the Declaration, including the right to take part in the government of one's country, directly or through freely chosen representatives.

The economic, social, and cultural rights proclaimed in the Declaration have their starting point in the proposition, expressed in Article 22, that "[e]veryone, as a member of society ... is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." The Declaration accordingly proclaims the individual's right to social security, to work, and to "protection against unemployment." The right to education is dealt with in Article 26 of the Declaration, which provides, among other things, that education shall be free "at least in the elementary and fundamental stages." It established a "prior right" of parents "to choose the kind of education that shall be given to their children." Article 27 of the Declaration deals with cultural rights and proclaims that every human being

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has “the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

The Declaration recognizes that the rights it proclaims are not absolute. It permits a state to enact laws limiting the exercise of these rights solely for the purpose of securing “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” A government’s authority to impose such restrictions is further limited by the stipulation that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

The Universal Declaration is not a treaty. It was adopted by the United Nations General Assembly in the form of a resolution that has no force of law, and it was not intended by the Assembly to create binding legal obligations. Contrary to popular myth, it was not signed, nor is it an instrument intended to be signed. The Declaration was designed, as its preamble indicates, to provide “a common understanding” of the human rights and fundamental freedoms referred to in the United Nations Charter, and to serve “as a common standard for achievement for all peoples and all nations....”

Time, however, transformed the normative status of the Universal Declaration. Today few international lawyers would deny that the Universal Declaration imposes some international legal obligations. There is dispute, however, about whether all the rights it proclaims are binding and under what circumstances, and about whether its obligatory character derives from its status as an authoritative interpretation of the human rights obligation contained in the United Nations Charter, or its status as customary international law.

B. The Covenants

The International Covenants on Human Rights consist of three separate treaties – the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These treaties were adopted by the United Nations General Assembly in 1966. Another decade passed before thirty-five states – the number required to bring the two Covenants into force – ratified them....

The Covenants were designed to transform the general principles proclaimed in the Universal Declaration into binding treaty obligations. This meant that the lofty rhetoric of the Declaration had to give way to precise statutory language, and that exceptions, limitations, and restrictions on the

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exercise of various rights had to be spelled out in considerable detail. The Covenants also sought to establish an international machinery to ensure governmental compliance....

The Covenants have a number of common substantive provisions. Two of these deal with what might be described as “group” or “collective” rights. Article 1, paragraph 1 of both Covenants proclaims that “all peoples have the right of self-determination.” Article 1, paragraph 2 of both instruments also recognizes that “all peoples” have the right to freely dispose of their natural resources and that “in no case may a people be deprived of its own means of subsistence.” Both Covenants also bar discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth.

The catalog of civil and political rights spelled out in the Covenant on Civil and Political Rights is formulated with greater juridical precision and is somewhat longer than the list of comparable rights proclaimed in the Universal Declaration. An important addition is the provision which bars states from denying members of ethnic, religious, or linguistic minorities the right, “in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Some rights that the Universal Declaration proclaims are not guaranteed by the Covenant on Civil and Political Rights. Among these is the right to own property. This right was not included in the Covenant because the different ideological blocs represented in the United Nations were unable to agree on its scope and definition.

The Covenant on Economic, Social and Cultural Rights contains a longer and more comprehensive list of economic, social, and cultural rights than does the Universal Declaration. This Covenant recognizes the right to work; the right to enjoy just and favorable conditions of work and to form and join trade unions; the right to social security, the protection of the family, and an adequate standard of living; the right to enjoy the highest attainable standard of physical and mental health; and the right to education and to take part in cultural life.

The decision to have two separate treaties, one for civil and political rights and another for economic, social, and cultural rights, was dictated in part by the consideration that these two broad categories of rights require very different methods of implementation. In general, all a government has to do to respect civil and political rights is to adopt and enforce appropriate laws on the subject. This approach will in most cases not work with regard to economic, social, and cultural rights. Their implementation usually necessitates economic and technical resources, training, and time.

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Consequently, most governments cannot assume the same legal obligations for both categories of rights.

A State Party to the Covenant on Civil and Political Rights is under an immediate legal obligation to comply with its provisions. This is not the case under the Covenant on Economic, Social and Cultural Rights. The latter Covenant requires progressive, as distinguished from immediate, implementation, and merely obligates each State Party “to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Had this “progressive” or “promotional” approach not been adopted, few governments, if any, could in good faith have agreed to be bound by this Covenant.

Each Covenant has its own international machinery to encourage and to supervise compliance by the parties to these treaties.

Laurence R. Helfer & Anne-Marie Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997)

[This article discusses the activities of the U.N. Human Rights Committee, a body of eighteen human rights experts elected in their individual capacities to monitor the behavior of the now more than 160 countries that have ratified the International Covenant on Civil and Political Rights (ICCPR). The functions that the Human Rights Committee performs are similar to those performed by the Committee on Economic, Social and Cultural Rights, which supervises the implementation of the International Covenant on Economic, Social and Cultural Rights and which has given considerable attention to the intersection of intellectual property and human rights. The Committee's functions are also similar to the activities of other “treaty bodies” that monitor government adherence to subject-specific U.N. human rights agreements, including treaties on racial discrimination, torture, women's rights, and children's rights.]

1. The Reporting Process

Article 40 of the ICCPR requires all states parties to file reports with the Committee “on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.” Initial reports are due within one year of the treaty's entry into force with the subsequent reports due at five year intervals thereafter.... Once a