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# Rebalancing Intellectual Property In The Information Society: The Human Rights Approach

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***REBALANCING INTELLECTUAL PROPERTY IN THE INFORMATION  
SOCIETY: THE HUMAN RIGHTS APPROACH***

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*REBALANCING INTELLECTUAL PROPERTY IN THE INFORMATION SOCIETY:  
THE HUMAN RIGHTS APPROACH*

**Summary**

In today's Information Society, one of the most salient paradoxes is the fact that the law of intellectual property has been systematically used in ways that erect barriers around the very building blocks that lie at its foundation. As intellectual property law stretches to cover all kinds of information-intensive goods at an atomic level, access to raw data and educational materials is hindered, creative inputs shrink and scientific research becomes harder, costlier and, in some cases, virtually impossible.

The set of limitations and exceptions offered by intellectual property laws around the world tends to be either too frail or too frailly implemented to combat intellectual property's organic malfunctions. The emergence of digital platforms and new forms of collaborative research and creation has not been matched by flexible, open-minded laws and regulations promoting innovation. This makes intellectual property one of the most unbalanced areas in Law.

Recent literature has suggested that one way of mitigating some of these problems would be to resort to human rights law as a framework when interpreting intellectual property norms. However, although an increased dialectic relationship between these two fields seems desirable, the almost remedial quality of this proposal makes it somewhat limited in scope. Also, as technology changes quickly and new forms of production of intangible goods remain elusive to predict, summoning human rights provisions as a corrective measure to intellectual property's

shortcomings might not be as illuminating as it has been in other legal areas. Nevertheless, reconsidering intellectual property norms in light of human rights' concerns might prove useful to recalibrate the already existing, albeit rather soft- safeguard mechanisms embedded in intellectual property law: in particular, it might serve as a guide for legislators and policy makers when considering new exceptions and limitations to exclusive rights, as well for courts when interpreting broadly drafted provisions.

It is impossible to have a sound public domain, which is the primary source of any kind of innovation, without a flexible intellectual property framework. Opening up intellectual property to multidisciplinary influences – among which human rights are likely to play an important role – is not only the key to fix its existing organic shortcomings, but also crucial for intellectual property to face (and finally fit in) the Information age.

## **Introduction**

As developments in skill and technology brought down the marginal cost of copying, creators and related industries began worrying that non-rivalrousness and non-excludability<sup>1</sup> would soon lead to a scenario in which if anybody (and especially *everybody*) could easily appropriate the goods that they produced, then no one would have the incentives to spend time and money producing them<sup>2</sup>. Intellectual property was therefore designed as a balancing mechanism that would solve this particular kind of market failure: through the grant of

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<sup>1</sup> See Joseph Stiglitz, *Knowledge as a Global Public Good*, in *Global Public Goods: International Cooperation in the 21st Century*, Inge Kaul, Isabelle Grunberg, Marc A. Stern (eds.), United Nations Development Programme, New York: Oxford University Press, 1999, pp. 308-325

<sup>2</sup> A problem that is often referred to as “the tragedy of the commons”, a variation of the dilemma first described by Garrett Hardin. See *The Tragedy of the Commons*, Garrett Hardin, in *Science*, 162 (1968), 1243-1248.

monopolies (the copyright that will last the life of the author plus a few more decades<sup>3</sup>, the patent that will give lead time to inventor) it keeps alive the economic incentives that will lead to the production of public goods and therefore assures that the general public will be able to access the books and medicines that otherwise it may not have had. The catch is that when that period of exclusivity ends these goods will fall into the public domain, where anyone can use or re-use them for free<sup>4</sup>.

A different, less utilitarian approach, tells us that intellectual property is rooted in natural law and has its oldest coordinates in the labor theory of property<sup>5</sup>. Wendy Gordon summarizes Locke's arguments in the following way:

“Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in the objects. Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well.”<sup>6</sup>

Locke's notion of property, although subject to many reinterpretations, has remained influential in framing intellectual property as a set of rights that orbit around the sphere of human

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<sup>3</sup> Usually it lasts for the life of the author plus 50 or 70 years (both Europe and the United States have adopted the latter standard). Mexico has stretched it to life plus 100 years.

<sup>4</sup> For a theory on the multiple configurations of the public domain see e.g., Pamela Samuelson, *Enriching Discourse on Public Domains*, [Duke Law Journal, Vol. 55 \(2006\)](#).

<sup>5</sup> See John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, 1689.

<sup>6</sup> Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993), at 1544-1555.

rights<sup>7</sup>, as yet another manifestation of Justinian's *jus suum cuique tribuendi*. In copyright theory, for instance, it is acknowledged that each author leaves his or her personal imprint in a given work and it is in deference to this seed of one's personality that copyright law seeks to protect original expression. However, the fact that intellectual property deals with non-rivalrous and non-excludable goods poses some insurmountable problems to its assimilation into a strictly Lockean philosophy<sup>8</sup>. Human rights approaches to intellectual property that assume that the latter should be regarded as a human right *qua* property are fatally wounded because they rely on a defective analogy, confusing the tangible goods in which the intellectual work is embodied with the intangible goods themselves.

Regardless of which one of these approaches one may choose – and the truth is that legal systems are not aseptic ecosystems, so there has been a contamination both ways<sup>9</sup> – there is a balancing feature that is implicit in each one of them. An analysis of a possible dialectics between human rights and intellectual property must therefore have its essential focus on the current status of this balance and on the external disruptive effects that an ill-calibrated ratio between protected and unprotected elements will cause.

Despite its half-blood affiliation with natural law, it took a long time before intellectual property was first scrutinized through the lens of human rights. This does not mean that there

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<sup>7</sup> For further developments and critical analysis of this theory see, in general, Jeanne Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, University of Miami Law Review, vol. 60, no 4, p. 453-504 (2005); Michel Vivant, 'Authors' Rights, Human Rights, 174 *Revue Internationale du Droit D'Auteur* 60 (1997). For copyright in particular and the contrast between civil law and common law systems, see Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, Tulane Law Review, 64 (1990).

<sup>8</sup> Cf. n. 1. A good and recent example of how a purely proprietary framework for intellectual property leads to conceptual confusion is the campaign led by the movie industry across Europe and the United States, asking "You wouldn't steal a movie/a car/a purse, would you?". The conclusion that followed in the ads showed in cinemas before the feature presentation was that *because* you wouldn't steal any of those physical goods, you wouldn't either download illegal music or movies. The incongruency is that if one steals a cd from a music store, it is one less cd in the store, whereas if one downloads a song, that very same song is still available for other to hear and download.

<sup>9</sup> See n7.

have not always been tensions between these two fields (think about how a copyright can apply pressure on freedom of expression<sup>10</sup>, or how the proprietary enclosure of science may affect traditional knowledge or the right to health<sup>11</sup>), but only recently did the first claims arise for a “comprehensive and coherent “human rights framework” for intellectual property law and policy<sup>12</sup>”. One of the reasons that has led to the emergence of this new approach has been the worrisome impact that the “progressive alignment of trade and intellectual property policy<sup>13</sup>” has had in the past few years. The TRIPS Agreement<sup>14</sup> (Agreement on Trade-Related Aspects of Intellectual Property Rights) has, in this regard, a self-explanatory name. As Daniel Gervais explains, “[i]ntellectual property rights holders ask for the linkage with trade essentially to benefit from the protection of trade sanctions and cross-sectoral trade-offs in trade agreements.<sup>15</sup>” For those who believe that intellectual property and human rights are indissolubly tied, embracing the trade paradigm has at least two disruptive consequences, as the author further explains: “unlike human rights, trade law is essentially pragmatic and results-based<sup>16</sup>” and “trade remedies are generally predicated on a showing of actual adverse impact on trade. The protection of intellectual property by trade rules does not seem to mesh with its ideological deference either as a ‘property’ or a human right.<sup>17</sup>”

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<sup>10</sup> See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in *Innovation Policy in an Information Age*, Rochelle Cooper Dreyfuss, Harry First and Diane Leenheer Zimmerman (eds.), Oxford University Press (2000)

<sup>11</sup> See e.g., Sisule Musungu, *The Right to Health, Intellectual Property and Competition Principles*, in *Human Rights and International Trade*, Cottier, Paulwelyn and Bonanomi (eds.), Oxford University Press (2005)

<sup>12</sup> See Laurence Helfer, *Toward a Human Rights Framework for Intellectual Property*, *U.C. Davis Law Review* (2007), at 977.

<sup>13</sup> Daniel Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, in *Intellectual Property and Human Rights*, Paul L.C. Torremans, ed., Kluwer (2008), at 6.

<sup>14</sup> Annex 1C of the [Marrakesh Agreement Establishing the World Trade Organization](#), signed in Marrakesh, Morocco on 15 April 1994. Hereinafter referred to as TRIPS. Text available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

<sup>15</sup> Daniel Gervais, *loc. cit.*, at 6.

<sup>16</sup> *Id.*, at 7.

<sup>17</sup> *Id.*, at 7.

At the same time that trade was becoming a magnetic force, intellectual property rights became stronger than ever before: for instance, the term of protection afforded by copyright law was extended in the United States<sup>18</sup>, Europe created *sui generis* rights over databases<sup>19</sup>, the scope of patentability kept stretching and stretching over time<sup>20</sup>. All these phenomena raise serious concerns that the balance inherent to intellectual property may have been destroyed and that anti-commons effects<sup>21</sup> might be hindering future creation and innovation. And, in this regard, for the sake of some human rights – or some components of these rights – it is crucial to rethink intellectual property in light of its much needed balance.

### **What do we talk about when we talk about Intellectual Property and Human Rights**

One can think about the connection between intellectual property and human rights in two different ways: intellectual property rights *as* human rights; or intellectual property *and* human rights as separate but overlapping areas. The first notion has direct roots in natural law and personalistic conceptions of intellectual property and it places the creator at the center of its system: civil law countries are called *droit d'auteur* countries, an expression that literally translates as “the rights *of the* author”. Therefore, it is not surprising that the first time that European courts examined the relationship between intellectual property and human rights, their main concern was to make intellectual property rights fit the concept of “property” as it appeared

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<sup>18</sup> Commonly known as the Sonny Bono Copyright Term Extension Act

<sup>19</sup> See III.2

<sup>20</sup> See e.g., Michael Heller and Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, in *Science* 280 (1998)

<sup>21</sup> The existence of a plethora of intellectual property rights and its consequent web of transaction costs, which would slow down subsequent innovation. See Heller and Eisenberg, *id.*

in the European Convention on Human Rights<sup>22</sup>. In recent years, concerns about the negative effects of over-protective legislation in the copyright and patent fields began being voiced by academics, non-governmental organizations and the civil society, but the debate has so far been detached from a human rights framework. The emphasis is therefore on a *static* perspective – copyrights, patents and trademarks as rights, and possibly as human rights – rather than on the *dynamic* interplay between intellectual property and the areas affected<sup>23</sup> by the grant of these exclusive rights (which, in many cases, are areas of incidence of classic human rights doctrine).

Common law countries, known as copyright countries, have built their intellectual property frameworks around the concepts of market failure and incentives to creation and innovation. The main difference between a *droit d'auteur* system and a copyright system is that the latter tends to recognize weaker moral rights, if any at all<sup>24</sup>. Because less emphasis is given to the centrality of the author or the inventor, the discussion is not centered on the possibility of copyright or patents qualifying as human rights per se; much of the critical thinking about the appropriate degree of patent and copyright protection and the recent trend of overprotection in both these fields<sup>25</sup> revolves around the detrimental effects that intellectual property rights have had on access to data or medicines, for instance, but they do so from an internal viewpoint – the viewpoint of intellectual property (in the United States, usually departing from an analysis of the Copyright and Patent clause<sup>26</sup>). As far as the debate goes, there has also been what Graeme

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<sup>22</sup> See *infra*, p.8.

<sup>23</sup> See *infra*, p.17.

<sup>24</sup> See article 6bis of the Berne Convention: *Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.*

<sup>25</sup> See, for instance, James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 Duke L. & Tech. Rev. 0009

<sup>26</sup> Article I, Section 8, clause 8 of the United States Constitution, which empowers the Congress to pass laws [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Austin and Laurence Helfer have aptly described as a “historical isolation of the Human Rights and Intellectual Property regimes<sup>27</sup>”.

In recent years, with movements like “Free Culture<sup>28</sup>” or “Access to Knowledge<sup>29</sup>” the gap between copyrights and human rights has begun to shrink. Also, with the growth of the generic industry, both in the developed and in the developing worlds, as well as with the renewed concerns with orphan diseases and drugs<sup>30</sup>, the linkage between patents and human rights has become even more apparent and one can only hope that it will continue to expand in the near future.

### **Intellectual Property Rights as Human Rights? – The debate surrounding the European Convention on Human Rights**

The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as European Convention on Human Rights (ECHR) was signed in 1950, establishing the European Court of Human Rights. Protocol 1 of the ECHR protects (physical) property, stating that everybody is “entitled to the peaceful enjoyment of his possessions.<sup>31</sup>” Until very recently,

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<sup>27</sup> See *Human Rights and Intellectual Property: Mapping the Global Interface*, Cambridge University Press, Cambridge, Massachusetts, 2011, at 31.

<sup>28</sup> See Lawrence Lessig, *Free Culture: The Nature and Future of Creativity*, Penguin, 2005.

<sup>29</sup> See <http://a2knetwork.org/>

<sup>30</sup> See Kevin Outterson, *Patent Buy-Outs for Global Disease Innovations for Low- and Middle-Income Countries*, in *American Journal of Law and Medicine*, Vol. 32, 2006.

<sup>31</sup> European Convention on Human Rights, Protocol 1, article 1: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

the Court did not hear any cases on intellectual property, a scenario that changed with *Dima v. Romania*<sup>32</sup> and *Anheuser-Busch v. Portugal*<sup>33</sup>.

In *Dima v. Romania*, an admissibility decision, the Court addressed the case of a Romanian graphic artist who worked in the Defence Ministry's plastic arts studio and created a new State emblem for a competition supported by the Romanian Parliament. In 1992, his design was approved by the Parliament. Dima developed it and it was later published in the Official Gazette, which identified him as being “the graphic designer”. In 1996, Dima brought suit against two private companies that had reproduced and distributed his design and a State owned company that minted of Romanian coins, claiming that he was entitled to a statutory percentage of the profits. The Romanian Supreme Court dismissed his claims, considering that, although Dima had created himself the State emblem, it was the Parliament who had commissioned it and therefore the Parliament should be deemed the “author” of the design.

Dima claimed before the European Court of Human Rights that Romanian national law protected “works of graphic art” and that it established that the “author” of a work was “the person who [had] created [it]”. He also claimed that copyright arose when the work took “concrete form”.

The Court held that Dima was not entitled to any “legitimate expectation” to “acquire a possession” as author of the emblem because the existence of a valid copyright was, in the first place, an unresolved issue. In such cases, the European Court defers to domestic courts, and the Romanian Supreme Court had ruled against Dima.

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<sup>32</sup> App. No. 58472/00

<sup>33</sup> App. No. 73049/01, 44 Eur. H.R. Rep

As Laurence Helfer points out<sup>34</sup>, it is relevant that the Court has not tried to “second-guess the Romanian court’s interpretation of domestic copyright law in a case whose facts were sympathetic to the creator.” Moreover, it is also worthwhile noticing that the European Court, while deferring judgment to domestic courts, did say that article 1 of Protocol 1 protected copyrighted works, a step forward in arguing that some components of intellectual property rights – at least where copyright is concerned – might have a human rights dimension.

In *Anheuser-Busch v. Portugal* the European Court of Human Rights dealt with trademarks. In 1981, Anheuser-Busch Inc. sought to register *Budweiser* as a trademark with the Portuguese National Institute for Industrial Property. The application was not immediately granted because *Budweiser Bier* had already been registered as a designation of origin by Budejovicky Budvar, a Czechoslovak beer producer. In 1995 Anheuser-Busch obtained a court order canceling the registration of Budejovicky Budvar’s designation of origin and Anheuser-Busch was therefore allowed to register *Budweiser* as a trademark. Budejovicky Budvar, however, invoked a 1986 bilateral agreement between Portugal and Czechoslovakia protecting designations of origin and argued that Portugal had the obligation to register its beer as geographical indication. Budejovicky Budvar lost at the lower level<sup>35</sup> but won in appeal, which led to the cancellation of Anheuser-Busch’s trademark. At this stage Anheuser-Busch filed a complaint with the European Court of Human Rights, stating that Portugal had violated article 1.

The Court had to decide whether article 1 protected not only registered marks but also trademark applications. The Chamber ruled that article 1 did not apply, because Budejovicky

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<sup>34</sup> See Laurence Helfer, *Intellectual Property and the European Court of Human Rights*, in *Intellectual Property and Human Rights*, Paul L.C. Torremans, ed., Kluwer (2008), at 41.

<sup>35</sup> The lower court reasoned that only the Czech version of the beer name could be considered a designation of origin and Budweiser was its German form.

Budvar had already contested Anheuser-Busch's trademark when the latter filed its 1981 application and because of the bilateral agreement, which had been in effect for over two years when Anheuser-Busch challenged the geographical indication. In 2007, the Grand Chamber revised the Chamber's decision and held that Portugal had not violated article 1 and it also declared that it applies to both registered marks and trademark applications.

### **The meaning of the decisions of the European Court of Human Rights**

The jurisprudence in Europe is now clear: intellectual property rights claims can find shelter under the European Convention on Human Rights. How far could a doctrine of intellectual property rights *as* human rights be pushed remains to be seen, but nonetheless it is worth pointing out that the reasoning followed by the Court departs from an erroneous construction of what intellectual property actually is. Protocol 1 of the ECHR talks about "peaceful enjoyment" of one's "possessions". This is language that is strange to the intellectual property field, and with good reason: the analogy between property *stricto sensu* and intangible property may be helpful to understand certain problems<sup>36</sup>, but it is certainly not accurate<sup>37</sup>. Intellectual property rights were not created to promote "peaceful enjoyment" of works or inventions; they were created to promote their existence, which is to say that they confer to their holders precisely the ability to exclude others from enjoying the protected intangible good at all, if they so wish to do.

This is not to say that the Court overstepped into an area which it was not supposed to reach: but it was more a clever and slightly twisted construction meant to encompass a field that

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<sup>36</sup> See *supra*, footnote 2.

<sup>37</sup> See *supra*, footnote 1.

the drafters of the ECHR were not particularly concerned about, rather than a truly meaningful statement that intellectual property rights should be treated as human rights per se.

## **Interaction between Intellectual Property and Human Rights: the International Framework**

### *The Universal Declaration of Human Rights*

Article 27 of the Universal Declaration of Human Rights (UDHR), states that:

(1) Everyone 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.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Although the UDHR is said to have no binding effect (given that it is a Recommendation of the United Nations General Assembly), many authors<sup>38</sup> point out that in fact possesses the force of international customary law.

### *The International Covenant on Economic, Social and Cultural Rights*

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<sup>38</sup> See Christophe Geiger, *The Constitutional Dimension of Intellectual Property*, in in *Intellectual Property and Human Rights*, Paul L.C. Torremans, ed., Kluwer (2008), at 113.

Article 15.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of “everyone” to “(a) take part in cultural life; (b) enjoy the benefits of scientific progress and its applications; (c) benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. Article 15.2 of the ICESCR states that “the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture”. 15.3 proclaims that “the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” And 15.4 states that “the States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Audrey Chapman has pointed out that in order “[t]o be consistent with the full provisions of article 15 [of the ICESCR], the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level<sup>39</sup>”. As we will see in the next section, it is highly doubtful that many of today’s intellectual property policies are consistent with this proviso<sup>40</sup>.

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<sup>39</sup> See Audrey Chapman, *Approaching Intellectual Property as a Human Right*, in Copyright Bulletin, volume XXXV, no. 3, available at <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf>, at 14.

<sup>40</sup> See III.

Some of the recommendations made in 2000 by a United Nations Sub-Commission with regard to “Intellectual Property and Human Rights<sup>41</sup>” are worth highlighting. The Recommendations requests that governments protect “the social functions of intellectual property”<sup>42</sup> consentaneously with international human-rights obligations and principles. Chapman suggests that “[o]ne way to do so would be to have a mechanism for a human rights review/appeal of decisions by patent and copyright procedures.<sup>43</sup>” The Resolution also calls for the WTO in general and the Council on TRIPS in particular to take “fully into account existing state obligations under international human-rights instruments” during its review of the TRIPS agreement. Chapman argues that “[f]or this to happen in a meaningful way, however, it would first be necessary to gain recognition for the principle that human rights are fundamental and prior to free trade itself<sup>44</sup>”. Finally, the Resolution encourages the Committee on Economic, Social and Cultural Rights “to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject<sup>45</sup>”.

### *The TRIPS Agreement*

Article 7 of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property) lists the objectives in the following way:

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<sup>41</sup> See Office of the High Commissioner for Human Rights, Sub-Commission on Human Rights Resolution 2000/7, hereinafter Resolution, available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>.

<sup>42</sup> See Resolution, para. 6

<sup>43</sup> See Chapman, *loc. cit.*, at 30.

<sup>44</sup> See *id.*, *ib.*

<sup>45</sup> See Resolution, para. 11

“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.”<sup>46</sup>”

Authors who suggest that the proper connection between intellectual property and human rights lies on a balancing effect of the latter over the former, often quote article 7 as the foundation of their claim<sup>47</sup>. TRIPS 7 would therefore “encourage (...) WTO Member States to build their IP systems in equilibrium between the two key interests at stake: Providing an incentive for the creation of new innovations through rewards (...) [and] secure the transfer and diffusion of innovations to the public. (...) The proportional balance of these two interests should be determined in accordance with the overall aim of promoting progress in science, arts and technology (...)”<sup>48</sup>”.

### **Intellectual Property and Human Rights – a dialectic relationship?**

Some scholars have suggested that [h]uman rights and intellectual property were natural law cousins owing to their shared filiation in equity.<sup>49</sup>” Others have expressed doubts about the possibility of a long lasting “marriage<sup>50</sup>” between these two spheres. As a matter of fact,

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<sup>46</sup> TRIPS article 7, highlights added.

<sup>47</sup> See, for instance, Henning Grosse Ruse-Khan, *Proportionality and Balancing within the Objectives*, in *Intellectual Property and Human Rights*, Paul L.C. Torremans, ed., Kluwer (2008).

<sup>48</sup> Ruse-Khan, *loc. cit.*, at 174.

<sup>49</sup> See Daniel Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, *loc.cit.*, at 12.

<sup>50</sup> To use Peter Yu’s expression. See *Reconceptualizing Intellectual Property Interests in a Human-Rights Framework*, 40 U.C. Davis L. Rev. 1039 (2007), at 1128.

international and regional agreements do provide us with a *locus* for rooting intellectual property claims based on human rights violations (and, as seen above, some courts might be actually be willing to explore this connection), but it is nonetheless a fragile liaison. It should suffice to remember that the European Court of Human Rights' interpretation of article 1 is based on the concept of "peaceful enjoyment of possessions", which resonates with proprietary notions ill-suited to the universe and *raison d'être* of intellectual property. Also, as Helfer points out<sup>51</sup>, decisions like *Dima v. Romania* and *Anheuser-Busch v. Portugal* only bind the parties involved in particular case. Cases like these were very fact-specific<sup>52</sup> and therefore the jump forward that the Court chose to give in applying article 1 to intellectual property might be more limited than it would seem at first sight.

Likewise, the UDHR's call for everyone to be able to freely "participate in cultural life"<sup>53</sup> and "share in scientific advancement"<sup>54</sup> should be understood with a grain of salt. The fact that it may be international customary law is certainly relevant in many other areas (areas that have always been at the core of human rights protection), but one should notice that the same article 27, at number 2, also mentions "the right to the protection of the *moral* and material interests resulting from any scientific, literary or artistic production of which he is the author"<sup>55</sup> – and moral rights were expressly excluded by TRIPS in article 9.1<sup>56</sup>, so that countries who have

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<sup>51</sup> Laurence Helfer, *Intellectual Property and the European Court of Human Rights*, in *Intellectual Property and Human Rights*, Paul L.C. Torremans, ed., Kluwer (2008), at 48.

<sup>52</sup> *Id.*, at 49

<sup>53</sup> UDHR, article 27.1

<sup>54</sup> *Id.*, *ib.*

<sup>55</sup> *Id.*, article 27.2. Emphasis added.

<sup>56</sup> TRIPS article 9.1 states that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom." Berne article 6 bis.1 states that "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Underlining added.

embraced a more utilitarian approach to intellectual property, i.e. copyright countries, would still join the Agreement.

It should also be mentioned that although a balancing approach to intellectual property in general is certainly welcome, there are also some disadvantages in this new trend. Indeed, there is some literature that suggests that bringing intellectual property rights too close to the human rights sphere would not result in a smoothening of intellectual property-generated imbalances, but in the rather twisted consequence of sharpening these asymmetries. As Peter Yu pointed out, “[a]n emphasis of the human rights attributes in intellectual property rights is also likely to further strengthen intellectual property rights, especially in civil law countries where judges are more likely to uphold rights that are considered human rights. As a result, the development of a human rights framework for intellectual property would result in the undesirable “human rights” ratchet of intellectual property protection.<sup>57</sup>” Other potential problems would include “undesirable capture of the human rights forum by intellectual property rightsholders<sup>58</sup>” and “the framework’s potential bias against non-Western cultures and traditional communities<sup>59</sup>”.

Nonetheless, it seems reasonable to acknowledge that it might be perhaps too late to ignore that a significant part of the international community has embraced this quest for a so-called “human rights framework” to intellectual property. At the very least, this quest should lead us to look carefully into areas where intellectual property overprotectionism might lead to practical effects that endanger human rights: an unbalanced patent regime may directly affect the right to health, access to medicines or the right to food; an unbalanced copyright regime may impact freedom of speech, the right to education, cultural participation and to benefit from

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<sup>57</sup> See Peter Yu, *loc. cit.*, at 1125. The author considers, nonetheless, that this risk is mitigated by the approach that existing international instruments have been careful enough “to have recognized only certain attributes of existing intellectual property rights as human rights.” *Id.*, *ib.*

<sup>58</sup> *Id.*, at 1047.

<sup>59</sup> *Id.*, *ib.* Cf. n. 49.

scientific advancements. How can human rights theory help? By illuminating the debate about the appropriate levels of intellectual property protection, particularly when the field affected by the exclusive right is one of the mentioned above. The first step in any discussion over the possible interface between intellectual property and human rights should be to assess the impact that current intellectual property law and policy have on the core areas that they are supposed to balance and nurture, some of which are inherently at the core of human rights protection.

The language in article 7 of TRIPS, calling for the “*promotion* of technological innovation”, the “*transfer and dissemination* of technology”, alluding to the need of a “*mutual advantage* of producers and users of technological knowledge” and highlighting that intellectual property rights should be set at a level that is “*conducive to social and economic welfare*” and to “a *balance* of rights and obligations”, is a very good example of how human rights concerns can add a new layer to intellectual property legislation.

The recent debate surrounding intellectual property and human rights is therefore far more estimable if seen as the raising of a powerful red flag rather than the search for a unified theoretical human rights frame for intellectual property. The relationship between intellectual property and human rights is akin to the one of two distinct spheres or planets with different resources and different trajectories; one cannot be assimilated into another, but they are able to exert some effects on each other and it is this distant but continuous gravitational force that keeps each one of them on the right track. That is why it is important to keep monitoring intellectual property’s routes, to prevent it from deviating from its original goals. Ultimately, the reason that should lead us to keep looking for more contact points between intellectual and human rights is exactly the same that lead to the emergence of the first intellectual property rules: the search for

a balance, for an equilibrium of inputs and outputs that will benefit copyrights and patents' internal systems and prevent it from colliding with other spheres.