

Economic partnership agreements and international human rights

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Abstract

This chapter examines the impact of the intellectual property chapters in the economic partnership agreements (EPAs) on the protection of human rights. It begins by outlining the challenges inherent in any analysis of the interface between intellectual property and human rights. It reminds readers that some of the rights protected under the intellectual property chapters in the EPAs do overlap with rights recognized in existing international or regional human rights instruments. Taking seriously this overlap, the chapter discusses the compatibilities between intellectual property rights and human rights and the resulting synergies created by the EPAs. The chapter then examines the various impediments the EPAs have posed to greater protection of human rights. In particular, it discusses the conflicts and inconsistencies within the EPAs, lost opportunities for promoting human rights and the indirect systemic tension that the agreements have generated within the human rights system. The chapter concludes with a discussion of normative and systemic adjustments that seek to alleviate the tension or conflict between the intellectual property chapters in the EPAs and the international human rights system.

1. Introduction

In the past decade, the European Union has been actively pushing for the establishment of bilateral, plurilateral and regional economic partnership agreements (EPAs) with its trading partners. These agreements aim to promote free trade, facilitate economic integration and stimulate local development. Of great concern in the intellectual property area are those EPA provisions that call for high standards of protection and enforcement that exceed what is required by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO).

This chapter examines the impact of the intellectual property chapters in the EPAs on the protection of human rights. It begins by outlining the challenges inherent in any analysis of the interface between intellectual property and human rights. It reminds readers that some of the rights protected under the intellectual property chapters in the EPAs do overlap with rights recognized in existing international or regional human rights instruments. Taking seriously this overlap, the chapter discusses the compatibilities between intellectual property rights and human rights and the resulting synergies created by the EPAs.

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The chapter then examines the various impediments the EPAs have posed to greater protection of human rights. In particular, it discusses the conflicts and inconsistencies within the EPAs, lost opportunities for promoting human rights and the indirect systemic tension that the agreements have generated within the human rights system. The chapter concludes with a discussion of normative and systemic adjustments that seek to alleviate the tension or conflict between the intellectual property chapters in the EPAs and the international human rights system.

2. Inherent challenges

Until recently, policymakers, scholars and activists paid little attention to the implications of the intellectual property system for the protection of human rights. Their position changed, however, with the adoption of the TRIPS Agreement and the increasing push for TRIPS-plus standards through bilateral, plurilateral and regional trade and investment agreements. Although the growing discussion has enriched our understanding of both human rights and intellectual property laws, significant challenges remain in any discussion of the interface between human rights and intellectual property. This section explores three of these challenges.

2.1. IP rights as human rights?

The first challenge concerns the human rights attributes of intellectual property rights. Traditionally, policymakers, international bureaucrats, academic commentators and civil society organizations examine the interface between intellectual property and human rights by using either the conflict approach or the coexistence approach.¹ The conflict approach views the two sets of rights as being in fundamental conflict. The coexistence approach, by contrast, considers them essentially compatible.

Although each of these approaches has benefits and drawbacks, both ignore the fact that *some* attributes of intellectual property rights are protected in international human rights instruments while other attributes do not have any human rights basis at all. Thus, instead of inquiring whether intellectual property and human rights conflict or coexist with each other, it is important to distinguish the human rights attributes of intellectual property rights from the non-human rights aspects of intellectual property protection.

For example, the protection of corporate trademarks is unlikely to be considered a human right, unless one accepts the right to property as a human right *and* equates intellectual property with personal property. Likewise, trade secrets owned by corporations do not have any human rights basis, because they are created or developed by employees. Other examples of existing intellectual property rights that lack human rights aspects are rights in works made for hire, employee inventions, and non-original, non-creative databases; neighboring rights for broadcasters and phonogram producers; exclusive rights for clinical trial data; and protections for the economic investments of institutional authors and inventors.

Article 27(2) of the Universal Declaration of Human Rights (UDHR) states explicitly that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”. Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) further requires state parties to “recognize the right of everyone ... [t]o benefit from the

¹ Helfer 2003, pp 48–49; Torremans 2008, pp 196–197.

protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”.

In view of these provisions, the tension between the intellectual property chapters in the EPAs and the existing international human rights instruments is not the simple categorical tension between intellectual property rights and human rights. Rather, tension exists between the non-human rights aspects of intellectual property protection and human rights, including the human rights attributes of intellectual property rights. Although commentators tend to emphasize the conflicts between intellectual property rights and human rights, the intellectual property chapters, in certain circumstances, can create synergy between the EPAs and international or regional human rights instruments.

2.2. No consensus on human rights?

The second challenge concerns the type of human rights that the analysis should cover. Despite decades of efforts establishing the international human rights system, countries have yet to agree on the nature, scope and meaning of human rights obligations. While the Vienna Declaration and Programme of Action states that “[a]ll human rights are universal, indivisible and interdependent and interrelated”, the document is mostly aspirational.² Many governments, policymakers and commentators still have yet to view all forms of human rights as having the same weight and priority. Many of them continue to prioritize civil and political rights over rights of later generations, such as economic, social and cultural rights (second-generation rights) or collective rights for minorities, indigenous peoples and traditional communities (third-generation rights).

To complicate matters, policymakers and commentators subscribe to different conceptions of human rights. While some take a highly *philosophical* approach that relies heavily on first principles and natural law, others take a more *positive* approach that focuses on compromises in existing international or regional human rights instruments. As Richard Falk observes:

The positivists consider the content of human rights to be determined by the texts agreed upon by states and embodied in valid treaties, or determined by obligatory state practice attaining the status of binding international custom. The naturalists, on the other hand, regard the content of human rights as principally based upon immutable values that endow standards and norms with a universal validity.³

Some commentators also question how relatively trivial matters such as intellectual property rights can be equated with such fundamental rights as the prohibition on genocide, slavery and torture; the rights to freedom of thought, expression, association and religion; and the rights to life, food, health, basic education and work.⁴ That question was, indeed, raised during the drafting of the UDHR. Alan Watt, the Australian delegate, declared that “the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work”.⁵

Although both the philosophical and positive approaches have merits, this chapter focuses on the latter, for at least three reasons.⁶ First, the drafting histories of the UDHR and the ICESCR

² Vienna Declaration and Programme of Action, 12 July 1993, para 5.

³ Falk 1992, p. 44.

⁴ Yu 2007d, p. 713.

⁵ Morsink 1999, p. 221.

⁶ On the weakness of this approach, see Yu 2007d, pp 715–716.

have shown that it is difficult enough for countries to achieve a *political* consensus on the rights recognized in the instruments. Given the divergent interests, backgrounds, beliefs and cultures, countries are very unlikely to succeed in achieving an international *philosophical* consensus on these rights. As Jack Donnelly reminds us, “few issues in moral or political philosophy are more contentious or intractable than theories of human nature”.⁷ Thus, it makes great pragmatic sense to focus on rights that have already attained international consensus, if not universal agreement.

Second, international human rights instruments thus far have received significant attention in the international debate concerning the human rights implications of intellectual property protection. The plain language of these instruments is therefore likely to have a significant impact on the future development of the international intellectual property system. While commentators may question whether the UDHR has now achieved the status of customary international law,⁸ this declaration, along with other international and regional human rights instruments, has undeniably achieved an international normative consensus.⁹

Third, based on the usual approach to drafting international agreements, the provisions in the international human rights instruments do not necessarily have a commonly agreed-upon purpose (other than a broad one, such as the promotion of human dignity and respect). As James Nickel points out, “people can agree on human rights without agreeing on the grounds of human rights”.¹⁰ Moreover, international instruments cannot escape the *realpolitik* of international negotiations no matter how much foresight the drafters had. As one commentator observes:

[H]uman rights codifications inevitably convey a somewhat incomplete, or even biased, image of what human rights really are. All of them have been drafted and enacted under specific political and economic circumstances, and therefore reflect the mindsets and specific concerns of their drafters and the time they lived in. They are often the fruit of political compromise—a constraint to which moral truth is not exposed.¹¹

According to Professor Donnelly, human rights are far from “timeless, unchanging, or absolute; any list or conception of human rights—and the idea of human rights itself—is historically specific and contingent”.¹²

2.3. Human rights for corporate owners?

The final challenge concerns the increasing willingness of the European Court of Human Rights (ECtHR) to extend human rights protection to non-individuals, such as corporate owners of intellectual property rights. As Laurence Helfer and Graeme Austin observe:

Some in the human rights community ... fear that intellectual property owners—in particular, multinational corporations—will invoke the creators’ rights and property rights provisions of international instruments to lock in

⁷ Donnelly 2003, p. 16.

⁸ Yu 2007c, p. 1046, fn. 16.

⁹ Donnelly 2003, p. 17.

¹⁰ Nickel 2007, p. 177.

¹¹ Cornides 2004, p. 137.

¹² Donnelly 2003, p. 1.

maximalist intellectual property rules that will further concentrate wealth in the hands of a few at the expense of the many.¹³

In *Anheuser-Busch, Inc v. Portugal*, for example, the Grand Chamber of the ECtHR extended the coverage of Article 1 of Protocol No. 1 to the European Convention of Human Rights to both registered trademarks and trademark applications of a multinational corporation.¹⁴ The case concerned a dispute over Portugal's cancellation of the application by a multinational brewery for the BUDWEISER trademark in an effort to protect the appellation of origin BUDĚJOVICKÝ BUDVAR owned by its longstanding Czech rival. Focusing on the right to property, the ECtHR considered the term "possessions" to include trademarks and trademark applications. Following this decision, even a faceless corporation may receive human rights-like protection for its intellectual property.

The willingness of the ECtHR to extend human rights protection to the intellectual property of corporate entities is particularly important to our analysis of the human rights implications of the EPAs. To be certain, one could make a strong argument that corporations aggregate the disparate human rights interests of individuals, such as their individual shareholders. One could also cite the many social benefits created through lawsuits brought by resourceful corporate entities on behalf of individuals whose rights have been violated. Nevertheless, given the considerable disparity in power between transnational corporations and individuals (or even governments representing some of these individuals¹⁵), the tension created by a system that allows *corporate* owners to demand greater *human* rights protection at the expense of individuals is inherently troubling.

As a conceptual matter, such an expansive view of human rights is also highly problematic. As Professor Donnelly declares emphatically, "[c]ollectivities of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept".¹⁶ It is one thing to give corporations standing to bring human rights claims on behalf of individuals, but quite another to allow corporate owners to claim that their "human" rights have actually been violated.¹⁷ This chapter therefore focuses only on individuals; it does not explore the EPA's impact on the human rights-like protection afforded to corporate owners that the ECtHR has recently recognized.

Moreover, if corporate owners have rights, they should also have human rights responsibilities. The lack of such responsibilities is indeed the reason why we need to better balance the protection and enforcement of intellectual property rights against international human rights commitments. In recent years, international human rights bodies have increasingly outlined the vast responsibilities of corporate owners in areas involving intellectual property protection and enforcement.

For example, in its authoritative interpretative comment on the right to health, the Committee on Economic, Social and Cultural Rights declares: "While only States are parties to the [ICESCR] and thus ultimately accountable for compliance with it, all members of society— ... including ... the private business sector—have responsibilities regarding the realization of the right to health".¹⁸ The preamble to the Human Rights Guidelines for Pharmaceutical

¹³ Helfer and Austin 2011, pp 504–505.

¹⁴ *Anheuser-Busch, Inc. v. Portugal*, 45 ECHR 36 (2007) (Grand Chamber).

¹⁵ Hestermeyer 2007, pp 94–95.

¹⁶ Donnelly 2003, p. 25.

¹⁷ Yu 2007c, pp 1130–1131; Yu 2007d, p. 730.

¹⁸ Committee on Economic, Social and Cultural Rights 2000, para 42.

Companies in Relation to Access to Medicines similarly states: “Pharmaceutical companies, including innovator, generic and biotechnology companies, have human rights responsibilities in relation to access to medicines”.¹⁹ Guideline 26, in particular, stipulates that these companies “should make and respect a public commitment not to lobby for more demanding protection of intellectual property interests than those required by TRIPS, such as additional limitations on compulsory licensing”.

3. Compatibilities and synergies

Although commentators remain concerned about the adverse impact of intellectual property rights on the human rights system, the protection and enforcement of those rights can be consistent with a country’s human rights commitments. In fact, because some attributes of intellectual property rights are protected by international or regional human rights instruments, greater protection of those attributes can promote the protection of human rights.

In the EPAs, the intellectual property chapters include provisions covering a wide variety of intellectual property rights, ranging from copyrights to patents and from geographical indications to *sui generis* database protection. Although an ongoing debate exists concerning whether international human rights instruments recognize the right to property²⁰ and whether intellectual property should be identified as personal property,²¹ many commentators have equated the protection of intellectual property rights with the protection of human rights. Their view is indeed strongly supported by the ECtHR’s interpretation of Article 1 of Protocol No. 1 to the European Convention of Human Rights. Intellectual property is also explicitly covered in the right-to-property provision in Article 17(2) of the Charter of Fundamental Rights of the European Union, which recently entered into force following the adoption of the Lisbon Treaty on the Functioning of the European Union.

Even for those refusing to equate intellectual property rights with human rights, the intellectual property chapters do protect important human rights attributes of intellectual property rights. To begin with, these chapters protect the *material* interests in the creations of individual authors and inventors as recognized in international human rights instruments. While not all forms of intellectual property rights should be protected at the level of human rights, copyrights and patents clearly implicate the material interests of individual authors and inventors.

The intellectual property chapters also offer important protection to the *moral* interests in the creations of individual authors and inventors. For instance, the provisions on copyright and related rights help strengthen the protection of moral rights; they ensure proper identification and attribution of the creative work and prevent the work from being recoded or otherwise modified in a manner that would prejudice the author’s honor or reputation. The provisions on copyright management information and the requirement that the EPA parties ratify the 1996 Internet Treaties of the World Intellectual Property Organization (WIPO) also serve similar purposes. In addition, the provisions on patents help ensure the recognition of individual inventors, whose contributions patent grants will acknowledge.²²

¹⁹ The Guidelines were included as an annex in Human Rights Council 2008.

²⁰ Yu 2007d, pp 731–736.

²¹ Raustiala 2007, p. 1032.

²² Article 4*ter* of the Paris Convention for the Protection of Industrial Property stipulated that “the inventor shall have the right to be mentioned as such in the patent”.

Likewise, the provisions on geographical indications can help indigenous peoples and traditional communities obtain the much-needed protection of the moral and material interests in their creations.²³ The provisions on the protection of traditional knowledge and cultural expressions can also preserve the ways of life and economic and cultural heritage of these individuals and communities.²⁴ By fostering the equitable sharing of benefits, these provisions thereby promote the right to self-determination, the right to development, the right to cultural participation and development and the right to the benefits of scientific progress of these individuals and communities. As far as biodiversity, seeds, plant genetic resources and traditional agrarian practices are concerned, such protection could implicate the rights to adequate food and health.

From the human rights standpoint, the protection of traditional knowledge and cultural expressions is rather important. As stated in the Declaration on the Rights of Indigenous Peoples, which the United Nations General Assembly adopted in September 2007:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. *They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*²⁵

Although this Declaration does not cover intellectual property rights per se, the protection of indigenous heritage is likely to have serious ramifications for the protection of intellectual property rights. The Declaration's focus on the protection of "cultural heritage, traditional knowledge and traditional cultural expressions" also echoes provisions in the UDHR, the International Covenant on Civil and Political Rights, the ICESCR, and other international and regional human rights instruments.²⁶

Moreover, the EPAs include in their intellectual property chapters abuse-of-rights provisions to promote competition, which complement other EPA provisions related to competition law. The chapters also include technology transfer provisions, which could promote the protection of human rights, in particular the right to the benefits of scientific progress. The scope and extent of such protection, however, will depend on how seriously signatory countries take the obligations under those provisions. For example, Articles 66.2 and 67 of the TRIPS Agreement outline the obligations of developed countries to promote technology transfer, technical cooperation and legal assistance in developing and least-developed countries. Even though the Doha Ministerial Decision of 14 November 2001 reaffirmed the mandatory nature of these obligations, developed countries thus far have failed to take them seriously.

²³ Nevertheless, the protection of geographical indications could also undermine the protection of human rights if the former creates a trade barrier by imposing unfair restrictions on the ability of local producers to rename, label, remarket or brand their products. Musungu 2009, p. 31.

²⁴ Helfer and Austin 2011, p. 3.

²⁵ United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, Art. 31(1) (emphasis added).

²⁶ Universal Declaration of Human Rights, 10 December 1948, Art. 27(1); International Covenant on Civil and Political Rights, 16 December 1966, Art. 27; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Art. 15(1)(a); Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, Art. 15(2).

Finally, if trademark protection in the EPAs could be extended to cover personality interests, such as those protections found under the right of publicity in the United States, the intellectual property chapters could provide important protection to individuals—especially celebrities—against the unauthorized use of their names, likenesses, images, voices or other personal attributes. Such protection may also enhance the protection against privacy intrusions, which goes hand in hand with personality rights.²⁷ Although the right to privacy is generally not covered within the scope of intellectual property rights, the intellectual property chapters do contain provisions to ensure proper protection of personal data and of informational privacy.

4. Conflicts, inconsistencies and lost opportunities

Although the intellectual property chapters in the EPAs can promote the protection of human rights, they can also frustrate such protection. Indeed, many commentators believe that the chapters would frustrate such protection more than they promote it. The human rights impediments created by the EPAs can arise in two different ways: (1) directly through the tension created by the language used in the intellectual property chapters in the EPAs and (2) indirectly through an emphasis on trade, economic partnerships and non-multilateral approaches that eventually divert time, resources, energy and attention from the further development of the international human rights system. This section discusses direct impediments, and the next section examines indirect impediments.

At the normative level, direct human rights impediments can take the form of conflicts or inconsistencies between the intellectual property chapters and international human rights instruments. They can also take the form of lost opportunities resulting from the failure of the EPAs to promote the protection of human rights, even though such protection would not create any direct conflict within the intellectual property chapters.²⁸ These lost opportunities are due in large part to the misguided and unproven assumption that more intellectual property rights are always better. At times, developed countries and their policymakers seek to strengthen the levels of protection and enforcement of intellectual property rights *at all costs*, without taking full account of the many spillover effects in the human rights arena.

To help us better understand the potential conflicts, inconsistencies and lost opportunities, this section focuses on three debates in areas where intellectual property rights have posed significant challenges to the protection of human rights. It does not, however, identify each individual provision in the intellectual property chapters in light of the large number of interrelated provisions involved and the wide variety of human rights implicated in the debates.

The most widely cited debate concerns the much-needed access to essential medicines in less-developed countries,²⁹ which is impeded by the strong protection of patents and clinical trial data as well as heightened measures that restrict parallel imports while mandating the seizure of in-transit generic drugs. This debate has caught the attention of the WTO, WIPO, the World Health Organization (WHO) and other international intergovernmental bodies.

²⁷ Zapparoni 2004, p. 706.

²⁸ Musungu 2009, p. 35.

²⁹ The TRIPS Agreement distinguishes between developing and least-developed countries. This chapter uses the term “less-developed countries” to denote both developing and least-developed countries. When referring to a specific country group, the chapter may return to use of the terms “developing countries” and “least-developed countries”.

The debate over access to essential medicines implicates both the right to life and the right to health. Article 3 of the UDHR explicitly provides: “Everyone has the right to life, liberty and security of person”. Article 25(1) further recognizes that every person has “the right to a standard of living adequate for the health and well-being of himself [or herself] and of his [or her] family, including food, clothing, housing and medical care and necessary social services”. Echoing this provision, the preamble to the WHO Constitution declares: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”. While the right to life has arguably entered into customary international law, a raging debate continues over the legal status of the right to health.³⁰

Regardless of the legal status of the right to health, the HIV/AIDS crises in less-developed countries have led many policymakers, commentators and activists to question the expediency and appropriateness of the existing intellectual property system. Indeed, concerns over these crises led WTO members to adopt the Doha Declaration on the TRIPS Agreement and Public Health, which “recognize[d] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics”.

A few years later, the member states adopted a pioneering protocol to formally amend the TRIPS Agreement by adding Article 31*bis*.³¹ If ratified by two-thirds of the WTO membership, the proposed amendment will allow countries with insufficient or no manufacturing capacity to import generic versions of patented pharmaceuticals. As of this writing, more than a third of the 159 WTO member states, including the United States, India, Japan, China and members of the European Union, have ratified the proposed amendment.³²

Interestingly, some commentators have suggested that the right to health can go in the opposite direction. For example, victims of harmful diseases can use this right to argue for the need to provide incentives for pharmaceutical manufacturers to develop drugs that treat, prevent or cure diseases. Although the intellectual property system provides the much-needed incentives for the development of new pharmaceuticals, commentators continue to disagree over whether some of these incentives can be generated outside the intellectual property system or through other funding models, such as grants, subsidies, prizes, advance market commitments, reputation gains, open-source drug discovery, patent pools, public-private partnerships or equity-based systems built upon liability rules.³³ There is also an ongoing debate concerning the optimal levels of patent protection for less-developed countries and whether existing protections have already exceeded those levels.³⁴ As Josh Lerner observes: “Almost all economists would agree that some intellectual property protection is better than no intellectual property protection at all. But this does not mean that very strong protection is better than a more moderate level of protection”.³⁵

A second debate concerns access to information technology, communications infrastructure, computer software, electronic databases and digital content. Such access is impeded by the protection of copyrights, databases and technological measures. This debate implicates the rights to education and freedom of expression. Because education directly affects one’s ability

³⁰ e.g. Borges Barbosa et al. 2007, pp 131–33; Hestermeyer 2007, pp 76–136.

³¹ Yu 2007a, pp 872–886.

³² World Trade Organization 2011.

³³ Pogge et al. 2010; Van Overwalle 2009; Yu 2007c, pp 1089–1092.

³⁴ Maskus and Reichman 2005, pp 36–39.

³⁵ Lerner 2010, p. 32.

to fully realize oneself, the impeded access has troubled those adopting the human capabilities or human flourishing approaches to human rights.³⁶ The issue regarding access to knowledge further ties the debate on intellectual property and human rights to the older debate about the global digital divide³⁷ and to a much newer one concerning access to knowledge.³⁸

Thanks to the internet and new communications technologies, the debate on access to information technology has now caught the attention of not only civil liberties groups, but also the United Nations and other international intergovernmental organizations. Held in two phases in Geneva and Tunis, the World Summit on the Information Society sought to address the concerns raised by the growing digital divide in less-developed countries and the possibility that these countries might lose out on many unprecedented opportunities generated by the information revolution.³⁹ This summit led to the launch of the Internet Governance Forum (IGF), which was created to promote a “multilateral, multi-stakeholder, democratic and transparent” policy dialogue on internet governance.⁴⁰ IGF meetings have since been convened in Athens, Rio de Janeiro, Hyderabad, Sharm El Sheikh, Vilnius, Nairobi and Baku.

In recent years, the adoption of the graduated response system has elicited strong criticisms in the human rights arena.⁴¹ Of primary concern are the human rights implications of internet disconnection, the system’s most draconian sanction. From the human rights standpoint, using suspension or termination of internet service as a remedy to alleged copyright infringement is highly problematic. As Frank La Rue, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, declared in his recent report:

The Special Rapporteur considers cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights. ...

The Special Rapporteur [further] calls upon all States to ensure that Internet access is maintained at all times, including during times of political unrest. In particular, the Special Rapporteur urges States to repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access, and to refrain from adopting such laws.⁴²

The Special Rapporteur’s concern and request are understandable. After all, repressive governments have recruited internet service providers to serve as gatekeepers to help censor digital content and restrict information flows.⁴³ While the graduated response system protects intellectual property rights holders, as opposed to governments, its impact on individual freedom of expression is not that different from the impact of government censorship.

Indeed, as I have pointed out elsewhere, the developed countries’ increasing push for draconian measures to respond to enforcement problems in the digital environment has slowly

³⁶ Helfer and Austin 2011, p. 322. On the human capabilities and human flourishing approaches to human rights, see Nussbaum 2001; Nussbaum 2011; Sen 1999.

³⁷ Yu 2002.

³⁸ Kapczynski 2008; Krikorian and Kapczynski 2010.

³⁹ Yu 2005.

⁴⁰ World Summit on the Information Society 2005, paras 72–73.

⁴¹ Yu 2010c.

⁴² Human Rights Council 2011, paras 78–79.

⁴³ Yu 2010a, p. 715; Yu 2010c, pp 1402.

backfired on their longstanding interests in promoting free speech, free press, human rights and civil liberties abroad.⁴⁴ From the human rights standpoint, those EPA provisions that call for internet disconnection, greater intermediary liability for internet service providers and tougher criminal penalties for unauthorized dissemination of online content have raised very serious concerns.

The final debate concerns the role of the intellectual property system in response to challenges posed by global climate change. As the debate has emerged only recently, it is unclear what rights will be implicated, what limitations and exceptions will be introduced and how and whether the overall intellectual property system will be changed. Indeed, the rights involved are more likely to be covered in the category of lost opportunities than in the category of conflicts or inconsistencies.

Nevertheless, it is worth noting that the debate will implicate such important human rights as the rights to health, adequate housing, adequate food, water and development.⁴⁵ Because of the asymmetry in resource endowment, less-developed countries with significant populations and resources in areas vulnerable to floods, hurricanes, typhoons, tsunamis, severe drought, desertification or forest decay will likely suffer more than others if the intellectual property system is not better managed to respond to climate change.

5. Systemic tension

In addition to the above conflicts and inconsistencies, the intellectual property chapters in the EPAs have created considerable tension between the intellectual property and human rights systems. Even in areas where no direct conflicts or inconsistencies arise, the chapters could distort the work of the international human rights system by creating an undue emphasis on trade, economic partnerships and non-multilateral approaches. They could also divert time, resources, energy and attention from the further development of the international human rights system.

5.1. Intellectual property v. human rights

Compared with the intellectual property system, the human rights system has a distinctively different culture, language and forum structure as well as drastically different approaches to negotiation and conflict resolution. The position human rights advocates take often does not coincide with that taken by intellectual property rights holders and their supportive governments.⁴⁶ The latter's views are often colored by the trade-based—and, at times, trade-only—approach developed through the founding of the WTO and the adoption of the TRIPS Agreement. It is therefore no surprise that commentators have heavily criticized the WTO panels and the Appellate Body for failing to protect important human rights.⁴⁷

Indeed, the tension between the WTO and the international human rights system has led UN human rights bodies to heavily criticize the TRIPS Agreement. For example, in Resolution 2000/7, the UN Sub-Commission on the Promotion and Protection of Human Rights (UN Sub-Commission) stated that “the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights”.⁴⁸ Noting the “apparent conflicts between the intellectual property rights regime embodied in the TRIPS

⁴⁴ Yu 2011a, pp 928–929.

⁴⁵ International Council on Human Rights Policy 2010, p. 4.

⁴⁶ Gervais 2008, p. 22.

⁴⁷ Broude 2010; Howse 2000.

⁴⁸ Sub-Commission on Human Rights 2000.

Agreement, on the one hand, and international human rights law, on the other”, the Sub-Commission underscored the “social function of intellectual property” and reminded governments of “the primacy of human rights obligations over economic policies and agreements”. The resolution also requested “[g]overnments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation”.

Likewise, Mary Robinson, the UN High Commissioner for Human Rights, released a report highly critical of the TRIPS Agreement.⁴⁹ The report provided five observations concerning the potential challenge for developing a human rights approach to the Agreement. First, the High Commissioner noted:

[T]he overall thrust of the TRIPS Agreement is the promotion of innovation through the provision of commercial incentives. The various links with the subject matter of human rights—the promotion of public health, nutrition, environment and development—are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement.

Second, “while the [TRIPS] Agreement identifies the need to balance rights with obligations, it gives no guidance on how to achieve this balance”. Third, because of the required minimum standards, the TRIPS Agreement has taken away a high degree of autonomy and a considerable amount of policy space from the WTO member states. Fourth, and relatedly, “the protection contained in the TRIPS Agreement focuses on forms of protection that have developed in industrialized countries”. The protection less-developed countries are required to offer therefore does not always take account of local needs, interests and conditions. Finally, under the current international intellectual property system, limited attention has been devoted to the protection of “the cultural heritage and technology of local communities and indigenous peoples”.

Notwithstanding these concerns, the High Commissioner recognized the flexibilities built into the TRIPS Agreement and noted that “much still depends on how the ... Agreement is actually implemented”. While these flexibilities are important and may help retain the balance in the international intellectual property system, it is important to remember that countries need expertise and resources to take advantage of these flexibilities. As UNCTAD reminded us in *The Least Developed Countries Report 2007*:

Even with its inbuilt flexibilities, the TRIPS Agreement is highly problematic for [least-developed countries] owing to the high transaction costs involved in complex and burdensome procedural requirements for implementing and enforcing appropriate national legal provisions. [These countries] generally lack the relevant expertise and the administrative capacity to implement them.⁵⁰

In sum, as shown in the UN Sub-Commission’s and High Commissioner’s analyses of the human rights impact of the TRIPS Agreement, obligations in international intellectual property agreements—including the EPAs—could create tension between the intellectual property and human rights systems. Even if tension does not exist on the surface, the

⁴⁹ Commission on Human Rights 2001.

⁵⁰ UNCTAD 2007, p. 99.

obligations could create a mismatch between the adopted standards and local conditions.⁵¹ They could also divert the scarce economic resources from other important public needs. Such diversion is particularly likely in the enforcement area.⁵²

5.2. Bi/Plurilateral v. Multilateral

Although the intellectual property chapters in the EPAs have created significant tension between the intellectual property and human rights systems, the bilateral and plurilateral approaches the European Union used to establish these agreements have raised additional concerns. By going outside the multilateral system, the EPAs have undermined the existing multilateral approach to international norm-setting in both the intellectual property and human rights arenas.

As commentators have widely recognized, the development of the highly controversial Anti-Counterfeiting Trade Agreement (ACTA), the equally problematic Trans-Pacific Partnership Agreement and other TRIPS-plus non-multilateral agreements is not only an effort to strengthen the protection and enforcement of intellectual property rights, but also an indictment of the deficiencies in the TRIPS Agreement and the multilateral approach used in completing the WTO rounds of trade negotiations.⁵³ By changing countries' preference for multilateral approaches, the establishment of EPAs has therefore posed significant challenges to the stability of both the international trading system and the international human rights system.⁵⁴ These bilateral and plurilateral negotiations may further alienate a country's trading partners, thereby making it more difficult for the country to undertake multilateral discussions in the future.⁵⁵

Even worse, by fragmenting the international regulatory system, the continued push for EPAs has forced countries to divert scarce time, resources, energy and attention from other international intergovernmental initiatives, including the further development of the international human rights system. In less-developed countries where resources are scarce and where personnel dedicated to the negotiation of international human rights instruments may overlap with those involved in developing international intellectual property agreements, the negotiation of EPAs will inevitably deplete resources that could otherwise be used to strengthen human rights protection.

It is important to remember that not every country has the ability to undertake discussions in a multitude of fora—in this case, in both intellectual property and human rights fora as well as in both multilateral and non-multilateral processes. Even the United States or the European Union could not devote the same amount of time, energy and attention to the multilateral process had it been asked to negotiate a large number of bilateral and plurilateral agreements alongside the ongoing multilateral negotiations.⁵⁶ With significantly more limited resources, less-developed countries most certainly would do much worse.

Moreover, as Eyal Benvenisti and George Downs insightfully observe, the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries could help powerful countries preserve their dominance in the

⁵¹ Yu 2006, pp 42–50; Yu 2007a, pp 889–891.

⁵² Fink 2009, p. 2; Li and Correa 2009, p. 210; Musungu 2009, p. 61; Xue 2009, p. 143; Yu 2010b, pp 2–6.

⁵³ Atik 2012, p. 145; Yu 2011c; Yu 2011d, pp 511–514.

⁵⁴ Yu 2011b, p. 976.

⁵⁵ Cho 2004, p. 239; Leaffer 1991, p. 297; Yu 2011b, p. 976.

⁵⁶ Directorate General for Trade 2005, p. 5; Schott 2004, pp 15–16.

international arena.⁵⁷ The growing complexities could also result in what Kal Raustiala describes as “strategic inconsistencies”, which help alter, undermine or put pressure on unfavorable norms in the international human rights system.⁵⁸ Such complexities could further upset the existing coalition dynamics between international actors and institutions, thereby threatening to reduce the bargaining power and influence less-developed countries have obtained through past coalition-building initiatives.⁵⁹

6. Reconciliation and adjustments

To reconcile the conflicts and inconsistencies, and to alleviate the tension, between the intellectual property and human rights systems, this chapter proposes two different sets of adjustments. The first set focuses on normative challenges, while the second responds to systemic challenges.

6.1. Normative adjustments

As discussed earlier, some attributes of intellectual property rights are protected by international human rights instruments. A satisfactory resolution of the tension between the intellectual property and human rights systems therefore requires a careful delineation of the different attributes of intellectual property rights. After all, the Committee on Economic, Social and Cultural Rights stated clearly that, “[i]n contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else”.⁶⁰

From the human rights standpoint, there are two different types of conflicts: external conflicts and internal conflicts.⁶¹ External conflicts arise at the intersection between human rights and the non-human rights aspects of intellectual property protection. Internal conflicts, by contrast, arise at the intersection between rights protecting the human rights attributes of intellectual property and other forms of human rights. These conflicts take place within the human rights system even though they also implicate intellectual property protection.

With respect to external conflicts, countries can consider the introduction of limitations and exceptions either within the intellectual property system or without. Externally, countries can embrace the principle of human rights primacy the UN Sub-Commission outlined in Resolution 2000/7. In the event of a conflict between intellectual property rights and human rights, countries can ensure proper protection of human rights by using certain human rights to pre-empt intellectual property rights. For example, the rights to life and health can be used to safeguard against the over-protection of pharmaceutical patents or clinical trial data. To some extent, greater utilization of the human rights system may help less-developed countries uphold the flexibilities in the TRIPS Agreement.

Nevertheless, authors, inventors or their corporate owners may abuse the human rights system. Because those attributes or forms of intellectual property rights that do not have any human rights basis are likely to be deemed less important through a human rights lens, without the proper safeguards, pre-emption based on the principle of human rights primacy

⁵⁷ Benvenisti and Downs 2007.

⁵⁸ Helfer 2004, p. 14; Raustiala 2007, pp 1027–1028.

⁵⁹ Okediji 2003, p. 373; Yu 2007b, pp 17–18.

⁶⁰ Committee on Economic, Social and Cultural Rights 2006, para 2. On this general comment, see Helfer 2007.

⁶¹ In addition to these two sets of conflicts, which are true conflicts, it is also worth noting the possibilities for false conflicts (similar to those identified by conflict-of-law scholars). One commentator, for example, contends that market failures can precipitate false conflicts. Foster 2008, pp 305–306.

could significantly reduce the incentives generated by the existing intellectual property system. After all, those attributes or forms of intellectual property rights that do not have a human rights basis are likely to be deemed less important through a human rights lens.

Internally, countries can proactively introduce limitations and exceptions into the intellectual property system. They can also adopt safeguard provisions to ensure better protection of human rights. A recent example is Article 27 of ACTA, which, as a compromise, includes safeguard clauses in three sub-provisions to preserve “fundamental principles such as freedom of expression, fair process, and privacy”.⁶² Although these clauses may be a redeeming feature of this highly controversial treaty, it remains to be seen whether they can alleviate the tension between intellectual property rights and human rights. After all, ACTA member states, especially the powerful ones, could deem the safeguard provisions as merely hortatory, as they did in regard to Articles 7 and 8 of the TRIPS Agreement and to the Doha Declaration.⁶³ The effectiveness of these safeguard clauses could also be undermined by a member state’s insistence that the human rights conflicts have been internally resolved through the flexibilities built into the intellectual property system.

A better alternative, therefore, is for countries to clearly delineate the limitations or exceptions available to individuals. Article 6(4) of the EU Information Society Directive, for instance, requires each member state to

take appropriate measures to ensure that rightholders make available to the beneficiary of [the specified] exception or limitation provided for in national law ... the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

Such a clearly delineated exception not only strikes a better balance in the intellectual property system, but also ensures the proper recognition of the human rights interests of individual users.

With respect to internal conflicts, however, the resolution of these conflicts will require more complicated approaches. In an earlier work, I outlined three different approaches that can be used to resolve these conflicts: (1) just remuneration; (2) core minimum; and (3) progressive realization.⁶⁴ For the purposes of this chapter, the most important is the just remuneration approach, which is specially designed for situations involving an unavoidable conflict between two sets of human rights. Under this approach, authors and inventors hold a right to remuneration, rather than maintaining exclusive control; meanwhile, individuals obtain a human rights–based compulsory license, as opposed to a free license.

Consider, for example, a conflict involving a newspaper’s freedom of expression and the author’s moral and material interests in his or her creation.⁶⁵ If the publication of a news account is of significant public interest and high political value (for example, when the author is a public figure), the human rights interest in freedom of expression will ensure the publication of the news account (that is, no injunction). Meanwhile, the author will receive

⁶² Anti-Counterfeiting Trade Agreement, 1 May 2011, Arts 27.2–27.4.

⁶³ Chon 2006, p. 2843; Correa 2007, p. 93; Gorlin 1999, p. 16; Yu 2009, p. 1003.

⁶⁴ Yu 2007c, pp 1094–1123.

⁶⁵ This hypothetical draws on the famous case of *Ashdown v. Telegraph Group Ltd.*, [2002] EWCA (Civ) 1142. The case concerned the publication by the *Sunday Telegraph* of a yet-to-be-published minute written by Paddy Ashdown, the former leader of the Liberal Democrats in the United Kingdom, of his secret meeting with Prime Minister Tony Blair shortly after the 1997 general elections.

proper compensation for the injury to the creative interest through the introduction of a human right–based compulsory license. Although this outcome may not please either party, it strikes a reasonable compromise from the human rights standpoint.

6.2. Systemic adjustments

At the systemic level, countries can consider building the infrastructure needed to promote the protection of human rights. For example, a country can demand the inclusion of human rights impact assessments before the adoption of new EPAs or the introduction of new legislation that seeks to implement those agreements. Impact assessment has become increasingly common in not only the human rights field, but also in the areas of public health and biological diversity.⁶⁶ Assessment, evaluation and impact studies also constitute one of the six clusters of recommendations WIPO adopted in October 2007 as part of its Development Agenda.⁶⁷

In addition, countries can take advantage of the existing human rights infrastructure to monitor the impact of intellectual property rights on the protection of human rights. For example, commentators have suggested the use of monitoring mechanisms to alleviate the tension between intellectual property rights and human rights. While these monitoring mechanisms may not be as powerful as a mandatory conflict resolution mechanism, they have significant benefits. As Molly Beutz Land explains:

Although these institutions do not have the ability to sanction or reward states based on their records of compliance other than by publishing conclusions regarding the state’s compliance, the very act of a state reporting to a committee fosters greater transparency, provides human rights organizations with an opportunity to expose and challenge state actions and decisions, and forces the state to provide reasons for its conduct.⁶⁸

7. Conclusion

Since the adoption of the Cotonou Agreement in 2000, the European Union has used the Agreement’s framework to negotiate an ambitious set of bilateral, plurilateral and regional EPAs. Thus far, the high standards of intellectual property protection and enforcement incorporated into the Agreement’s intellectual property chapters have raised significant tension between the intellectual property and human rights systems. While some provisions in the chapters arguably have strengthened those attributes of intellectual property rights that have human rights status, others have created considerable impediments to the protection of human rights. It is therefore imperative that countries strike a more appropriate balance between the protection and enforcement of intellectual property rights and the commitments made in international or regional human rights instruments.

⁶⁶ e.g., Convention on Biological Diversity, 5 June 1992, Art 14(1)(a); Commission on Intellectual Property Rights, Innovation and Public Health 2006, p. 10; Committee on Economic, Social and Cultural Rights 2006, para 35.

⁶⁷ World Intellectual Property Organization 2007.

⁶⁸ Beutz Land 2009, pp 29–30.

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