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The Interface between Intellectual Property, Human Rights, and Competition

Abbe E.L. Brown, *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology*, Edward Elgar 2012, 236 pp.

Willem Grosheide (ed.), *Intellectual Property and Human Rights: A Paradox*, Edward Elgar 2010, 317 pp.

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1. Monopolies and the Public Interest

There is something intuitively paradoxical about the very existence of intellectual property (IP) laws. The idea behind IP rights (IPRs), copyrights and patents in particular, is that restricting public access to and use of information and technology can further the public interest. IP laws seek to stimulate innovation and creativity by granting authors and inventors some sort of legal monopoly that gives them the exclusive right to exploit their works and inventions – and thus to draw profit from their innovative or creative labour – for a certain period of time. However, public benefits and private monopolies can obviously conflict. For example, in a recent decision, the Indian Supreme Court has denied patent protection for a new version of a cancer drug. Without patent protection, pharmaceutical companies in India can now produce generic versions of the drug and sell it at much lower prices, making it much more widely available. But the denial of patent protection also significantly restricts the possibilities for the original producer to earn back his investment in the development of the drug, and that may impact negatively on future investments in its improvement.[1] The conflict also arises, for example, in the context of the (commercial) public interest in free competition. At times, a patented technology may become so successful that no competitive product can do without it – e.g., the technique with which mobile phones communicate with a mobile network.[2] Such technology then

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1 'Novartis Denied Cancer Drug Patent in Landmark Indian Case', *The Guardian (Online)*, 1 Apr. 2013, http://www.guardian.co.uk/world/2013/apr/01/novartis-denied-cancer-drug-patent-india. The legal basis for the court's decision was that the improvements made to the already existing drug were not sufficiently innovative to warrant a new patent. The patent for the original drug had, by then, expired.

2 The issue of Standard Essential Patents was raised in some of the disputes between Apple and Samsung: 'iPhone 4 Sales Could Be Blocked in US after Samsung 3G Patent Victory', *The Guardian (Online)*, 5 Jun. 2013, http://www.guardian.co.uk/technology/2013/jun/05/samsung-patent-win-apple-iphone-4.

becomes a *de facto* standard, and regulation is required to ensure that the patentee does not abuse his quasi-monopolistic powers to distort free competition.[3]

IP law itself provides for means to ensure a balance between public and private interests, between protection and free access. Thresholds apply for protection by copyright (originality) and patent (innovation). Furthermore, the quasi-monopolies are limited in duration. Copyright generally expires 70 years after the death of the author, and patents will not usually be granted for more than 25 years. These terms allow rewards and returns on investment, but after their expiry the works and technologies will be free for anyone to use. Furthermore, during the protection term, IP laws also provide for exceptions and limitations to the exclusive rights and for mechanisms of mandatory licensing that further the public interest.

2. IP, Human Rights, and Competition

The balancing involved in IP protection is not always enough, argues Abbe Brown in her recent monograph on the interaction between IPRs, human rights law, and competition law. There are many examples, she claims, of essential technologies – pharmaceuticals, techniques, software, information – to which the IP owner's right to exclude hampers access. There may be many users who need to access those technologies for some essential need or goal but cannot in practice do so without infringing IPRs. Working from the assumption that limited access to essential technologies hampers the public interest, she sets out to analyse how human rights law and competition law could be used to curb the powers of IP holders and to make essential technologies more widely available. The focus of her book is on EU and UK law, though references are made to and inspiration is drawn from other jurisdictions as well. The book aims to provide practical guidance to decision-makers and activists faced with questions of access to IP-protected essential technologies, and its final aim is that users can have better access to essential technologies.

Both human rights law and competition law have been used, with some success, to limit the powers of IP owners. The European Court of Human Rights (ECtHR) has sometimes found that the freedom of expression should prevail over the protection of copyright. Under European competition law, it has sometimes been found that the denial to licence patented technology amounted to an abuse of the IP owner's dominant market position. However, Brown argues that these existing approaches fail to deliver the required access to essential technologies. Human rights law and competition law have been used to limit IPRs in

3 See, on the issue of conflicts between standards, IP, and competition law (with an emphasis on Austrian and German laws): C. APPL, *Technische Standardisierung und Geistiges Eigentum*, Springer, Vienna 2012.

exceptional circumstances only.[4] This is due to a conflict: freedom of information, health, and education may be human rights but so is property, including IP, Brown argues. As there is no hierarchy between human rights, there must be special circumstances to award the one priority over the other. A similar tension is present in competition law: competition is a means to stimulate innovation but so is the granting and protection of IPRs. IPRs cannot easily be set aside because they are thought to hamper competition, because their very essence is the exclusivity of use they grant. As a consequence, and this poses a second problem according to Brown, competition law has sometimes been used to force access to essential technologies for further development or for use in secondary markets but not for accessing and using the essential technology for the same purpose for which it is marketed. A third problem is remedies: neither human rights law nor competition law is particularly suited for granting end-users access to essential technologies. Thus, the law as it stands is not very favourable to granting users access to essential technologies that are protected by IPRs.[5]

Against this backdrop, Brown proposes a structure of legal analysis in which human rights law and competition law serve jointly to ensure access to essential technologies. Under this approach, human rights law is used first to identify what technologies are 'essential', relying on a wide range of rights including health and life (access to medication), freedom of expression (access to information), and education (access to information and software); competition law doctrine about essential facilities may also be used in the analysis. The second step requires balancing the human rights involved – both those of access seekers and of IP owners – by assigning numerical values to them. This balancing exercise, termed the 'Human Rights Emphasis', seeks to make balancing easier by roughly measuring the human rights interests (and legitimate exceptions to these interests) of all stakeholders involved. It is not so much a theoretical innovation as a tool for structuring and presenting the analysis of the age-old problem of balancing conflicting human rights.[6] In the third step, competition law comes into play. It is proposed that the IPR in the essential technology is taken as the definition of the relevant market (thus in case of a patent, the patented innovation is taken as the market). In determining whether the IP owner has a dominant position and, if so, whether he abused it, the Human Rights Emphasis is again important: the more the human rights emphasis is against the IP owner

4 However, see ECtHR 10 Jan. 2013, *Ashby Donald and Others* v. *France*, Appl. nr. 36769/08, in which it was held that a conviction for copyright infringement implies a limitation on the freedom of expression and information enshrined in Art. 10 of the Convention. This means that for such a conviction to be legitimate, it does not suffice that copyright has been infringed: Additionally, the three conditions for limiting the freedom of information enumerated in the Convention must be met. There remains, however, a wide margin of appreciation for Member States.

5 These arguments are made in Chapters 3 and 4 of Brown's book.

6 See p. 126 of Brown's book.

and in favour of access seekers, the more likely it should be that enforcing the IPR or refusing to grant a (fair) licence amounts to abuse.

Brown's book supplies the argument for this approach in the following structure: Chapters 1 and 2 introduce the problem that IP owners are sometimes too powerful and that this can have negative impact on society. It should be noted that the problematic nature of IPRs is assumed and explained by examples rather than argued from an economic or normative-theoretical perspective. Chapter 3 deals with the question of identifying what technologies are essential from the perspective of human rights law and competition law. Chapter 4 demonstrates that neither human rights law nor competition law has so far been used effectively to support access seekers, except in limited, special circumstances. Then, in Chapter 5, Brown's alternative approach is introduced by suggesting the Human Rights Emphasis, using four hypothetical scenarios and demonstrating how these should be analysed and solved. In Chapter 6, a more access-friendly approach to competition law is suggested by proposing a new, IP rights-based definition of relevant markets and human rights-oriented assessment of abuse. Again, the four hypothetical scenarios are used as illustrations. Chapter 7 is devoted mainly to arguing that the approach proposed is compliant with international treaties, though some modifications to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) are suggested in order to ensure better access to essential technologies.[7] The findings are summarized in Chapter 8.

Brown's book is a good and well-referenced overview of the topic, containing case law and legal decisions from many jurisdictions, national and international, regulations and policies from official and private regulatory bodies, and insights from legal practice. It is also novel in trying to create synergy between human rights law and competition law in improving access to essential technologies. However, the argumentation may be difficult to follow at times, perhaps because the book combines some parts that are introductory with others that are more detailed and require prior knowledge of the legal fields involved. It should also be noted that Brown does not give an overview of the literature nor presents the various positions in the debate, although many sources are referenced and sometimes also quoted. Furthermore, the book tries to present a general argument (with a focus on UK and EU laws) but in doing so relies on arguments, examples, legislation, and case law from many jurisdictions with very different legal systems. Another complicating issue is perhaps the wide scope of the book. The issue of access to technology unavoidably involves a wide array of IPRs – Brown includes discussions on copyright, patent, and trademark law.

7 Articles 7 and 8 TRIPS already contain provisions on access to essential medicine and nutrition, but Brown proposes to amend them to the effect that they become mandatory rather than optional and also to require measures to prevent the abuse of a dominant market position by IP owners.

However, these fields are very different, both in legal technique and in legal theory. Copyright deals with the dissemination of information, patent law with the application of technology. Almost all of Brown's examples of successful use of human rights law to break the monopolies of IP holders relate to copyrights, not patents, whereas most problems of access to essential technologies seem to be caused by patent law. In any event, what applies in one field cannot, without theoretical argumentation, be used in the other. This is especially pertinent because the horizontal effect of human rights, which is important in Brown's proposed strategy, is still a matter of debate and varies significantly between the different human rights mentioned.

The book seeks to offer practical guidance to decision-makers and access seekers for a more access-enabling application of IP law with the help of human rights law and competition law. Whether that guidance makes such decisions easier remains to be seen; whatever be of attributing numerical values to the rights and interests involved in a case, the age-old philosophical problem of balancing rights that are theoretically equal remains (a point that the author readily admits). However, the book is thought provoking, and the problems it seeks to solve are important and real. Nevertheless, some might miss a discussion of the theoretical and philosophical issues involved in those problems and their possible solutions.

3. Human Rights as Foundation of and Limitation on IPRs

Food for theoretical thought can be found in a volume on IP and human rights, edited by Willem Grosheide, which was published in 2010. The volume is titled 'Intellectual Property and Human Rights: A Paradox' and explores the tension between IPRs as human rights and human rights as limitation on IPRs. It contains 14 contributions on topics related to the interrelation between copyright law, patent law, and human rights. Competition law falls outside the scope of the book. The book is the outcome of a conference held in 2006.

In his introduction, Willem Grosheide provides an excellent overview of the dogmatic and scholarly issues surrounding the relationship between IP and human rights. He raises a number of interesting and inspiring questions that are central to his introduction and to the book in general:

> Are human rights universal or culturally defined? Do any legal consequences follow from the fact that dogmatically (at least from a civil law perspective) intellectual property law belongs to the domain of private law and human rights law to that of public law? Are all intellectual property rights, seen from a human rights perspective, of the same ranking? Construing intellectual property rights as human rights implies construing them as absolute rights – is executing any of these absolute rights acceptable even if it is at the expense of society at large? Can human rights such as intellectual property rights be held

> by corporate entities? How should a proper balance be found between the protection of intellectual property rights and access to intellectual products protected by them? Is the debate about the human rights qualification of intellectual property rights equally relevant for the developed world and the developing world? (p. 6).

Grosheide uses his introduction to show that the relationship between IP and human rights is complicated. From a dogmatic point of view, it is not straightforward to defend the claim that IPRs have a human rights status. Although both IPRs and human rights were developed during the same period of time and in the same historical context (industrialization, the emergence of modern economies and of nation states, the development of international law), important legal differences remain. It is not without reason, Grosheide points out, that very few of the international human rights documents refer to property, and especially IP. The main differences between human rights and IPRs that Grosheide identifies are, respectively: their public versus private law character; their universal versus territorial nature; their protecting immaterial versus mainly material (economic) interests; and their unlimited versus limited duration. Other important legal-technical distinctions relate to the assignability of rights and to their pertaining to individuals or also to corporate entities. Moreover, IPRs are not historically regarded as natural rights (unlike real property rights); claims to such a moral foundation did emerge in the 19th century, but they were strongly intertwined with utilitarian concerns.

The legal literature, which is usefully summarized at the end of Grosheide's introduction, is divided on the question of the human rights status of IPRs. There are those who argue that human rights can somehow be used to limit the potentially excessive and harmful effects of IPRs (a position also taken by Brown). Others argue the reverse: IP law can be instrumental in implementing, protecting, and serving human rights. Others again deny that IPRs, as monopolies, can have a human rights status: even if those rights, to some extent, are based on fundamental values such as human dignity and reward for creativity, they are, in the modern world, mostly an economic tool for powerful, often entrepreneurial rights holders.

Unfortunately, there is insufficient space here to discuss all contributions to the volume in full. Therefore, I shall give a brief abstract of each contribution before highlighting some of the general themes that emerge in the book. The volume is divided into three parts, each with its own introduction: an introductory part, sketching the general trends in the development of IP law and human rights; a second part discussing questions of IPRs *as* human rights; and a third part about human rights as *restrictions on* IPRs and their enforcement.

After Grosheide's introduction, the first part continues with a general outline of the development of international human rights law, written by Cees Flinterman. It discusses relevant themes such as enforcement mechanisms and

the horizontal applicability of rights, but it does not deal with IP explicitly. Then, a chapter by Madeleine de Cock Buning on expansion and convergence in copyright law follows. She argues that, traditionally, copyright and patent were distinct domains of IP. Copyright was meant to protect expressions of information against unauthorized distribution, dissemination, and reproduction, but it did not monopolize access and use – an important check and balance for the freedom of information. Patents did protect utilization but were limited to innovative technologies and did not regard information as such. De Cock Buning argues that because of technological developments in the 20th century, and legislative responses to them worldwide, the objects of copyright protection and the scope of the rights granted have expanded into the territory that was traditionally reserved for patents. The consequence is that modern copyright law can grant *de facto* exclusive rights of use; consequently, information monopolies can be created, with grave consequences for the fundamental freedom of information.

In the last chapter of the introductory part of the volume, Rochelle Cooper Dreyfuss argues against granting patent rights the status of human rights. Doing so would be incorrect from a historical and (American) constitutional perspective and undesirable from an economic one. She maintains that patents ultimately serve a utilitarian goal, and that it does so best by relying on the limitations provided by patent law rather than by engaging in unpredictable balancing exercises between human rights of patentees and users. That is not to say that current patent law always serves the public interest well, but any improvements required should be made through policymaking and lawmaking, not by granting patents human rights status. According to Dreyfuss, there is no 'paradox' between the human rights of the patentees and of the users. The conflict between their respective interests should not be construed as a conflict between human rights. If patent rights are given human rights status, a new and real paradox would emerge: An adversarial climate is created in which rights holders will seek to increase prices and reduce output so as to maximize their return, thus limiting the public utility of the patent system as originally intended.

The question raised by Dreyfuss – does IP really involve a clash between the human rights of owners and users? – is taken up in the second part of the book, which deals with the human rights status of IPRs. It addresses the fundamental question of whether IPRs are human rights or should be seen as such, but it also discusses the way in which IPRs seek to implement other human rights, such as the right to food, health, or the freedom of information. The second part of the book opens with a contribution by Joost Smiers in which it is argued that copyright is not fit for the 21st century. This claim is not new, but Smiers, after identifying some of copyright's major shortcomings in rewarding actual artists, sets out to propose an alternative. The article deviates somewhat from the paradox theme of the other contributions and is essentially an argument for abolishing copyright protection rather than improving the existing system (as for instance the Creative Commons movement seeks to do). His alternative is

based on the idea that there should be no paradox because artistic works always belong to the public domain and cannot and should not be monopolized, especially not by large commercial media corporations.

The second contribution to the second part, by Duncan Matthews, addresses what is perhaps one of the most important and politically sensitive aspects of the paradox: the clash between IPRs, especially patents, and the right to health and access to medicine. Matthews assumes, on the basis of a review of literature and legislation, that IPRs are human rights, but that IPRs can also unduly restrict the human right to health. According to Matthews, framing this clash in terms of human rights is proper and effective. He illustrates this through a number of case studies, including one on the access to HIV/AIDS medication in Brazil. Action groups forced the state to provide such medicine for free on the basis of a constitutional right to health. However, as these foreign-produced medicines were very expensive, the Brazilian government decided not to protect them by a patent so that, in Brazil, they could be copied legally and at significantly lower costs. Such an approach was popular in the West in earlier days – for example, the industries of the Netherlands and Switzerland benefitted greatly from temporary suspensions of patent protection, which allowed them to copy foreign inventions and technology freely[8] – but is now, of course, considered to be economically harmful and wrong. That is why the Western world insisted on the TRIPS Agreement as part of the establishment of the World Trade Organization (WTO). Under the TRIPS Agreement, WTO members are obliged to respect and protect patents from other Member States.[9] As a consequence, developing countries are no longer free to make patent exemptions unless they are willing to risk multilateral trade sanctions. Due to human rights campaigning, the TRIPS Agreement was amended to allow compulsory licencing for ensuring, among other things, access to medicine. According to Matthews, the right to health discourse has been so successful that there is now a countermovement of sorts, stressing that in matters of public health the human right to IP should be respected and adequately protected.

In the third contribution, dealing again with the question of whether patents are human rights, Jan Brinkhof raises a number of interesting and critical questions about the discourse of framing clashes between IPRs and public interests as clashes between human rights. He argues, *contra* Matthews and Brown, that we only complicate matters if we construe patents as human rights. In his view, human rights are based on human dignity and therefore universal, whereas patents are economic instruments that seek to further the public interest. Indeed, the public interest is best served by viewing patents as subordinate to human rights, so that, for instance, the right to health will always prevail over the

8 This history is described in Jan Brinkhof's chapter in the volume discussed below.

9 Some temporary exemptions from TRIPS obligations apply for the least developed countries.

private interest of monopolizing the production of a medicine. According to Brinkhof, this is the situation *de lege lata.* He makes an important distinction between the entitlement to a patent and the protection of a patent once granted. The international documents on human rights do refer to the protection of property as a human right, but they are silent about the right to having patents granted. Accordingly, a patent once granted must be protected as a matter of human right, but the scope of the patent is a matter of economic policy. Brinkhof argues that, historically, patents have always been instrumental and that claims for human right status were not more than rhetoric used to justify (or expand) economic monopolies.

Wendy J. Gordon continues this line of enquiry by taking a closer look at the relationship between patents and Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which grants authors the right to the protection of 'the moral and material interests resulting from any scientific, literary or artistic production'. Gordon claims that viewing patents as human rights has damaging consequences, because it can be used as a 'weapon to expand patent rights and against the desires of impoverished peoples to manufacture or distribute inexpensive versions of patented drugs' (p. 157). She argues that patents could only claim human rights backing on the basis of the ICESCR if the patents are given to the creator or author of an invention, because it is the creator's interests that the Covenant seeks to protect. However, national patent laws often attribute patents to entities that would not be considered creators or authors for human rights purposes.

The third and final section of the book deals with the way in which human rights can restrict the scope and exercise of IPRs, though the themes of the contributions overlap partly with those discussed before. In a chapter co-authored with Charlotte Waelde, Abbe E.L. Brown discusses the theme that is central to her book reviewed above: the interaction between IP law, human rights, competition, and, also, contract law. The authors use a thought-provoking fictitious case study to demonstrate how those fields of law can be used to correct any undesirable effects of copyright law. In the hypothetical scenario, an academic writes and publishes a paper on a topic that is highly politically sensitive. The government seizes all copies of the work and also takes it down from the author's website. The author persists and contacts a foreign university, which is willing to publish it on its website but demands that the author assigns his copyright. However, upon diplomatic pressure, the foreign university also takes down the work. Subsequently, students upload the work to another website with the consent of the author, but the university, which now owns the copyright, demands that the work be taken down. Waelde and Brown are of the opinion that the most desirable situation is that the work is published and that some remuneration is paid (either to the author or to the university as copyright owner). They discuss five ways in which human rights, competition, and contract law could be used to achieve that goal. The first strategy is to rely on general contract law (the chapter discusses UK

law) to attack the contract by which the author transferred his copyright to the university. The second strategy is to simply publish the paper and then defend against a copyright injunction, either by relying on the freedom of expression or on competition law or a combination of both. The third strategy is for prospective readers to appeal to the ECtHR. The fourth approach is for readers to seek regulatory action by appealing to the competition authorities. Upon finding that the chances for success under any of these strategies are slim, the authors suggest an alternative outside of the legal process that might be more effective. Access seekers could engage the assistance of Non-Governmental Organisations (NGOs) and start a media campaign against the university using strong human rights rhetoric, so that there is significant reputation pressure on the university to publish.

The next chapter, by Geertrui van Overwalle, takes us back to patent law. Van Overwalle explores how human rights can limit patent law. However, rather than claiming absolute priority of human rights over patents, she argues for a more harmonious and moderate relationship between the two fields of law. The public interest goals of the patent system are best served not by making patents absolutely subordinate to human rights but by incorporating human rights into the patent system. To achieve this, Van Overwalle argues, the patent law concept of public interest should be interpreted to include human rights and human values, instead of mere economic interests. Then, there are three ways in which human rights can limit patents. First, human rights such as the right to human dignity and the right to food can prevent the existence of certain patents, as might be the case for certain forms of gene patenting. Second, some human rights can have implications for the procedure of patent applications to the benefit of stakeholders, such as the right to informed consent and the right to protection and remuneration for rights holders. Third, human rights can limit the exercise and enforcement of patents in certain cases, for instance those involving the right of access to public health (access to medicines and treatment techniques), the right to education and research, and the right of access to information. According to Van Overwalle, the public interest both in stimulating innovation and in protecting human rights would be best served if human rights considerations were incorporated into the patent law system. One should thus move beyond the idea of a paradox and recognize that human rights and patent law share the same moral foundations, goals, and values.

The final chapter of the volume, by Charles R. McManis, addresses the same point: that IPRs and human rights have the same moral foundations and have shared goals. McManis focuses on the protection of genetic material through patents and plant variety rights and its relationship to the protection of traditional knowledge.[10] The chapter involves more legal technicalities than most other

10 Traditional knowledge is usually defined as a body of knowledge built by a group of people through generations living in close contact with nature, which will include knowledge about the

contributions to the volume, but the general outlines of the issues at stake are clear. Chemists and engineers working for Western companies travel to traditional, indigenous communities and try to learn how locals use plants and other natural resources, for instance, for medical purposes. Back at home, the plants obtained are chemically analysed, a method for industrial processing is developed, and patents are obtained for the use of the chemicals extracted from the plant for particular medical purposes. The company can make great profits using and monopolizing the traditional knowledge and genetic resources of the community, without any of the money flowing back to that community.

This is sometimes called biopiracy, and opponents of the practice argue that the IP regime favours industrialized nations over traditional communities, so that a new system for the protection of traditional knowledge is required. Indeed, as McManis points out, the need to protect such knowledge is recognized in international treaties: the Convention on Biological Diversity encourages the legal protection of traditional knowledge, and the Food and Agriculture Organization (FAO) Treaty on Plant Genetic Resources for Food and Agriculture provides for a system of facilitated access (i.e., free or at low cost) and the equitable sharing of benefits for certain forms of traditional agricultural knowledge. But McManis argues, on the basis of an exploration of the moral foundations of IP law, that there is no conflict between patents and plant variety rights, on the one hand, and the protection of traditional knowledge, on the other hand. IPRs can be used to protect traditional knowledge and ensure that benefits are equitably shared, but a number of amendments would be required. McManis suggests that the FAO system of facilitated access and benefit sharing should be applied more widely and that the TRIPS Agreement should be modified to the effect that patents and plant variety rights could only be enforced if the patentee discloses that his invention originates in traditional knowledge and that he has obtained prior, informed consent to use that knowledge from the local community. In a brief and critical comment, which forms the final contribution to the book, Martin J. Adelman disagrees with the latter proposal. He argues that it would increase litigation costs and be of little help to the protection of traditional knowledge. He also questions whether it is fair that communities can continue to benefit financially from their traditional knowledge (under the proposals, they will receive an equitable share of the profits from any patent that is based on it), whereas the idea of patent law is that innovations enter the public domain and can be used freely after a limited period of time.

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local environment and the use of its resources. See p. 284 of McManis' contribution and the sources quoted there.

4. Some Final Thoughts

The idea that IPRs, though intended to serve the public interest, sometimes conflict with other public interests – such as the right to food, health, or freedom of information – is not new. As mentioned before, there is something seemingly contradictory about trying to further the public interest by creating private quasi-monopolies that exclude public access to information and technology. This paradox is innate to IPRs. The solution of the paradox is that an exclusive right of use is believed to stimulate innovation and creativity because it allows authors and inventors to be rewarded for their work. However, the public interest would obviously be harmed if IPRs amounted to absolute monopolies, which is why IP law provides for limitations on the scope of protection and on duration. The books by Brown and Grosheide raise two interesting questions in this regard. First, should the clash between public and private interests be framed as a clash between human rights? Second, does IP law provide for an adequate balance between the various interests involved, and if not, can human rights law offer improvement? In addition, could general private law help human rights to control the excessive effects of IP law?

As to the first question, four general positions can be distinguished. The proponents of speaking of a clash between human rights fall into two groups: those who claim that IPRs should be considered as human rights because this yields the best results for balancing the various interests, and others who hold that IPRs simply have to be considered as human rights because this follows from the international conventions. Opponents refer to the utilitarian and instrumental nature of IPRs and claim that these rights are, or should be, hierarchically subordanite to human rights. The fourth group, taking a middle position, argues that there is no real clash because IPRs and human rights serve the same goals, though readjustment and recalibration might be required to ensure that this is true in practice.

Speaking only about what ought to be, I should wonder whether the opinions are truly and fundamentally divided. All authors agree that IP law is essentially instrumental, while human rights are not. In addition, all agree that human rights are important orientation points for identifying the ends that IP law should serve. The differences between the opinions relate to the implementation of these assumptions. Some say that human rights should have priority over IPRs, so that the human rights can always set limits to IP law. Others say that it would be better to internalize human rights goals into IP law and use the IP law system to realize those goals. In both cases, human rights law feeds into IP law; but the former approach calls on judges to set aside IPRs in favour of human rights, whereas the latter rather requires the involvement of policymakers and legislators.

Some of the contributions discussed above seek to offer ways for users or access seekers to use human rights law in court proceedings, if necessary in combination with other fields of law, to limit IPRs and gain access to essential technologies and information. These are important issues, but it seems difficult to use human rights to this effect. Interestingly, human rights can sometimes be

used to limit copyright protection, but they are rarely effective as an argument against the enforcement of patents. However, most cases of IPRs restricting access to essential goods involve patents, not copyrights. Perhaps this is due to the different nature of the human rights involved. Copyright is closely related to the freedom of expression and information, which are classic liberty rights that trace back to fears about suppression and censorship by the state.[11] Patents do not affect the dissemination of information but the application of a technological innovation, making the link to classic liberty rights such as the freedom of expression less obvious. Patents can impinge on more modern social fundamental rights such as the right to health, life, and education, but these are in the sphere of positive obligations on the state and, therefore, less easily enforceable, especially in horizontal relations. This may explain why patent law dominates in both books under review.

It would seem that the most appropriate level for ensuring access to essential goods is policymaking and lawmaking. IP law should benefit the public interest, and this includes the protection of human rights. There is little doubt that current international IP system may favour particular groups and interests, or countries or regions, more than others, and a fundamental rebalancing seems required. That balancing is essentially a policy decision, not one of pure legal analysis. It may well be necessary to move beyond the law as it currently stands and to revise the IP system more fundamentally. The impetus for change may come from the Brazil, Russia, India, China, South Africa (the BRICS countries) states, whose growing economic power gives them a stronger vote in readjusting the international IP system to suit their interests. In addition, there is also significant popular and political attention for IP law in the West, for instance, in relation to copyright in online environments, access to cultural heritage and scientific information (open access), and gene patenting.

Human rights rhetoric can influence the policy debate, but there is a danger that the reification of abstract interests on the side of users and authors/inventors leads to an adversarial climate in which fundamental interests of allegedly equal status are opposed.[12] Framing the debate in terms of opposing moral concerns, even if many of the issues are of a more instrumental and economic nature, risks that the debate becomes divided between opponents whose interests should be aligned.

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11 In Europe, software is protected by copyright, so that disputes about infringement on software can be drawn into the sphere of freedom of expression.

12 See Dreyfuss' contribution to Grosheide's book.