Intellectual Property and Human Rights

A PARADOX

EDITED BY

Willem Grosheide

CIER

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Preface

This volume is the first in what from now onwards will be the CIER series, containing some of the results emanating from research carried out by researchers belonging to the Centre for Intellectual Property Law, Molengraaff Institute for Private Law, Utrecht University or working regularly or incidentally in co-operation with the CIER in the field of intellectual property law and related law.

This present collection of chapters on the relation between intellectual property law and human rights law presents the outcome of a conference held in 2006 to celebrate the 20th anniversary of the centre.

Willem Grosheide
The Editor

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Copyright Law and Patent Law: to its Enforcement – Differing Views

PART I

Setting the stage: the law and its trends

1. General introduction

Willem Grosheide*

1. INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS: RELATED ORIGIN AND DEVELOPMENT[1]

It may be said that intellectual property law and human rights law share a related origin. Both stem from Western European societal developments starting in the nineteenth, if not already in the eighteenth century.[2] The indicated societal developments were of three kinds. The first was the rapid industrialization and economic growth that affected countries unevenly and that was underpinned to a large extent by scientific, technological and cultural innovations. The second was a growing divide between the countries affected by

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1 In what follows I use *intellectual property law* as a generic term referring to the legal system with regard to intellectual property rights, being rights with regard to the commercial and non-commercial use of information.

Until far into the twentieth century it was customary to refer in this respect to industrial and intellectual property rights. *Industrial* was used to cover trade-related areas like patent law, designs law and trademark law; *intellectual* was used to refer to culture-related copyrights. Particularly since the conclusion of the WIPO Treaty in 1967 it is conventional to use the term *intellectual property* to refer to both industrial and intellectual property rights. Note that this terminology is broader than the one used in Article 1(2) TRIPS A. Taking into account that *information* is a rather diffuse term, having different meanings depending on the relevant context, it is used here as a generic term for the subject-matter of intellectual property rights. Comp. ITU, World Summit on the Information Society, Geneva 2003-Tunis 2005, Document WSIS-03/Geneva/DOC/5-E 12 December 2003 in combination with ITU, Declaration of Principles, Document WSIS-03/Geneva/DOC/4-E 12 December 2003. Comp. Drahos (1999), p. 1.

2 See Grosheide (1986) and Ishay (2004), pp. 8; 107–16; Sellars (2002), pp. vii–ix. To some both human rights and the public interest were already used to justify early intellectual property law systems; see UN, Committee on Economic, Social and Cultural Rights, Protection of Intellectual Property Under the TRIPS Agreement, Doc. 29/11/2000, E/C.12/2000/18; idem, Human Rights and Intellectual Property, Doc. E/C. 12/2001/15.

these trends, and those that were left outside these developments. The third was a sustained expansion of international commerce that was promoted by economically dominant countries.[3]

That which indeed may be called modern intellectual property law was shaped not earlier than the second half of the nineteenth century is illustrated and evidenced by the Paris Convention (PC) of 1883 on industrial property law and the Berne Convention (BC) of 1886 on copyright law.[4] It is equally true that the second half of that age saw the breakthrough of various forms of social emancipation – general support for self-determination without any distinction as to race or sex, as well as the broad promotion of social, economic and political rights for everyone – legally speaking laying the fundamentals of modern human rights law.[5]

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[3] Comp. Dutfield and Suthersanen (2008), p. 6. In this respect it is noteworthy that the expansion of trade relates not only to commerce in ipr-protected products and services but also (and today even increasingly so) to commerce in the iprs themselves (either by transfer or by licence).

[4] See Grosheide (1986); Firth (1997); Dutfield and Suthersanen (2008). It is of note that at this early moment in the history of modern intellectual property law for different reasons not all leading industrial countries of the time immediately joined either union: for example, the USA did not join the PC until 1887, Germany not until 1903; the Netherlands did not join the BC until 1912, the USA not until 1989.

[5] The indicated societal developments were driven by a combination of the dominant ideological and political considerations at that time. Most of the outcomes can be largely ascribed to the socialist movements of the time. See Ishay (2004), p. 155:

> If socialists were responsible for the first emulation of a supranational authority to resist either the aggressive politics of states or their colonial enterprises, their position also represented the first historical assertion that all humans, regardless of wealth, gender, race, or age, were entitled to both political and social rights. In this respect, they broadened the narrow definition of universalism they inherited from the Enlightenment, articulating a broad commitment to enhance simultaneously, rather than selectively, the rights of slaves, children, women, homosexuals, and Jews.

See also (with a focus on copyright law) Grosheide (2008), pp. 410–11:

> (...) two interconnected phenomena would interfere with this steady process in the last quarter of the 20th Century:
> 1. the changed relationship between the industrialized and the non industrialized world,
> 2. the changes in *the hidden* code of the industrialized world, in particular the evolution from the industrial era into the information era. (...) The following new societal and paradigmatic components of the hidden code will prove to be determinative: the development of technology, the expansion of the possibilities to communicate, the creation of the welfare state and the related increase in cultural participation, the dominance of ideological utilitarianism, short-term compromise politics and an instrumental approach to the law.

In addition, not only do intellectual property law and human rights law have a related origin, but the same can be said of their development, particularly during the twentieth century, as can be illustrated by the legislative history of the Universal Declaration of Human Rights (UDHR) of 1948 and that of the TRIPS Agreement of 1994 (TRIPS A).[6] All this despite the fact that, dogmatically speaking, intellectual property law, by addressing primarily private parties, is of a private law character, while human rights law, addressing primarily states, is of a public law nature.

It appears, however, that in spite of the fact that the two domains of law are both rooted in the indicated societal developments, from their beginning and over the years they have evolved largely separately, from being not interrelated at all into a rather problematic relationship.[7]

Two opposing views have been proposed in this respect. The first view maintains that intellectual property law and human rights law are in fundamental conflict since the legal protection of individually held intellectual property rights is considered to be incompatible with communally-based human rights. In that, so to speak, hierarchical perspective, human rights are seen as legal instruments to limit and restrict the execution and enforcement of intellectual property rights. In other words: human rights are perceived as a countervailing force against intellectual property rights. Strategically, this view is often used during international trade negotiations in order to weaken the position of the developed world. In order to overcome the consequential tension between the two, it is suggested in this first view that human rights should always prevail over intellectual property rights.

The second view holds that intellectual property law and human rights law are compatible since they pursue the same aim. In this, so to speak, equal footing view, intellectual property rights are in fact embodied in the human rights system. In other words: human rights law is seen as the fundament of intellectual property law. This view requires, on the one hand, a definition to be given to the appropriate scope of protection for private monopoly power to create and invent and, on the other, at the same time ensuring adequate access to intellectual products for the public at large. However, at the same time it follows from the compatibility of intellectual property rights and human rights that a balance should be struck between protection and access. How to do that is a real challenge.[8]

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[6] See generally on the UDHR Sellars (2002) and Ishay (2004); on the TRIPS A see Blakeney (1997), Gervais (2003) and Correa (2007).

[7] See Helfer (2003), questioning whether the relationship between both domains reflects a *conflict or a coexistence*. Comp. Cullet (2007).

[8] Comp. Helfer (2003), pp. 48–9. A different approach to these conflicting views is taken by Yu (2007b) (instead of inquiring whether human rights and intellectual

As will be discussed in the following sections of this general introduction, taking account of the indicated situation in the light of these two opposing views, any attempt at trying to reconcile the one view with the other raises many questions. In trying to come to terms with these questions, I will follow the approach that is generally taken in the various contributions bundled in this book, focusing on those questions that consider the status of intellectual property rights as human rights.[9] It suffices in these introductory remarks to mention only some of these questions. 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 identities? 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?

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property rights conflict or coexist with each other, it is important to identify the human rights attributes of intellectual property rights and to distinguish them from the non-human rights aspects of intellectual property protection) to which I will return in Section 3.

[9] As a consequence I will not principally discuss the tension or even the conflict that may arise between human rights and intellectual property rights, offering such interesting questions as whether human rights can block the execution of intellectual property rights or whether it is possible to legally force an owner of an intellectual property right to actually execute its right. See for an example of the first situation the Dutch *Scientology* case; Court of Appeal of The Hague, Case No. 99/1040, Chamber M C – 5, Mediaforum 200310, pp. 337–42 (no copyright infringement by the defendant who published copyright-protected documents without the permission and against the will of the copyright owner based upon the human right of freedom of speech, that is, the right to be informed), and for an example of the second situation the British *Ashdown v Telegraph Group Ltd* case; [2001] EWCA Civ 1142, [2001] 3 WLR 1368 (human rights arguments served the purpose of making it possible for a third party to use works that were kept secret by the copyright owner and as a consequence were not already lawfully disseminated to the public), see Karnell (2004) and Yu (2007a). Another, again copyright-related, example can be found in the application of human rights law as a weapon against globalisation, that is, the Americanization of cultures, see Porsdam (2007). See for an alternative perspective Grosheide (2008) (copyright law is not the appropriate legal instrument to promote cultural diversity and to protect cultural identity). For a view from the perspective of patent law see Prove/Kothari (2000) (the TRIPS A has raised serious human rights concerns such as the restriction of access to patented pharmaceuticals for citizens of developing countries).

In order to come to terms with these and other related questions, this general introduction will proceed in the following order. Section 2, offering a brief account of the status of intellectual property rights in the actual international regulation of human rights law as well as of the status of human rights in the actual international regulation of intellectual property law, will be followed by Section 3 in which these international regulations will be analysed in the light of their appreciation and estimation in the legal literature. It follows from this order of things that there will occasionally be some overlap between Sections 2 and 3. The general introduction ends with some concluding observations in Section 4. As a whole, this general introduction may be read as a guide to the different views exposed in the contributions that have been collected in this book.

2. THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS IN THE ACTUAL INTERNATIONAL REGULATIONS

Taking account of the relationship between intellectual property rights and human rights can best be done by placing intellectual property law in the context of its recent history. Following the generally accepted main view, the protection of modern intellectual property rights at an international level can roughly be divided into three periods: the territorial period, the international period, and the global period.[10]

The territorial period is dominated by national law, that is, the principle of territoriality: intellectual property rights do not extend beyond the national territory where the rights have been granted in the first place. This period runs from the end of the eighteenth century and during the greater half of the nineteenth century. It is marked by bilateralism, that is, the conclusion of bilateral agreements between national states. This bilateralism was important in as far as it contributed to the recognition that an international framework for the regulation of intellectual property law had to be developed.[11] The international period is characterised by a growing interest in cooperation between national states in the domain of intellectual property law. This period in fact saw the introduction of the required international framework with the establishment of

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[10] Comp. Drahos (1999), pp. 1–13.

[11] See Sherman and Bentley (1999); Bentley and Sherman (2004). What is here called *bilateralism* is sometimes called *unilateralism* referring to the fact that it is the legal regime of a particular nation state which counts. See also Okediji (2003–2004), suggesting that the actual need for intellectual property law policies may lead to a swing of the pendulum back to bilateralism.

the PC and the BC. The global period that is still running today can be marked by the constant efforts made to transform the existing international framework for intellectual property law into a real form of harmonised interstate regulation that would fit the growing international commercial interdependency of the developed world.[12] Sticking to the territoriality principle and maintaining the possibility of binding their signatories led to all sorts of reservations by the member states, so that the international harmonization of intellectual property law under the PC and the BC did not progress very quickly. In that last perspective it is of note that the corridor from the international period to the global period saw, next to various revisions of the PC and the BC, a proliferation of international intellectual property regimes leading to harmonisation in specific areas.[13]

What becomes clear from this brief overview of its historical development is that modern intellectual property law was introduced primarily out of economic considerations. Indeed, intellectual property law was mostly made for doing business. By its very nature it is mainly policy-driven, time and place-bound trade law. This is not contradicted by the fact that also cultural

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[12] It is of note that, as rightly stated by Dutfield and Suthersanen (2008), p. 22,

> (t)he histories of these agreements make evident that despite the fact that in each case their bringing into being had much to do with the activism of IP owners and legal practitioners, neither their direct nor underlying purposes were the same. The Paris Convention was about helping inventors and trade mark and industrial design owners to get wider geographical protection, but cannot really be seen as a means to bind the catcher-uppers to standards of the leaders with respect to substantive IP law.(...) Much the same can be said to apply to the Berne Convention, which again was primarily a response to the strong commercial interests of copyright owners in securing protection in foreign markets. However, over time the Berne Convention came to differ markedly from the Paris Convention in that it increasingly dealt with more substantial rules (...). A second reason why the Berne Convention represents a much more cohesive international architecture of rules is that copyright interests are very ably presented not only by the publishing and entertainment industries, but also by collecting societies.

[13] Examples of these regimes are the Madrid Agreement 1891 (trademarks), the Madrid Agreement 1891 (indication of source), the Hague Agreement 1925 (designs), the Rome Convention 1961 (performing rights), the International Convention for the Protection of New Varieties of Plants 1961, 1991 (plant varieties), the Patent Cooperation Treaty 1970 (patents), the Integrated Circuits Treaty 1989 (semiconductor chips). These changes were accompanied by the spread of new forms of international organization: the United International Bureaux for the Protection of Intellectual Property (BIRPI) 1893, the World Intellectual Property Organization (WIPO) 1967, becoming a specialized agency of the UN in 1974. See Bogsch (1992), pp. 7–8.

objectives have always been part of intellectual property law.[14] This equally holds true for industrial property law and copyright law, bearing in mind that since their encoding in the BC in 1928, copyright law also, and next to economic rights, grants so-called moral rights to right owners which underlines the cultural objectives of the latter. As will be seen later, this moral rights aspect plays an important role in the discussion on the relationship between copyright law and human rights law.

It seems that recently the primary economic character of intellectual property law has been underlined by the TRIPS A. This is at present the most prominent international legal instrument aiming, as far as possible, to overcome the still existing lack of substantive law harmonization in the global period, set in the key of law enforcement. For that reason, somewhat more attention will now be paid to the TRIPS A.[15]

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[14] See in this respect the WIPO Copyright Treaty (WCT 1996), in its Preamble recognizing 'the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments'. Comp. Dinwoody in Gervais (2007), pp. 113–14, formulating his conclusion as follows:

> The international intellectual property system has always been driven, to some extent, by trade concerns. However, the recent incorporation of intellectual property within the apparatus of the World Trade Organization, along with other social and economic developments, has caused the rapid evolution of the international intellectual property system. The contours of that system are now quite different than when the system first took shape in the late nineteenth century. Yet, appreciating the important role of trade institutions in changing the intellectual property system should not distract commentators from other developments that are now effecting the creation of international intellectual property norms equally. In particular, private ordering activities have the capacity to regulate extensive international activity, and to do so without full public scrutiny.

See also Drahos (1999).

[15] See generally on TRIPS A, Blakeney (1997), Gervais (2003), Correa (2007). The TRIPS A of 1994 entered into force in 1995.The TRIPS A has been characterized by its designers as a prerequisite for the worldwide stimulation of innovation and creativity, and as a consequence thereof as an essential legal instrument for human progress. I share the view of Dutfield and Suthersanen (2008), p. 7, that '(i)t is unlikely that history or economic analyses can prove beyond doubt that having an IP system is better than not having one, or vice versa'. See already in the same sense Plant (1934). However, as observed by Gervais, p. 47, the TRIPS A being 'the strongest normative vector in setting intellectual property policy (...) and it (*being*) unlikely that TRIPS norms will be diluted in the Doha Round, it would seem to be pragmatically justified to take TRIPS as a given quantity in the policy equation'. I do not discuss in this context the latest development (at the end of 2007) in this respect: the Anti-Counterfeiting Trade Agreement (ACTA), a multilateral intellectual property trade