HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Mapping the Global Interface

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Preface

The key terms in this book's subtitle – "mapping," "global," and "interface" – reflect our approach to analyzing the relationship between human rights and intellectual property.

Consider first the cartographical trope, "mapping." It is possible to envision intellectual property law and human rights law as the product of the gradual accretion and spread of international and domestic laws and institutions. The terrain of international intellectual property law was the first to emerge. Initially the subject of discrete bilateral agreements between sovereign nations, its modern form came to be established with the two great multilateral intellectual property treaties from the end of the 19th century: the Paris Convention on industrial property (1883) and the Berne Convention on literary and artistic works (1886). The international human rights regime emerged more recently, with the founding of the United Nations after World War II, and, in particular, the adoption of the Universal Declaration of Human Rights (1948).

From these beginnings, the terrain occupied by both issue areas has expanded significantly in substantive reach, in prescriptive detail, and in geographic scope. In the intellectual property context, the international law relating to patents illustrates this point. At the end of the 19th century, the desirability of domestic – let alone international – patent protection was a matter of sharp debate, even among industrialized nations. For this reason, the Paris Convention contains few substantive rules – although its national treatment and international priority rules for patent registrations were important achievements – and (like the Berne Convention) it has no effective enforcement mechanisms.

Today, in contrast, international intellectual property law imposes a significant and detailed array of substantive and enforcement obligations. The Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which came into force in 1995, obliges member states to recognize patents

in all fields of technology (subject to transitional arrangements for developing nations). TRIPS also dictates the standard by which domestic law deviations from international patent rules are to be tested, and it sets forth detailed requirements in areas such as domestic enforcement procedures. Perhaps most significantly, noncompliance with TRIPS can trigger meaningful sanctions, as a result of the treaty's integration into the international trade regime now administered by the World Trade Organization. That body, through its dispute settlement system, also contributes to the development of international intellectual property norms, along with a number of other key agencies, most notably the World Intellectual Property Organization (WIPO). The expansion of international patent law did not stop with TRIPS. International norms continue to emerge and develop as a result of multilateral, regional, and bilateral agreements. A potentially important new initiative, the Anti-Counterfeiting Trade Agreement (ACTA), is currently being negotiated. If adopted, ACTA will shape international intellectual property rules and enforcement mechanisms in a range of different contexts.

The space occupied by the international human rights regime has also grown significantly since its inauguration in the middle of the 20th century. The Universal Declaration gave birth to two foundational treaties that entered into force in 1976 – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The Covenants, together with the general comments, case law, and recommendations of their respective treaty bodies, and the decisions of regional human rights courts and commissions, have significantly bolstered the prescriptive force of human rights law. A particularly noteworthy development has been the widening acceptance of social, economic, and cultural rights that, until the 1990s, remained mostly underdeveloped, particularly in the West. New recognition of the human rights of groups has also emerged – commitments that are especially important to the world's indigenous peoples.

In terms of enforcement, the most important activities are occurring at the regional and domestic levels, especially in Europe but also in the Americas and other regions. National courts increasingly adjudicate human rights treaties directly or draw upon international norms when construing national constitutions and statutes. At all levels, multiple review mechanisms and judicial bodies shape human rights law through their investigative and interpretive activities. Indeed, one critique of the international human rights regime is that it suffers from a surfeit of rules, institutions, and decision makers that risks weakening the system as a whole.

As a result of these and related developments, the respective terrains of both the human rights and intellectual property regimes have grown significantly and the intersections between them have expanded. There now exists a

broad range of legal, social, political, practical, and philosophical issues that straddle both fields. These intersections are evolving rapidly, requiring a new conceptual cartography to help map the changing landscape.

We explore a number of these intersections in this book. To continue with the patent example introduced earlier, consider the human right to the highest attainable standard of health in the light of the protection of pharmaceutical patents. Many nations once denied patents for new drugs on public health grounds; today, TRIPS obliges member nations to recognize and enforce patents in all fields of technology, including medicines. As a result of these countervailing legal commitments, government agencies, international organizations, and civil society groups must engage with the disciplines of both human rights and intellectual property to develop effective, just, and enduring responses to public health crises and to identify new mechanisms for harnessing private innovation to serve the wider social good. This is already occurring as a growing number of actors typically concerned with human rights issues are becoming engaged in intellectual property issues and (although perhaps to a lesser extent) vice versa.

This discussion also underscores the salience of the term "global" in the book's subtitle. State and private actors in legal regimes have long recognized the inadequacy of purely domestic responses. In the human rights context, the atrocities of the Second World War engendered a commitment to the idea that sovereign nations cannot be the sole arbiter of the fundamental human entitlements. The founders of the United Nations and the drafters of the Universal Declaration recognized that human rights must be bolstered by international institutions and international legal obligations. In the intellectual property context, both private firms and governments have long recognized that effective responses to piracy and counterfeiting, and, more recently, the protection of genetic resources and indigenous knowledge, cannot be adequately addressed at the domestic level. In addition, there now exist important feedback mechanisms in intellectual property lawmaking, whereby norms developed at the international and domestic levels mutually influence each other.

As we discuss in Chapter 1, the existence of *any* meaningful engagement between the two areas of law is a relatively recent phenomenon. Scholars and policymakers in each regime are only beginning to recognize areas of mutual concern. Because law is shaped by human agency, the way in which human rights and intellectual property intersect is not an inevitable or predetermined process. The actors who engage with the legal and social policy issues to which both regimes are relevant have a large measure of discretion in determining the character of this interaction. Will there be a seismic clash, a rupturing of tectonic plates, as the two areas move ever closer together and

finally collide? Or will the engagement be carefully considered, nuanced, and accommodating? Our preference is for the latter kind of engagement, and one of the aims of this book is to provide the substantive materials and original analytical content to help others to explore the intersections between the two regimes in a productive and coherent fashion.

These considerations also explain the use of the term "interface" in our subtitle. The most familiar use of the term is in the computing context. It denotes mechanisms for conjoining distinct or contrasting elements and systems: software and hardware, or interfaces between operating systems. Human rights and intellectual property exhibit distinctive systemic characteristics. For the most part they have evolved independently – although, as we discuss in Chapter 3, there is an often-overlooked set of human rights obligations that recognize the rights of creators in their artistic and scientific works – and have been shaped by different sets of actors in distinct institutional contexts and informed by divergent analytical traditions. A key aim of the book, suggested by our use of the term "interface," is to provide a structure for dialog and engagement between these two – hitherto largely separate – systems.

To that end, Chapter 1 offers a conceptual overview of the relationship between human rights and intellectual property, as well as a brief summary of each area of law. The latter will be useful for readers less familiar with the traditions and substance of one or both areas. Chapter 1 also explores different ways that the relationship between human rights and intellectual property has been understood by scholars and in different legal and policy contexts. The chapters that follow develop the latter theme and present "case studies" of several distinct controversies. Chapter 2 considers the right to health and patented pharmaceuticals; Chapter 3 addresses the human rights associated with certain types of creative activity; Chapter 4 examines the rights of freedom of expression and cultural participation and the right to benefit from scientific progress; Chapter 5 explores the right to education and the potential tensions with copyright protection in learning materials; Chapter 6 examines the human right to food in the context of intellectual property protections in plant genetic materials; Chapter 7 considers the claims that have emerged in the context of indigenous peoples' struggles for recognition of their rights in respect of traditional knowledge and other forms of cultural production. In a final chapter, we offer a fuller exposition of our own framework for conceptualizing the most productive connections between the human rights and intellectual property regimes.

The decision to defer the exposition of our conceptual framework until the Conclusion in part reflects the genesis of this book. Several years ago, one of us developed a law school course entitled Human Rights and Intellectual

Property. Partly because of the novelty of the topic, no teaching materials existed, a gap that endures today. Teaching the course was a very fulfilling experience. The course brought together students from an array of different backgrounds and with a range of different interests – not only intellectual property and human rights, but also international trade and indigenous peoples' law and policy issues. The course invited these groups to engage with each other across the intellectual, heuristic, and, sometimes, cultural divides that had informed their thinking about the various issues to which human rights and intellectual property are relevant – issues that we consider at greater length in the case studies in each chapter of this book. The aims of the course included introducing students to the substantive laws, policies, and institutional frameworks of both human rights and intellectual property. But a more ambitious aim was to invite students to develop their own conceptions of how the two areas might interact. Although we have our own views on how the contours of the interface might be mapped, as a pedagogical matter we believe that readers' engagement with this topic will be richer if they are also encouraged to form their own views as to how this might be achieved. Hence our decision on the placement of the final chapter.

These concerns also reflect the thinking behind our use of the term "map*ping*" – the present participle form of the verb. Engagement between the two areas of law is a dynamic and evolving process, one to which we hope this book will contribute. But we labor under no pretension that this work is by any measure complete. We look forward to engaging with the responses – including, we imagine, rigorous critiques – that this text might invite.

Our aspirations for the book also extend beyond the classroom context. We hope that it will contribute to the emerging scholarship in the field and to the policy debates that are beginning to occur in both regimes. Here we offer a personal anecdote. When we first entered law teaching in the 1990s, human rights and intellectual property were separate components of our respective research agendas. Our decision to focus our scholarly efforts in these two discrete areas was highly unusual. In fact, a senior colleague counseled one of us to choose one field and abandon the other, warning that there was little benefit – and potentially much risk – in attempting to develop expertise in two such different and unrelated fields. The response offered by the recipient of this well-meaning advice was to acknowledge the lack of substantive connections between the two legal regimes, but to counter that there was much to be learned by interacting with different communities of scholars, government officials, and civil society groups, who rarely, if ever, interacted directly with each other.

More than a decade later, much has changed. When we now explain to colleagues and students that our research explores the intersections between

intellectual property and human rights, the usual response is a gleam of recognition and a question or two – most often about patented medicines and HIV-AIDS, but increasingly about freedom of expression and online technologies or the moral rights of artists. We are hardly alone in exploring these issues. As we indicated earlier, growing numbers of civil society organizations now include both human rights and intellectual property in their mandates, often specializing in subissues such as patents and the right to health, access to knowledge, or the intersection of human rights, intellectual property, and development. And the global network of commentators and journalists who write about the interface of the two fields is expanding, as revealed by the numerous and diverse entries in this book's extensive References.

For law students, as well as students in cognate disciplines, such as political theory and international relations, much of the value of the book may lie in the extensive Notes and Questions that follow the analysis of each substantive topic. These sections invite the kind of deep engagement and interrogation of substantive issues and conceptual frameworks that characterize university-level instruction, at both undergraduate and graduate levels. We also hope that this book will be useful in other contexts and for other actors, including government officials, international organizations, activists, and civil society groups. To that end, discussions of substantive topics often are followed by Issues in Focus. These sections perform a number of functions, including summarizing recent developments and highlighting emerging issues. By deploying a range of different analytical techniques and materials, we hope that the book can be used by, and will be useful for, a wider range of constituencies.

Finally, we would like to acknowledge the many scholars who have contributed to the writing of this book with comments and criticisms. They include Barbara Atwood, Molly Beutz, Jamie Boyle, Audrey Chapman, Graeme Dinwoodie, Maureen Garmon, Toni Massaro, Ruth Okediji, and Peter Yu. We are also grateful for the help of several research assistants, including Laura Duncan, Eric Larson, Lisa Lindemenn, María Méndoza, Casey Mock, Pedro Paranagua, Meryl Thomas, and Amy Zavidow. Erin Daniel provided invaluable assistance in obtaining permissions to reproduce copyrighted materials. Last, but by no means least, are the unswerving dedication and patience of our respective partners, David Boyd and Bryan Patchett, the acknowledgment of whose manifold contributions is itself a reflection of hard-fought human rights struggles.

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Contents

Chapter 1

Mapping the Interface of Human Rights and Intellectual Property

1.1. Thematic Overview and Introduction

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

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

[1] Louis Henkin, The Age of Rights (1990).

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

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

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

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

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

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

[4] Friedrich-Karl Beier & Gerhard Schricker (Eds.), From GATT to TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights, Studies in Industrial Property and Copyright Law (1996).

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

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

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

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

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

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