Intellectual Property and Human Rights

Enhanced Edition of Copyright and Human Rights

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Introduction

The discourse on the interface between intellectual property rights (IPR) and human rights is relatively recent. The debate was sparked at the end of the 1990s with the adoption of resolutions by several international bodies, and since then, the literature on the topic has grown. The debate has centered on whether IPR and human rights coexist or are in conflict. The 'conflict approach'...
sees human rights and IPR as fundamentally conflictual rights, so that the first must necessarily 'win' over the second. The 'coexistence approach' sees both rights trying to answer the same question, that is, where to strike the balance between giving an incentive to create and innovate whilst insuring the public has sufficient access to such creations and inventions, although disagreeing over where to strike that balance. The majority of commentators have accepted or assumed that the two were in conflict and focused on the resolution of these conflicts. Moreover, some of this literature and the documents issued by the UN institutions remain at the general and/or political, even demagogic level.

However, in order to determine the precise nature of the relationship between human rights and IPR in depth, one has to revert to the fundamentals of IPR and therefore their justifications and aims and then examine how the legislature has transcribed these aims. This analysis reveals two important findings. First, there is no intrinsic conflict between IPR and human rights (at least no more than between other human rights themselves, if any). This is because IPR are themselves human rights and for this reason, they share the same goals as other human rights (sections II-IV). To this end, the article gives concrete examples and lists the areas where such absence of conflict exists (section IV). However, in some (rare) cases, 'real conflicts' indeed occur because an excess of IPR protection results either from the legislation or from its interpretation by judges, or both. What needs to be done in these situations is to curtail IPR which do not respect other human rights and find specific tests so that courts can rectify the excess and the right balance can be achieved (if this cannot be solved internally, within the intellectual property laws themselves, by legislatures). Second, human rights and IPR do not 'simply' coexist but in fact most of them coincide from the outset, that is, they have the same goal (for example, protection of privacy, of property or freedom of speech) and as a result, in most cases, because of this similarity or identity of goals, they even 'cooperate' (section IV). The article focuses on EU law and the four main IPR namely, copyright, patents, trademarks and designs.

II. INTUITIONS

It is not difficult to imagine how the world would be without human rights. The two world wars have amply shown what the result is. The last of the two triggered a universal awareness of abuses by the world nations of human rights and their

commitment to avoid them at international and regional level by the signing of the
Universal Declaration of Human Rights (UDHR) (1948), the International Covenant
on Civil and Political Rights (ICCPR) (1966), the International Covenant
on Economic, Social and Cultural Rights (ICESCR) (1966) and the European

But what would the world be without IPR? It is not difficult to imagine as some
countries have lived in such a situation until very recently. To take but one
example, how was the situation in the USSR and its other dependent republics
and countries before the perestroika and the fall of the Berlin wall? With a
planned economy and markets controlled by the state, trademarks did not
exist or rather there was only one (the state's). Authors and artists were
constrained in their creations because of political reasons. As to innovation, it
took place and at an excellent level, but it was financed solely by the state and
corresponded to mostly, defense or broader political ends (nuclear energy, rockets,
satellites, submarines and so on). Other aims were barely considered. But we
don not even have to look at ex-communist countries to illustrate how a world without
IPR looks like, a simple trip back in time in Western Europe before the advent of
copyright and patent laws, similarly does the trick where authors and inventors
depended on private patrons or sovereigns. It is not a surprise that IPR came with
revolutions. Hence, the link between and even inclusion of IPR within human
rights. IPR are intrinsically linked to a free market economy and a democratic
society. By copyright, authors finally obtained the right to earn money by
themselves (through publication of their works independently) rather than writing
for the patron or sovereign only and being paid by him or her, restricting
therefore his or her ability to criticize power. These times were also those where
perpetual monopolies on inventions or even simply some common (not innova-
tive) businesses were granted by the monarch to the very few he trusted. Intellec-
tual property laws have abolished this state of play and allow everyone to
create or invent something to obtain a copyright or patent for it. Trademark
law also allows a free market economy as no right can subsist in descriptive
generic terms, thereby avoiding monopolies. Even if copyright and patents give
exclusive rights which may sometimes confer a monopoly, the latter are always
limited in time and scope, keeping competition alive. Micro-economists tell us
that such competitive state brings dynamic efficiency and with it, constant

5. International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171
together with the 23 March 1966, GA Res 2200 (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc.
A/6316 (1966) and International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 999 UNTS 171
together with the 23 January 1966, GA Res 2200 (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc.

6. This spans from (at least) Roman times until the eighteenth century. A good example is
the dependence of the poet Horatius on Maecenas' generosity, cited by Cornodes, above
ft. 1, at 143.

7. See e.g., N. Netanel, 'Copyright and a Democratic Civil Society' (1996) 100 Yale Law Journal
283, arguing this in respect of copyright.
innovation. They also tell us that competitive markets and the innovation that ensues leads to social welfare. So even if IPR were not human rights, they would still be conducive of human well-being. And what do human rights try to achieve? Human well-being. Q.E.D. there is no conflict between human rights and IPR. To that end, they both set rules so that human beings respect other human beings.

III. PHILosophical underpinnings

An analysis of the justifications for intellectual property protection confirms this intuitive supposition. A full-blown review of the several justifications for IPR is not repeated here as it has been many times explained in detail elsewhere. In short, IPR, copyright, patents and designs can be justified in three different ways. First, according to the naturalist justification, IPR are natural rights. Therefore, the author or inventor has both economic and moral property rights in his or her creation or invention as they are the fruits of his or her own labour. Although this justification is philosophical and therefore is not very detailed, it still acknowledges the fact that such rights must have some limits. Second, according to the utilitarian justification, IPR are necessary in society because they contribute to the general well-being. In order to achieve this goal, property rights are given to authors and inventors as an incentive to create and innovate but some aspects must remain in the public domain to preserve future creations and innovations. The underlying idea, which can also be found in the US Constitution, is that patent and copyright are not ends in themselves but only tools to another greater end: progress. The utilitarian justification has been further elaborated by the

cal economy of literature and more precise limits to IPR have been defined. These are called 'economics of intellectual property' and are often classified as a sub-category of the utilitarian argument. The economics of intellectual property have detailed the limits to IPR. Finally, the most recent justification is by way of human rights. In a way, it may be said to be encompassed in the naturalist justification if human rights are deemed to be natural rights. This justification also implies limits although they are generally only sketched out in the international, regional and national legal instruments and start to emerge from the case law. In addition, as this justification classifies IPR as a human right, it reinforces IPR's welfare goal and at the same time, reveals that the human rights and utilitarian justifications have the same goal. Furthermore, as human rights all have equal rank, they must balance one another and therefore all have intrinsic limits. IPR are no exception. A quick word should be said of trademarks. Their primary function is to guarantee the origin of products, i.e. that the same branded goods or services come from the same source, and therefore prevent confusion of consumers. Nowadays, an additional advertising function has been recognized to trademarks so that the trademark itself has value as such, as a 'lifestyle concept'. Trademarks are therefore different from patents and copyrights as they are not granted to incentivize innovation but to prevent confusion and protect the trademark owner's goodwill. Nevertheless, they have limits as well (such as the prohibition of protection of descriptive and misleading signs, limitation of infringement to use in trade and to use of a similar sign on similar goods or services) and thereby prevent monopolies.

From the above, it is clear that all these justifications and especially the economic and human-rights ones share the same underlying theme: there must be limits to IPR. For instance, the two last justifications entail that quotation, criticism and use for private and educational purposes should be possible. This shows that whatever the argument used to justify IPR, the specific IPR protection in question will by definition (intrinsically or externally) respect human rights. All IPR have internal, inherent limits from the outset that respect human rights. So there should not be any conflicts. Perhaps, this finding (that IPR have limits) and the related


11. Quoted erat demonstrandum, Latin for 'which was to be demonstrated'.

12. See e.g. Cornides, above fn. 1. For copyright in particular, see e.g., E. Derclaye, "The Legal Protection of Databases: A Comparative Analysis" (Cheltenham: Edward Elgar, 2008), Ch 5, s. 1 and authors cited.

13. The naturalist justification of IPR is inspired by Locke's Second Treatise on Civil Government of 1690.


15. Copyright and Patent clause, Art. 1, s. 1, clause 8 of the US Constitution which gives Congress the power to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries, also Cornides, above fn. 1, at 159.


18. Comides, above fn. 1, at 145.

19. The yardstick Comides, above fn. 1, at 159, proposes to use is that patents and copyright aim to promote progress and development. Accordingly, it may be assumed that if legislation on intellectual property corresponds to this purpose, there can be no true conflict between intellectual property and policy objectives, such as development, public health, or the fight against hunger.
set of rules boil down to the general jurisprudential or philosophical saying that no right should ever be absolute or "my freedom ends where yours begins". And this is also the case for human rights (for example, Articles 8 and 10 ECHR and 1 First Additional Protocol to the ECHR have limitations in their second paragraphs). Q.E.D. (Quod erat demonstrandum), once more. Most if not all the literature and its isolation in the law cannot be so easily equated with a mathematical equation and its solution. On the contrary, the law is full of nuances. This is why obviously this article does not stop here.

IV.
THE MYTH DESTROYED: THERE IS NO CONFLICT BETWEEN IPR AND HUMAN RIGHTS

Before looking at the areas identified by authors as areas of so-called "conflict", a few clarifications must be made. First of all, it is clear that rights on inventions and creations are human rights. This derives from Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. Although the UDHR is not

19. For instance, Chapman above fn. 16, at 867 who seems to imply that intellectual property law main or sole goal is to maximize economic benefits. See also L. Helber, "Toward a Human Rights Framework for Intellectual Property", [2007] 40 U.C. Davis Law Review 971, 1014: "A third human rights framework for intellectual property proceeds from a very different premise. It first specifies the minimum outcomes - in terms of health, poverty, education, and so forth - that human rights law requires of states. The framework next works backwards to identify different mechanisms available to states to achieve those outcomes. Intellectual property plays only a secondary role in this version of the framework. Where intellectual property laws help to achieve human rights outcomes, states should embrace it. Where it hinders those outcomes, its rules should be modified (but not necessarily restricted, as I indicate below). But the focus remains on the minimum levels of human well-being that states must provide, either appropriate intellectual property rules or other means." (emphasis added).

20. Even if this, he respectfully fails to more clearly state that human rights and IPR have the same goal, in fact, as IPR are a type of human right obviously, their goal is the same as all human rights - human welfare. C. Geiger, "The Constitutionalization of Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union" [2006] 37 International Review of Intellectual Property & Competition Law 371, 379-381, does not see this either. For him, natural law is vague and the utilitarian justification reduces 'creative activity to a sterile economic process' whereas many studies have shown that creators often do not act out of monetary purposes. This is why the human-rights justification for IPR seems to be 'the solution' for this author in order to re-establish the long-gone equilibrium (see ibid., "Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?" [2004] 35 International Review of Intellectual Property & Competition Law 268, 'the balance in IPR has long ceased to be harmonious'), although he admits that the balance is beneficial 'and indeed extremely valuable'; even if it can be said that in some countries (mainly the author's rights or civil law systems), 'copyright has become an industrial right which investors have become the reason for protection' (ibid., at 381), this was the case from the beginning a copyright systems (common law countries). In addition, if some authors do not create income, many still do live out of their intellectual efforts (authors and performers of audio-visual works and writers, other artists, most if not all patents).

21. Strictly binding, the ICESCR is. The remainder of the chapter will therefore focus on the ICESCR and the ECHR. When the ECHR has also provided for the creations but also inventions are classified as human rights. It appears equally from the latter two articles. What is the content of Article 15 ICESCR? It recognizes a number of distinct rights: everyone's cultural rights, everyone's right to benefit from scientific and technological development and everyone's right to benefit from individual contributions they make. In other words, it provides a framework within which the development of science and culture is undertaken for the greater good of society while recognizing the need to provide specific incentives to authors for this to happen.

Neither the UDHR nor the ICESCR dictate the level or modality of protection for material interests in intellectual productions. Hence, property rights are not mandated to protect intellectual endeavours. As a result, states have some latitude as to Article 17 UDHR's flexible drafting allows states to modulate their level of intellectual property protection (strong or less strong).

At European level, however, the European Court of Human Rights has recently clarified that IPR (at least copyright, trademarks, patents and even...
applications for the latter two rights) are property rights falling under Article 1 of the First Additional Protocol to the ECHR.26

Even international agreements on IPR integrate human rights notions, which can be said to come from the utilitarian justification and perhaps as well from the human-rights justification for IPR. Article 7 of the TRIPS Agreement provides that IPR must ‘contribute to the promotion of technological innovation . . . and in a manner conducive to social and economic welfare, and to balance of rights and obligations’.27 Human rights other than IPR are also, at least implicitly, recognized in Article 8(1) of the TRIPS which provides that: ‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.’28 The literature has derived from Article 8 that TRIPS must be applied in light of human rights laws. In other words, when implementing TRIPS, states must respect their human-rights obligations.29

As stated in the introduction, most commentators believe that IPR conflict with human rights. It should first be noted that no conflicts have been identified at the level of treaty obligations.30 Thus countries which have adhered to both human rights and intellectual property treaties do not have conflicting international obligations. It is now useful to summarize these alleged conflicts by listing the different types of IPR and of human rights (section IV.B), then analyze these relationships in more detail in order to disprove the presumption that they are in conflict (section IV.B). Finally, areas where excessive IPR protection leads to ‘real conflicts’ can be identified and remedies, discussed (also within section IV.B).

IV.A

Listing the ‘Conflicts’

Copyright, patents and trademarks may ‘conflict’ with the following human rights: right to freedom of expression,31 which contains the public’s right to information (Articles 19 UDHR, 19(2) ICESCR, 10 ECHR), right to education (Articles 26 UDHR, 13 ICESCR, 2, First Additional Protocol to the ECHR), right to privacy (Article 8 ECHR), right to health (Articles 25(1) UDHR, 12 ICESCR), right to food (Articles 25 UDHR and 11 ICESCR), right to life (Article 2 ECHR), right to liberty and security (Article 5 ECHR), right not to be discriminated against (Articles 14 ECHR and 7 of the 12th Additional Protocol to the ECHR), right to share in scientific advancement and its benefits (Article 15 ICESCR) and right to development (Articles 11 ICESCR or 1 of the Declaration on the Right to Development (1986)).32 Not every IPR ‘conflict’ with every human right. The following ‘conflicts’ can be identified:

- Copyright and related rights (including rights over data (in Europe, the sui generis right)) versus right to freedom of speech, right to privacy, right to health, right to education;
- Patents and related rights (including the plant breeder’s right) versus right to life, right to liberty and security,33 right to share in scientific advancement and its benefits, right to health, right to food, right to development; and
- Trademarks versus right to freedom of speech, right to privacy, right not to be discriminated against.

IV.B

Legal Analysis of the ‘Conflicts’

The aim here is not to make detailed developments on each of the potential conflictual areas. One or if not more articles would be needed to address each ‘conflict’. This book’s contributions do this in many ways. The aim is to show through analysis of the legal provisions that in the vast majority of the cases, there are no conflicts and when they are, they are the result of unbalanced IPR legislation, often itself an unfortunate consequence of heavy lobbying on the part of IPR holders. In that case, it is submitted that courts must interpret IPR restrictively to restore their internal balance and in any case, need to do so, in order for their respective countries to fulfill their international or even national obligations concerning human rights.

26. See Anheuser-Busch Inc. v. Portugal, No. 73049/01, ECHR, 11 January 2007, available at: http:// echr.coe.int/n/215195800947401 (accessed 22 April 2008). (conflict between two trademarks). The Court held that Art. 1 of the First Additional Protocol applies to intellectual property (para. 72). It also cited previous case law that ruled in this direction: Smith Kline and French Laboratories Ltd v. The Netherlands, No. 12633/87, Decision of 4 October 1990, Decisions and Reports (n.s.) 66, 70 (in relation to a patent); Melnychuk v. Ukraine (Dec.), No. 28744/03, ECHR 2005-IX (in relation to copyright). According to the court, not only trademarks but also an application for a trademark is a possession because Anheuser-Busch owned a set of rights recognized under Portuguese law that could only be revoked under certain conditions (para. 78).

27. See section 14.1 of the Introduction, supra.

28. As the wording (‘may’) suggests, though, it is not an obligation on Members.


30. Haugen, supra fn. 1, at least between TRIPS and ICESCR as regards patents.

31. The terms ‘freedom of speech’ and ‘freedom of expression’ will be used interchangeably.

32. See below, s. IV.B.1.

33. As identified by Ricketson, supra fn. 22, at 208 but not further explained (simply mentioning possible patents on gene sequences and other life forms).
Copyright and Related Rights

Copyright and the Right to Freedom of Expression

The first most obvious area of conflict on which a vast literature already exists is the so-called ‘conflict’ between copyright and related rights and freedom of expression.34 Because of the built-in limits of the idea/expression dichotomy, originality requirement, exceptions and terms,35 there is enough room for individuals to express themselves freely by taking the ideas or non-original expressions or even the protected expressions of one’s work (by exercising an exception or if the work has fallen in the public domain). There cannot therefore be conflicts between copyright and freedom of expression.36 It comes as no surprise that the European Court of Human Rights (ECHR) has never heard a case on the matter. The US Supreme Court has most exactly and recently again confirmed this absence of conflict and the intuitive and historical point made earlier (see section II). In Eldred v. Ashcroft,37 the Court held that ‘[t]he Copyright Clause and First Amendment were adopted close in time’. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to promote the creation and publication of free expression. As Harper & Row observed: ‘[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.38 The court then listed the idea/expression dichotomy, the fair use privilege, other exceptions to rights and the term to show that the copyright respects free speech.

However, of the nature of some works, which need to be communicated in their entirety for the user to achieve the purpose behind an exception/copyright (for example, reporting current events), there can be a ‘real conflict between freedom of expression and copyright. To take but a few important cases


35. See the international instruments on these limits, the idea/expression dichotomy (Art. 9 of TRIPS), originality requirement (e.g., Art. 2(1) Berne Convention), exceptions (Arts 9, 10, 10bis Berne Convention and 13 TRIPS), term (Art. 7 Berne Convention) and corresponding national and regional instruments.


technologically protected (Article 6(4) of the said Directive). For discussions and remedies, the reader is referred to the abundant literature, although not much has been said yet in detail on the interface between technological protection measures (TPMs), anti-circumvention provisions and freedom of speech.47

Another area of 'conflict' between copyright and freedom of speech may be the non-protection by some copyright laws of immoral works (e.g., pornographic, fascist, racist, sexist).48 However, again this is only an apparent conflict because the absence of copyright protection does not prevent the person from creating such works in the first place. The only consequence is the absence of a right to prevent their reproduction.

IV.B.1.b Copyright and the Right to Privacy

An apparent conflict exists between the right of the photographer or film maker on their work and the right to privacy of the person photographed or filmed.49 This conflict does not exist because it is specifically acknowledged in Article 8(2) ECHR. It can also be said that under Article 1 of the First Additional Protocol, state may ‘expropriate’50 copyright holders in the general interest, here being the interest of individuals having their right to privacy respected.51 Additionally, it can be said that even if such conflict may be said to exist, it is minimal because the artist’s freedom to create is not endangered. He or she can find other subjects for his or her work. For instance, section 85(1) of the UK Copyright Act makes it clear that the person who commissions the taking of a photograph or film for private or domestic purposes has the right not to have the latter reproduced or shown publicly.52 A few exceptions to this right are provided in section 85(2), which correspond to some exceptions to copyright infringement (for instance if the work is incidentally included in another work). They restore the prevalence of freedom of speech (through the use of private images in a subsequent copyright work) when the breach on the right to privacy can be deemed minimal.

Sometimes, when copyright and private interests go hand in hand, they can however be said to 'conflict' with freedom of speech and that brings us back to the discussion above (section IV.B.1.a). It is neither against the right to privacy nor the right to property, as freedom of speech (Article 10.1 ECHR) and/or the public interest (Article 1.2 First Additional Protocol) may prevail. Some national copyright laws even have an implicit inherent limit which allows such disclosure (for example, the public interest defense in, section 171 of the UK Copyright Act). Again, there is only an apparent conflict between copyright and the right to privacy.

A 'new' type of 'conflict' has emerged recently, that between the use by copyright holders of technical protection measures (TPMs) to control access and use of their work and the right of users to their privacy.53 Some TPMs can indeed monitor what people privately read, listen to or view. Arguably, however, this has always been the case as rental shops and libraries already record what work has been rented or lent. However, it has never been an issue in the analogue world. The digital world has not changed this state of fact that much, at least at first sight.54 But even if it did, this would be an apparent conflict again because of the limits in Articles 8, 10 ECHR and 1 First Additional Protocol.

47. For bibliographies, see S. Duchesne, Droit d’auteur et protection des oeuvres dans l’univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres (Bruxelles: Larcier, 2005) and Derclaye, above fn. 11. See, however, ALAI Annual Congress 2006, above fn. 34.

48. This stems from Art. 17 of the Berne Convention, which allows Members to deny copyright protection to works on reason of public policy or morality. It provides: 'The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right'. See S. Ricksteer, The Berne Convention for the Protection of Literary and Artistic Works (London: Kluwer & QMW, 1987), para. 9.72; S. Ricksteer & J. Giusburg, International Copyright and Neighbouring Rights, The Berne Convention and Beyond, 2nd ed. (Oxford: Oxford University Press, 2006), vol. 1, 841 n. 13.88.

49. L. Ginoemo, 'Case Comment, Spain: Copyright and Privacy, B v. AM' [1996] European Intellectual Property Review D360-361 (photograph); D. Van Engelen, 'Case Comment, Netherlands: Copyright - Freedom of Speech versus Invasion of Privacy, M v. Bios Amsterdam BV' [1997] Entertainment Law Review E91-92 (photograph); W. Roos, 'Case Comment, Netherlands: Copyright: Right to Privacy and Portrait Right, Van Hesters v. Ortheim' [1999] Entertainment Law Review N146-147 (film). All these courts converge in holding that if the copyright owner publishes the photograph or communicates the film to the public without the consent of the person photographed or filmed, this person’s right to privacy is breached. Note that this arguably applies to all works (a French case has recognized it in the case of literary works as well, see E. Dreyer, 'Case Comment, France: Copyright - Moral Rights versus Invasion of Privacy, Perbet v. Dauzin' [1997] Entertainment Law Review E83-84 (autobiography)).

50. It may not go as far as expropriation as the copyright holder retains the right to keep a copy of their work, but it may amount to interference with the peaceful enjoyment of possessions as it cannot exploit their work.

51. The margin of appreciation of states is wide. See Jones v. United Kingdom. Judgment of 21 February 1986, Series A, No. 98, [1986] ECHR 123, para. 46. C. Ovey & R. White, Jacobs and White, The European Convention on Human Rights, 4th ed. (Oxford: Oxford University Press, 2006), 362; note that it is difficult to find a case in which the Court has not recognised the policy preferences of a State as providing legitimate goal". But there must be a proportionality between the means employed and the aim sought to be realized. See James v. United Kingdom, above, para. 50.


54. It has been argued that these can also endanger free speech as people may be less inclined to express 'non-conformist' opinions because they are aware their use is being monitored by copyright holders. Bygrave, above fn. 52, at 53.
IV.B.1.c Copyright and the Right to Health

It is not copyright but the database right that may once more impact on the right to health. Because the sui generis right’s internal limits are too narrow, the right to health may be often impeded, leading to a real conflict.

IV.B.1.d Copyright and the Right to Education

There is no conflict between copyright and the right to education, at least as provided in Article 2 of the First Additional Protocol to the ECHR. Firstly, the right to education arguably does not extend to include an obligation on states to provide for any type of education at their own expense. It is a right to access educational institutions and to obtain official recognition for the studies pursued. However, the right to education seems to require States to maintain certain standards in education, and might be extended in the future. Article 13 ICESCR has been interpreted to require specific obligations from states. It includes availability, which means that teaching materials must be available. It also includes economic accessibility, education must be affordable to all. However, there is no conflict between copyright and the right to education again because of copyright’s intrinsic limits. The idea/expression dichotomy, the term and the exception for research and teaching allows states to respect the right to education. A problem may only occur if the teaching exception does not exist in the state in question (and it may happen as the Copyright Directive’s exception is not mandatory) and no other available source exists (the copyright gives the author a monopoly). Whilst this will be rare, it cannot be completely ruled out. In this case, there may be a real conflict and courts can use the right to education and/or competition law to force the right holder to license its copyright material. Finally, the database sui generis right arguably also clashes with the right to education, as its limits are not broad enough to accommodate the right (the exception for teaching purposes is optional and too restrictive).  

56. It provides: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’
57. Ovey & White, above fn. 51, at 376.
59. Ovey & White, above fn. 51, at 390–381.
60. Ovey & White, above fn. 51, at 387.
63. For a discussion, see Derclaye, above fn. 11. Art. 9 of the Database Directive reads: ‘Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: . . . (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved. Re-utilization, which is necessary to teach, is not allowed without the permission of the right holder.
64. This comes from the Committee on Economic, Social and Cultural Rights, General Comment No 14: The right to the highest attainable standard of health (Art. 12 of the Covenant), Twenty–at 875.
65. S. Musanga, ‘The Right to Health, Intellectual Property and Competition Principles, Commentary on P. Aboy,’ in Human Rights and International Trade, above fn. 29, at 301, 302–303. All protection requirements (novelty, non-obviousness and industrial application) and exceptions (private use, experimental purposes, farmer’s privilege) and term.
67. Art. 27 TRIPS and 52, 54, 56 and 57 EPC.
68. Arts 30 TRIPS or eq. and 60 UK Patent Act.
69. Arts 33 TRIPS and 63 EPC.
There are two counter-arguments to the assertion that there is a conflict between patents and the right to health. First, at the philosophical or justification level, the nature of the necessary incentive for development and progress demands some exclusivity. Otherwise, inventors would not innovate. In relation to the right to health, pharmaceutical companies would not develop new drugs as patents may allow a monopoly over a specific drug for a while, the price will generally be high, as a result of this monopoly. But even if the price may be high for a period of time (short-term), it does go down eventually with the expiry of the patent or sometimes earlier if similar inventions are invented around the patent (lower prices in the long-term). This is the price to pay for innovation. If patent laws did not exist, prices would be cheaper but there would be fewer drugs as there would be less or no development of new drugs. Patents are therefore necessary restrictions on competition to enhance competition. This proves that if patents and the right to health do not cooperate, at least they coincide. Patents in the long run help improve the standard of health. In addition, as some have rightly stated, the price of drugs is not exclusively owed to patent protection but may also be dictated by unrelated factors such as the level of import duties, taxes, and local market approval costs. There is another reason why there is no conflict between patents and the right to health. Because the research and development (R&D) that lead to patents will only be undertaken privately if the patent holder can recoup its investment, such private research will not be undertaken for some types of rare diseases or diseases that occur in countries where the population cannot afford treatment. Thus IPRs are necessary, but not the only, tool to serve the objective of public health. Political decisions have to be made to collect money to develop cures for rare diseases, so that the state or more generally public bodies (for example, research centres, universities) effectively conduct research on such diseases.

However, if a patent law is over-protective and some may be if they do not provide compulsory licenses in certain cases, then courts may use the right to health and/or competition rules to solve the conflict.

73. Comides, above fn. 1, at 159 (‘Even if there were benefits in the short term (e.g. the price for new medicines would fall sharply, there would be less innovation in the medium or long term, hardly any new treatment would be developed by privately owned companies, and the development of new treatments would then depend upon public funding’). See also in the same vein, H. Haugen, above fn. 1, at 100.


76. There is an exception for charities. But their work depends on private funding and the voluntary nature of the donations does not solve the problem of every disease on earth.

77. Comides, above fn. 1, at 164.

78. Art. 8(2) TRIPS already provides the possibility for Members to use competition law to tackle abuses of IPR.

IV.B.2.b Patents and the Right to Life

Some have noted that patent laws may be found to conflict with the right of life (Article 2 ECHR) when ‘licenses are not granted on reasonable terms for life-saving drugs’. It may be added that patents may also conflict with the right not to be subject to torture or to inhuman or degrading treatment (Article 3 ECHR). However, this conflict has not been further discussed in the literature. The right to life imposes a duty on the state to take steps to avoid the loss of life. But does the high cost of a drug and the consequence of its unavailability to certain persons pose this reason amount to unlawful killing by the patentee or the state? There has not been any case on this issue and it may be argued that courts might not go as far. Certainly, even if the price remains high as a result of a compulsory licence, there is arguably no conflict.

IV.B.2.c Patents and the Right to Food

Similarly to the right to health, there is only an apparent conflict between patents and the right to food. The latter is set forth in Articles 25 UDHR and 11 ICESCR. Its content is similar to the right to health. The food must be available and accessible. This means that first, states must not enact rules prohibiting the supply of food to people who would otherwise not have access to adequate food. Second, they must protect individuals from violation of the right by third parties. Third, they must facilitate opportunities by which the right can be enjoyed. Fourth, the right is progressive. States must not delay the realization of the right. In order to facilitate the cultivation of crops, ‘farmers must be able to save, exchange and replant seeds’ thus a law preventing this would encroach on the right to food.

First, as stated in section IV.B.2.a above, patent legislation’s goal is to promote scientific progress and development. Thus it can be said that patents are partly responsible for the growth in productivity in agriculture because this growth is mainly due to new plant varieties and agricultural techniques. Without IPRs, many of these innovations might not have happened. Thus, it is submitted that the two rights do not conflict if, at least, they coincide. In any case, there is no conflict as the natural limits of patent law prevent such conflict from occurring (see above section 32-2-A). Specifically in relation to the right to food, the farmer’s privilege in respect of the right given to the breeder of new plant varieties (that exists in most nations’ laws as allowed by Article 27(2) TRIPS and mandated by the
UPOV Convention which allows farmers to reuse and exchange the seeds of any plants they have grown and to sell them ensures that farmers can replant protected species of seeds without having to purchase new ones. Therefore, they are no adverse consequences on the right to food. As rightly expressed by S. Edwardson, "Plant variety protection can be implemented in a way that coincides rather than conflicts with, a state's obligation to realize and safeguard the right to food" (emphasis added).

IV.B.3 Trademarks

IV.B.3.a Trademarks and the Right to Freedom of Expression

As for copyright and patent, because of the internal limits within trademark laws (the distinctiveness requirement, the fact that there is only infringement if an identical or similar sign is used in the course of trade in connection with identical or similar goods) within Article 1(2) of the First Additional Protocol and within freedom of expression (Article 10 ECHR), there is only an apparent conflict between trademarks and freedom of speech. Similarly, no conflict occurs when a trademark is refused registration for reasons of morality or public policy. Again, this falls squarely within Article 10(2) ECHR. Trademark owners may also prevail when freedom of speech is abused through, e.g., the defamatory use of the trademark (that is, when the mark is not used in the course of trade). Such cases do not raise conflicts as defamatory use is clearly an abuse of freedom of expression falling into Article 10(2) ECHR. In addition, this does not strictly concern trademark law but civil liability in general.

Real conflicts can, however, exist, especially in relation to famous trademarks. Member States can provide, and generally have provided, more protection for famous trademarks – the so-called protection against dilution of the trademark (Article 5.2 of the Trade Mark Directive) – but also for any trademark (Article 5.5 of the same). Thus, in these cases, competitors and the public may not be able to use the trademark even though the use does not create (a risk of) confusion or deception (when goods are not similar) but only dilution. So far, however, this is somewhat unusual and happened only when the detriment to the reputation consists in disparagement or is very close to defamation. Accordingly, the more negative the association and the stronger the disparagement, the more likely the trademark owners will prevail.

European case law seems to indicate that this occurs when the trademark is depicted together with images clearly associated with death. This seems to be a logical test based on Article 10(2) ECHR and there is no real conflict. In some cases, courts have even made freedom of expression prevail as the association with death is in fact a characteristic of the trademark product (cigarettes). This may be contrasted with the use of images of death and defacement or malicious falsehood are typically used as complements or alternatives to trademark infringement.

86. Edwardson, above fn. 29, at 388.
87. Comides, above fn. 1, at 165. Breining-Kauffmann, above fn. 81, at 355 notes that IPR can improve the development of mono-agricultural practices to the detriment of agro-biodiversity. Thus there is a potential problem with the right to food. See then notes that Art. 27(2) of TRIPS TRIPS, exception for the protection of ordre public or morality includes the protection of human, animal, or plant life or health. We find it difficult to conceive that IPR may favor mono-agricultural practices as they encourage innovation and consequently, almost by definition, a growing number of new techniques and plant varieties. Only if the patentee has a monopoly could there be a problem in this respect.
88. Edwardson, above fn. 29, at 388.
89. See Rickson, above fn. 22, at 210 (traditional trademarks raise few human rights concerns). It has also been argued that freedom of speech could be used to counter the fact that there is no principal international exhaustion in the EEA and therefore the use of a parallel import in order to prevent trademark owner objecting to an import from outside the EEA. See Pinto, above fn. 43, at 218-219, citing K. Garnett, 'A Classic Clash Between Competing Rights – Parallel Imports: In the Human Rights Convention a Solution?', once available at www.snowsquare.co.uk/humans.htm. However, because of the state's margin of appreciation included in Art. 10(2) ECHR, judges would probably find that such a principle does not breach freedom of speech. Pinto, above fn. 43, at 219.
90. For a recent example, see Basic Trade Mark SA's Trade Mark Application [2005] RPC 41 (refusal to register application for the sign JESUS for among others clothing held to breach Art. 10 ECHR).
91. For examples of national decisions in Europe, see E. Baud, 'The Damage Done' [2005] 17 Trade Mark World 29; Geiger 2004, above fn. 19. Note that in the UK, actions against
businesses which very rarely cause death. A real conflict could nevertheless occur if imagery milder than death is used. In this case, trademark law would be going too far as it would prevent almost any fair criticism of any (famous or not) mark.

IV.B.3.b Trademarks and the Right to Privacy

Is there a conflict between the right to privacy and trademark law if a person wants to register the name or likeness of someone as a trademark? As with copyright (see section IV.B.1.b), this is only an apparent conflict as Article 8(2) and/or 1(1) First Additional Protocol's limits allow an encroachment of the right to privacy on trademark law in this case.

IV.B.3.c Trademarks and the Right to Non-discrimination

A real conflict seems to occur, however, in relation to the prohibition in the UK, which is supported by the UK courts and the ECI, for famous persons to register their own name as a trademark. This prohibition may be a breach of the celebrity human right not to be discriminated against (Article 14 ECHR). Arguably, such famous persons are discriminated on the basis of their personal status (this including social standing). Fiddes does not see any reason why there should be a difference of treatment between famous and ordinary persons. The registry would argue that 'the use of his own name by a famous person would be seen by consumers as a description of the subject matter of the products to which it is applied'. But that is the only reason that seems to be found.

IV.B.4 Designs

As designs cumulate aspects of patents, trademarks and copyright, most of the comments made above would equally apply to design rights. Therefore, one

100. See e.g., Paris Court of First Instance, 9 July 2004 [2004] IPRD 591; [2004] Communication Commerce Electronique comm. 110 (Arens v. Greenpeace). In this case, the French nuclear energy company, won against the use of death imagery by Greenpeace. The decision has nevertheless been recently overruled by the Court of Cassation (28 April 2005, available at http://www.legalin.net) so that freedom of speech seems to be prevailing even in cases where the trademark owner's business rarely causes death. Note however, that a mark may depend on the type of defendant who uses the trademark as the court notes specifically that here the defendant acted in conformity with its goals, namely the general interest and public health.

101. As suggested by Pinto, above fn. 43, at 218.


103. Ibid., at 351.

104. Ibid, at 352.

105. Ibid.


107. Pinto, above fn. 43, at 219, also noting that 'misunderstanding that designs can involve artistic and/or commercial expression, design law will probably always fall within a state's margin of appreciation for restricting that expression'.


109. Ricketson above fn. 22, at 197-198, believes that the conception that IPR's limits are generally well crafted is too 'generalised and idealistic to be a true reflection of current reality', because of the current expanding trends, i.e., mainly globalization of IPR, growing 'proprietaryisation'.

110. My view is that on the contrary, balanced IPR are generally the norm as is reflected in the different national and regional intellectual property laws and international agreements.
law in question is too protective, that is, when the IPR has been subverted or distorted, and its aims diverted so that it grants excessive protection, then judges can use human rights (and/or other laws such as competition law) as an external limit to curtail the overly broad intellectual property right. How must this balance be made? Clearly, when one right is abused to the detriment of the other (for example, when the use of freedom of expression is defamatory or when copyright prevents the communication of an entire work (perhaps only if the work is of such importance for the public to be adequately informed)) for the purposes of reporting current events), the latter should simply prevail. Otherwise, when the conflict is more subtle, fine-tuning is necessary. It is not my aim to elaborate a test here but some principles should be kept in mind when such test is crafted and applied. As has been rightly put, ‘the best balance is achieved when it is remembered that IPRs were originally created in order to secure societal purposes…’[110] The type and level of protection afforded by any IPR regime must, to the greatest possible extent, facilitate scientific progress.”[111] Also, one has to remember that IPRs are exceptions to the principle of freedom to copy and should therefore be interpreted restrictively at least in these types of conflicts.[112]

A final point should be made to emphasize the absence of conflict between human rights and IPR and in fact the overall beneficial effect of IPR for society. If the discourse of radical human-rights lawyers was followed, so that intellectual property protection should be abolished or severely diminished, such lawyers would in fact shoot themselves in the foot if not in the heart. Without IPR, or if IPR protection is lessened, other human rights would suffer considerably. The most striking example is possibly the right to health, as, without IPR protection, extremely few if any new drugs would be developed.

V. THE TRUTH REVEALED: IPR AND HUMAN RIGHTS COINCIDE OR EVEN COOPERATE

This section reveals the so far rarely and sometimes not yet analyzed areas where IPR and other human rights in fact work hand in hand. The analysis reveals that there is a coincidence and sometimes even more, a cooperation, between most IPR and most other human rights.

110. For instance, if there is only one person that has photographed or filmed the assassination of a famous person (or their last moments, as in Hyde Park v. Yelland). Contrast this with the information of the public about a new exhibit (like in the Ursillo case, above fn. 39). In this case, it may be said that showing only a part of the paintings adequately informs the public. Arguably, Art. 5(3)(c) of the Copyright Directive caters for this as it does not restrict the use of the work to a substantial part. Accordingly, a substantial part of the work or the entire work can be used for the purposes of reporting current events.

111. Cormidas, above fn. 1, at 167.

There are however, two exceptions to these areas of coincidence. There will be a real conflict in certain countries where the moral right of integrity gives to the author a (quasi) absolute right to object to the destruction of its work because in these countries, it is (almost) always seen as an attack on the honour or reputation of the author.\footnote{See e.g., France. For case law, see M. Salokannel, A. Strowel & E. Dercelaye, Final Report of the study contract concerning moral rights in the context of the exploitation of works through digital technology, April 2000, available at <http://ec.europa.eu/internal_market/copyright/docs/studies/ctd999053000e28_en.pdf>.
}

But this second exception is arguably an apparent conflict.

V.A.2 Copyright and the Right to Privacy

As some have noted, copyright and privacy rights have in fact some common origins, namely the doctrines on personality rights.\footnote{Bygrave, above fn. 52.}

There is no clearer proof that they sometimes coincide. In fact, as has been rightly stated, 'both attempt essentially to control the flow of information so as to safeguard certain values and interests'.\footnote{Ibid, 51.}

It is no surprise therefore that they in some respects also cooperate.

The moral right of divulgation or, if it is not recognized (like in the United Kingdom, for instance) the economic issuing right, implies that the author can choose to keep his writings private if he or she so wishes. In other words, an author has the right to keep his or her creations secret until he or she divulges them for the first time. A recent example is the dispute between HRH the Prince of Wales and a newspaper which reproduced parts of his private journals.\footnote{HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ. 1776.}

If the spoken words are recorded and are private conversations, and if they attract copyright (if they are sufficiently original), the author can prevent their reproduction and communication to the public on the basis of his or her copyright in his or her literary work even if he or she could not base an action in breach of confidence (that is, if the conditions of this action are not fulfilled, which often happens).\footnote{As a result of the Human Rights Act 1998, the UK has implemented the ECHR in its national law but it has not in that implementation recognized a right to privacy. On this issue, see T. Aspin's contribution in this book.}

The right to retract, in countries where it exists (for example, in France, Germany, Greece), may also be seen as working hand in hand with the right to privacy, as it allows the author to recall a work or copies of a work where it no longer corresponds with his or her beliefs.\footnote{On this right see e.g., Salokannel, Strowel & Dercelaye, above fn. 117.}

Another example is the exception for private use of a copyright work. This prevents copyright holders from entering the users' private sphere.\footnote{Bygrave, above fn. 52, at 51.}

"At the same time, privacy rights in the form of data protection law help copyright by placing limits on the processing of personal information that might subsequently be exploited in breach of copyright."\footnote{Ibid.}

V.A.3 Copyright and the Right to Education

The right to education includes the safeguard of pluralism as 'the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions'.\footnote{MacQueen, above fn. 52, at 355. In another case, breach of confidence helped claimants who could not win under copyright law (Creation Records Ltd and Others v News Group Newspapers Ltd [1997] EMLR 444, a static scene did not fall into any category of copyright subject matter.)}

As has been seen above in sections II and III, copyright also allows this pluralism as it is linked to freedom of expression. If copyright did not exist, authors would only be funded publicly, thereby drastically reducing pluralism (as their works may have to fit in the State's or private patron's tastes). This shows one more area of coincidence or cooperation.

V.A.4 Copyright and the Right to Freedom of Thought, Conscience and Religion

A similar area of coincidence or even cooperation is found between copyright and the right to freedom of thought, conscience and religion. As copyright is closely linked with freedom of expression and the latter allows a broad and varied expression of beliefs through writings and other copyright works, the three rights form an inseparable trio.

\footnote{At least in Europe, see Art. 2 of the First Additional Protocol to the ECHR. See Ovey & White, above fn. 51, at 381.}
V.B.1  Patents and the Right to Freedom of Speech

There is coincidence and even cooperation between patent law and the right to freedom of speech.\(^{129}\) It is a mandatory requirement for patentees to disclose their invention. This is done through the publication of the patent application by the respective patent office(s). This condition is the price to pay to obtain a patent and the disclosure function of patent law is linked to the utilitarian goal of patent laws. In order to provide an incentive to innovate, a patent may be gained but in order not to hinder further invention, the invention must be disclosed to the public. Freedom of speech and the right of the public to receive information is therefore specifically furthered by patent law.

V.B.2  Patents and the Right to Health

As seen above in section IV.B.2.a, the two rights may be said to coincide.

V.B.3  Patents and the Right to Food

Similarly, as seen above in section IV.B.2.c, the two rights may be said to coincide.

V.C  Trademarks

As seen above in section IV.B.3.a, the inherent limits of trademark laws generally preserve freedom of speech. In a similar vein, the Comparative Advertising Directive coincides with the right to freedom of speech.\(^{130}\)

V.D  IPR in General

V.D.1  IPR and the Right to Development

The right to development has been recognized in the 1986 Declaration on the Right to Development but it is not binding.\(^{131}\) As IPR encourage development, they cannot be blamed to be a restriction to development, provided they are adequately crafted. Both too strong and too weak IPR impact negatively on development.\(^{132}\) This is yet another area of cooperation.

V.D.2  IPR and the Right to a Safe and Clean Environment

At present, there is no enforceable human right to a safe and clean environment at international or EU level. If there was one however, it could be said that intellectual property coincides or even cooperates with such right. This might be said to be linked to the primary aim of intellectual property, scientific progress and with it, human welfare. First, the principle of exhaustion present in all IPR does not prevent recycling.\(^{133}\) Second, Article 27(2) TRIPS allows states to prevent the patenting of inventions which seriously prejudice the environment and the EPC case law clearly prohibits such patenting (on the basis of the morality clause).\(^{134}\)

VI. CONCLUSION

This chapter has shown that not only there are no conflicts between IPR and other human rights but they generally coincide or even cooperate. The reason is intellectual property’s philosophical underpinnings as reflected in the legislation, which carry with them an intrinsic element of balance in order to achieve social welfare. Not only the intellectual property laws but also the human rights instruments embody the limits of IPR and other human rights and thus enable courts to achieve the fine balancing when the rights come in apparent conflict. However, an IPR may be overly broad, and in this case, a real conflict may occur with another human right. If the IPR is abused, the other human right should prevail. Otherwise, when the conflict is more subtle, fine-tuning will be necessary. Several principles can be used to resolve such conflicts as stated above in section IV.B.5. But more importantly, this chapter has, hopefully, shown that most IPR work hand in hand with other human rights, as they have the same or similar goals. Thus contrary to what the main trend in the literature and official documents emanating from different treaty bodies would like us to believe, IPR and human rights are not enemies but friends (even brothers, as IPR are themselves human rights). Nonetheless, legislators and courts should exercise vigilance when respectively crafting intellectual property statutes and subsequently judging disputes involving them to ensure that

\(^{129}\) Pinto, above fn. 43, at 219, noted that since commercial information contained in a patent must be disclosed to the world, it is unlikely that freedom of speech will influence patent law

\(^{130}\) For a recent case applying Art. 10 ECHR to comparative advertising, see Red Dot Technologies Ltd v. Apollo Fire Detectors Ltd [2007] EWHC 1166 (Ch).

\(^{131}\) Available at <www.umich.edu/html/mem/3b/34.htm>, (last accessed 22 April 2008). Where Art. 1 provides that ‘1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.’

\(^{132}\) Corredes, supra fn. 1, at 159.

\(^{133}\) Note that even though there is no "proper" right to a clean and safe environment, environmental laws exist and thus indirectly ensure that such a right is respected. For a discussion, see E. Derclaye, ‘Intellectual Property Rights and Global Warming’, [2008] Marquette Intellectual Property Review,(forthcoming).

IPR's limits are not or have not been erased or lessened to the detriment of other human rights. In this case, proper tests should be devised to rectify the balance. The debate on the interface between human rights and IPR is therefore not completely moot but less acute as it may at first seem.  

Chapter 6

Proportionality and Balancing within the Objectives for Intellectual Property Protection

Dr Henning Grosse Ruse-Khan

INTRODUCTION

The principle of proportionality is a concept with different connotations; it has distinct functions and is employed in various environments. For example, it can be applied for the protection of human rights and fundamental freedoms to constrain the ways a state can exercise its power over its citizens. In this 'classic' case, the interference with a fundamental right affected must be proportional in relation to the legitimate public policy interests realized by the state measure. It can further serve as a general mechanism for the balance if interests; as a standard for judicial review, a tool to determine the scope of legal norms or as a limit on the power of

With particular reference to Professor Helfer's three possibilities at the end of his 2007 article (above fn. 19, at 1015–1020), I do not think that human rights will, or indeed can, be used to expand IPR, at least not in Europe, because of the limits that the ECHR already sets. Human rights are currently already used 'to impose external limits on intellectual property'. It is done in the case of 'real conflicts' i.e., when intellectual property rights are used excessively and contrary to their functions. As to the third possibility ('achieving human rights ends through intellectual property means'), as shown in sections II and III, it is what IPR always tend to achieve right from the start. Therefore, I do not believe 'it is too early to predict which of these three versions of the human rights framework for intellectual property, or others yet to be identified, will emerge as dominant'. The third possibility has always been there and this article has attempted to clarify and enlighten this. The second is happening more and should continue and the first should normally not happen at least in Europe.

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1. For an overview on these distinct contexts of application of proportionality, see M. Andreas, S. Zlepnic, 'Proportionality and Balancing in WTO Law: A Comparative Perspective', 20 CRIO (12/2007), at 2-3.

2. This can be further refined by requiring the state to pursue suitable or appropriate objectives, which it must implement in a way which necessary (that is, is least onerous to the citizen) and further not disproportionate or excessive in relation to the citizen's interests affected.