



Intellectual Property Law - and Human Rights

Finding an Intertwined Way to Promote Development
in Developing Countries

by

Satu Majamaa

Nordic Journal of Commercial Law
Special Edition 2011

1 Introduction

The World Trade Organization (WTO) was established in 1994.¹ Its member states, developing and developed countries have consequently cooperated more than 17 years on issues such as free trade, intellectual property protection and development. Many of the issues that are important to developing countries, like the protection of traditional knowledge, the right to development and access to medicines, have been brought up for discussion even though the economic and social development, especially on Africa's part, has not been as fast as expected. The right to development was adopted in UN's declaration in 1986.² In the declaration, achieving a balance between individuals, groups and states is mentioned as a vital factor in reaching a higher level of development.

The international intellectual property system is facing a crisis that highlights the need for a common framework for human rights and intellectual property laws. This kind of framework should aim at defining which system protects whom; the scope of protection; and who receives protection within the framework. It should also define whether the standards that already exist are legally binding and if so, whom these standards bind. Additionally, such framework should form rules that solve the currently existing conflicts between overlapping international and national laws. There is also a need for an institutional actor that would regulate the variety of different lawmaking actors that are currently active in the field, in order to reach sustainable solutions globally.

This essay identifies how intellectual property law could help transform conceptions of human rights in aid, into a stronger and more sustainable development process. The second chapter examines what human rights and intellectual property protection has traditionally entailed, focusing also on the intertwined nexus between human rights and intellectual property law. The third chapter begins with presentation of the legal tools that exist, and continues to sketch development tools that could be useful within intellectual property regulation. The fourth chapter describes current problems and examines Okediji's human rights and cultural narratives that could help form more sustainable legal instruments. Finally, I will draw the conclusion that although there are still many unsolved problems the development is in the hands of developing countries, and not outside their influence.

¹ The Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994.

² GA Res. 128, UN GAOR, 41st Sess., Supp. No. 53, UN Doc. A/RES/41/128 (1986) 186.

2 Traditional way of protecting human rights and intellectual property

2.1 Background

Human rights and the public interest have been used to justify the protection of IP in relation to its economic and utilitarian purposes, since the creation of early IP systems. The human rights approach was first specifically mentioned in the context of the French revolution. The 1789 Declaration of the Rights of Man and of the Citizen talks about “property” among the “natural and imprescriptibly rights of man”.³

Human rights protection started booming after the Second World War. While different human rights instruments, bodies and jurisprudence evolved, the de facto separation of human rights into categories that vary from protection of life to cultural rights was created.⁴ One should notice, however, that even though the rights in the field of intellectual property and human rights law have different theoretical background, their evolution was fairly similar.

There were two factors that brought the intellectual property protection into human rights agenda. These concerned the cultural rights of indigenous peoples that international treaties had long neglected and the linkage between intellectual property and trade through the TRIPS⁵ Agreement.⁶ Recently also regional and bilateral “TRIPS-plus” treaties have paid attention to intellectual property protection.⁷

In 2000, the U.N. human rights system acknowledged the TRIPS Agreement. The U.N. Sub-Commission on the promotion and protection of human rights adopted then Resolution 2000/7⁸ called for a human rights approach to the implementation of intellectual property rights and the development of an international intellectual property system. The resolution strongly criticized intellectual property protection claiming that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights”⁹. The Commission stated that conflicts existed between the transfers

³ Anderson and Wager 2006, p.721.

⁴ See Meron 1982, Norm Making and Supervision in International Human Rights: Reflections on Institutional Order, 76 Am. J. Int'l L. 754.

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, Legal Instruments-Results of the Uruguay Round vol 31, 33 I.L.M. 1197 (1994) (TRIPS Agreement).

⁶ Helfer 2003, pp.51-52.

⁷ These treaties are named “TRIPS-plus” because they include more intellectual property protection and stricter rules than those in TRIPS and bind developing countries to implement TRIPS before the end of specified transition periods. See Drahos 2002 p. 791.

⁸ U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm'n on Promotion & Protection. Of Human Rights, Intellectual Property Rights and Human Rights, Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000).

⁹ Ibid. preamble Para 11.

of technology to developing countries, and that there were problems regarding biopiracy and the protection of the culture of indigenous communities. This resolution did not include examination of intellectual property rights, but tried to find a balance between rights of knowledge products owners and product users. However, Commission resolutions do not have legal force, so the resolution is nonbinding.¹⁰

Nevertheless, the goal of the resolution was to set a new agenda based on monitoring and including an intellectual property protection system into the U.N. human rights framework and granting human rights primacy. After the adoption of the resolution, different human rights bodies in the U.N. have often addressed different intellectual property rights. For instance, access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria is addressed annually in the U.N. human rights council resolution.¹¹

The Millennium Development Goals were adopted in 2000 to commit nations to global partnership in order to adopt the time-bound targets given in the United Nations Millennium Declaration.¹² Goals include e.g. combating HIV/AIDS, malaria and other diseases and eradicating extreme poverty. Growing international aid, assistance and cooperation have without a doubt an important part in reaching these goals although experience shows that aid has its limitations as a development tool and that sustainable development can be achieved only if greater economic dynamism and better-functioning markets are created in the developing world.¹³

2.2 Intellectual property protection arising from human rights

Even though the author's right to his or hers intellectual production was already acknowledged in the Universal Declaration of Human Rights¹⁴ in 1948, it might be difficult to remember that intellectual creations are protected by human rights. Article 27(2) of the UDHR states that "everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author". This right is repeated also in other human rights instruments, most importantly in the International Covenant on Economic, Social and Cultural Rights.¹⁵ These rights were unutilized until the resurging public

¹⁰ Helfer 2007, p. 985.

¹¹ Ibid. p. 986.

¹² GA Res 55/2/A, United Nations Millennium Declaration, adopted 18 September 2000, UN millennium development goals 2000.

¹³ Gervais 2004.

¹⁴ Universal Declaration of Human Rights art. 27, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (Dec. 10, 1948) (hereinafter UDHR).

¹⁵ Article 15, GA Res 2200A, International Covenant on Economic, Social and Cultural Rights UN GAOR, 21st Sess, Supp No 16 at 49, UN Doc A/6316 (1966) (entered into force 3 January 1976), (hereinafter ICESCR).

health crisis, namely the HIV/AIDS pandemic in sub-Saharan Africa. This crisis elevated the effects of strong patent protection for pharmaceuticals and the corresponding limited opportunities for developing countries to secure access to medicines.¹⁶

Since states have a responsibility to afford human rights protection, they have been traditionally accountable for human rights violations against their citizens via obligations that human rights law has imposed upon them. The doctrine of sovereignty has thus been assaulted by human rights protection, since it justifies direct intervention into state affairs, when the intervention benefits the citizens of that state. By including the requirement of oversight and international dispute settlement in the TRIPS agreement, international economic law has also come closer to the human rights system. Members of the WTO can thus observe other member states intellectual property laws and provisions and intervene when necessary through filing a complaint before the dispute settlement body, i.e. the WTO body that has enforcement power.¹⁷

The United Nations (UN) Committee on Economic, Social, and Cultural Rights tried to draw a distinction between the human rights and present IP systems in its general comment on ICESCR article 15.1(c). According to the committee, the distinction between IP and human rights is that human rights are inherent to the human person as such, whereas affording IP rights are mainly a means by which the State seeks to provide incentives for innovation and creativity and encourage the production of innovative and creative products.¹⁸ It should be noted that the protection of IPRs is also the main reason why States give effect to the fundamental rights deriving from Article 15.1(c). These rights thus overlap with IPRs.¹⁹

2.3 Human rights protection within intellectual property regulation

Interestingly, the human rights framework securing the rights of creators is not specifically mentioned in the international intellectual property system. None of the multilateral treaties such as the Paris²⁰, Berne²¹ or Rome²² conventions mentions human rights protection nor is

¹⁶ Okediji 2007, pp. 364-365.

¹⁷ Ibid. p.358.

¹⁸ ECOSOC's General comment 63 on Article 15.1(c) of the ICESCR, adopted 21.11.2005 by the UN Committee on Economic, Social and Cultural Rights, UN document E/C.12/GC717.

¹⁹ Anderson and Wager 2006, p. 722.

²⁰ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967) (hereinafter Paris Convention).

²¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) (Berne Convention).

²² International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 (hereinafter Rome Convention)

that basis mentioned in the TRIPS Agreement. Under these conventions, legal protection covers investors, authors and other owners' intellectual property rights, as private rights. Since the end of the nineteenth century, when intellectual property system of protection was created, regulations were adopted in international diplomatic conferences. Treaty making aimed at gradually expanding the protected subject matter and scope of exclusive rights, through periodic revisions of the Berne, Paris and Rome conventions. Through the creation of the TRIPS Agreement in 1994, the international intellectual property system became bimodal, where rules were issued, discussed and negotiated separately in two intergovernmental organizations; the WTO and the World Intellectual Property Organisation (WIPO).²³

Article 7 of the TRIPS Agreement refers to the objectives of IP protection and underlines the importance of the public interest rationale, i.e. the promotion of benefit to society as a whole. According to the Article 7, "the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligation". Thus, the Article emphasizes the need for balance between users and producers, as well as rights and obligations.

2.4 Standards for research?

The idea of a human rights approach or human rights framework is not clearly articulated in the context of international intellectual property rights. Another question that remains unanswered is how human rights can effectively coerce and assure development outcomes other than being the moral force that connects the two bodies of law. Traditionally, the research has concentrated on how human rights and IP rights are in conflict or co-operate. Okediji, however, explores what the main features of the human rights arguments designed to aid economic development are and she seeks to link these to narratives considering the welfare prospects of intellectual property law that arise within the TRIPS Agreement.²⁴

A good starting point for the research and for finding common ground in the two bodies of law is that the normative roots are often seen as essentially the same, that is, value produced by humans is recognized through protecting the fruits of creative efforts. The concept of protecting intangible goods originates from protection of labor, which is crucial to life and living. Human rights framework considers the intellectual property system as an additional part of universal

²³ Helfer 2007, pp. 979-981.

²⁴ Okediji 2007, p.359.

values. In addition, intellectual property rights are seen to complement the human rights system.²⁵

3 Analytical Tools

3.1 Analysis of the TRIPS agreement

Yu has demonstrated that by analyzing TRIPS, one can find four narratives that clarify TRIPS negotiations.²⁶ Understanding the objectives that were presented in the negotiations helps us understand the current situation and problems that intellectual property protection is facing globally. The first, bargain narrative views the TRIPS Agreement as a product of a compromise between developed and developing countries.²⁷ The second, coercion or imperialistic narrative is typical for scholars who are sympathetic to developing countries and often consider the TRIPS agreement an unfair trade instrument that developed countries forced on developing countries.²⁸ According to the ignorance narrative developing countries are pictured as countries that did not understand the importance of intellectual property rights during TRIPS negotiations.²⁹ The last, self-interest narrative suggests that the developing countries agreed to the achieved level of protection, because they thought that this kind of protection would be necessary for knowledge development.³⁰

The self-interest narrative is interesting for this study since it concentrates on the benefits that the localized innovations create for developing nations. According to the theory, innovation i.e. creation and application of new ideas, is one of the most important factor that drive developing nations to innovate. Supporters of this narrative believe that TRIPS is vital in order to receive the rents achievable from the emerging foreign markets, and an important tool in measuring global development.³¹ What is more, supporters believe that TRIPS could also be the instrument that would help emerging economies in a similar way that development occurred in developed countries gradually achieving protection of intangible property.³²

²⁵ Ibid. pp. 367-368.

²⁶ K Yu 2005, pp. 371-378.

²⁷ Ibid. p. 371.

²⁸ Ibid. p. 373.

²⁹ Ibid. p. 375.

³⁰ Ibid. p. 376.

³¹ Alford 1995 pp. 67-68.

³² Gervais 2007, pp. 11-12.

3.2 Human rights tools

As noted above, the UDHR and ICESCR recognize the moral and material interests of authors and inventors. These instruments enable protection of creators and innovators as well as their intellectual products. Nevertheless, also the right of the public to benefit from the cultural and scientific product has been recognized within the scope of these rights. The clauses do not, however, offer normative clarity or elaborate on the terminology and leave many questions unanswered. Such unclarity leaves space for governments and activists on both sides to argue for or against revising the TRIPS Agreement utilizing human rights rhetoric. This kind of debate risks also creating a legal environment in which every claim enjoys the distinctive protection attached to human rights.³³

Human rights regulations in relation to intellectual property are underdeveloped and many questions remain unanswered. The relationships for instance, between ICESCR and UDHR and intellectual property clauses or the other economical, political and social rights that enjoy the human rights protection are unclear. Also the intertwined system between other multilateral instruments that WIPO, WTO or bilateral trade and investment treaties have set out in relation to human rights and intellectual property protection is confusing.³⁴

3.3 Intellectual property and development tools

Intellectual property regulation does not itself lead to more innovation or creativity. When patenting could be refused for promoting innovation in pharmaceuticals this mildness resulted in low-cost and wide access to drugs.³⁵ Regulation does not increase inward of foreign direct investment (FDI) either. Consequently, many developing countries have requested the developed countries to apply technology transfer, which is included in TRIPS Article 66.2. Article 66.2 lays down obligations on developed member states to provide incentives to institutions and enterprises that act in their territory in order to stimulate technology transfers to least-developed member states. This would help them “to create a sound and viable technological base”. In addition, capacity building is often mentioned as a tool to reach innovations by developing countries.³⁶ Enhancing capacity building in the form of education is important for it can bring long-term success and economic growth to the society.

Universities can have a vital part in developing national innovation systems and innovation structures since they train scientist and technically qualified personnel. Universities are, to a certain extent, a kind of laboratories, where research and development (R&D) plays a key role.

³³ Helfer 2007, pp. 975-976.

³⁴ Ibid. pp. 976-977.

³⁵ Roffe, Spennemann and Von Braun, 2006, pp.10-13.

³⁶ TRIPS Agreement art. 66.2. and art. 67.

They affect innovation by interacting with society and private enterprises.³⁷ A country can send its students to foreign universities and require new knowledge in technical, administrative or scientific fields. In addition, financial means should be used in order to draw graduates back to their home country. If a country would not have, for instance patent protection, it would be difficult for it to attract technology-minded employers.³⁸ Secondly, excellent universities should be created so that they could cooperate with foreign institutions. In the education sector, attention should also be paid to connecting creativity and computer technology rather than viewing the separately.³⁹ It is, however, problematic, especially for least-developed countries where the patenting of pharmaceuticals causes severe problems, since they cannot afford the level of R&D required for drug innovation, which would allow them easier and cheaper access. Also utilizing mechanisms for compulsory licensing or parallel importation generally causes problems, as well as, paying for the most effective patent-protected drugs.⁴⁰

Administrative personnel, the judiciary and politicians should be organized and trained to work successfully within the new framework. Training and capacity building requires both time and money. It would be important for developing countries to attempt solving the situation themselves rather than allowing the developed nations to do so and hence lose the flexibility or the possibility inherent in making services fit their needs. When it comes to building intellectual property registration offices, WIPO is providing technical knowledge regionally for instance in Africa.⁴¹

If the human rights model where state is the responsible actor to implement universal norms and follow these obligations in their domestic environment would be applied to intellectual property framework that aims for helping development processes, the state would then also have an obligation to take part in innovation policies. State policies should, in any case, be aiming to support creative action and better the prospects for development by the means of technological growth and by encouraging more FDI's in the country.

FDI promotion is also important since it brings along formal or informal knowledge and technology transfer. This increases the amount of local jobs. Combating corruption also plays a key role since investors try to avoid countries where it is common. As Gervais has stated economic development beyond the beginning phase, does not take place without adequate intellectual property protection. The TRIPS Agreement should consequently be considered and accepted as a "given in the intellectual property policy portfolio" and defended as a good

³⁷ Abdelgafar 2006 pp. 68-69.

³⁸ Kitch 1994, p. 166.

³⁹ Gervais 2007, p. 56.

⁴⁰ Maskus 2011, pp. 6-7.

⁴¹ Gervais 2007, p. 57.

reference source for developing nations, when it comes to deciding how future development could be achieved.⁴²

4 The Road to Development

4.1 The human rights narrative

Okediji notes that the human rights narrative has internationalized intellectual property as a norm and this narrative could and already has mandated that it is state's responsibility to balance intellectual property rights against each other's interests. This development can be seen for instance in the High Commissioner's report.⁴³ Such development, however, leads to problems since pure human rights protection, the right to enjoy the fruits of one's creation, does not give the same scope of protection that the TRIPS Agreement offers. Problems arise when examining the domain of literary and artistic works. Since the impact of implementing the TRIPS agreement cannot be measured in terms of human lives, like the case is for example with intellectual property rights in relation to access to medicines, the human rights narrative loses a lot of its moral appeal and political force.⁴⁴ Still, since there is no other norm in the current system, it seems plausible that most nations would agree to a human rights analysis as a set of balancing principles, if such an analysis were complete enough to take in consideration all interests.⁴⁵

It is the responsibility of each state to discuss development concerns that relate to intellectual property regulation. One should ask whether the level of protection of public interests, such as education and basic R&D infrastructure to support cultural industries, is sufficient and whether the passed laws adequately support the establishment and functioning creative enterprises. Okediji suggest that crisis tools should be developed in order to help to create effective measurements how innovation is best stimulated in developing countries and try answer whether or how intellectual property rights can aid that process in the current global scheme. Consequently, the human rights narrative must pay attention to more specific human rights guarantees and determine whether intellectual property rights as they are now and in the light of the conditions they produce, can truly be applied together with the fundamental

⁴² Ibid. pp. 58-59.

⁴³ Intellectual Property Rights and Human Rights: Report of the Secretary-General, ESCOR', Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights 52nd Sess, Provisional Agenda item4, §II.B.2, UN Doc E/CN.4/Sub.2/2001/12, at 7 (2001), requested by Sub-Commission and prepared by the office of the High Commission of Human Rights (High Commissioner's report), para 7.

⁴⁴ Okediji 2007, pp.369-371.

⁴⁵ Cahoy 2011, p.502.

principles of the human rights framework. This would entail paying global and national attention to local conditions, when trying to improve social conditions.⁴⁶

4.2 Cultural narratives

Cultural narratives have become important among intellectual property rights when protecting indigenous knowledge. They are based on the idea of self-determination and link tightly to the human rights narrative.⁴⁷ Indigenous knowledge is defined as “the knowledge held, evolved and passed only by indigenous peoples about their environment, plants and animals and the interaction of the two”.⁴⁸ This form of knowledge does not usually satisfy the requirements for IP protection. The benefits from the products that utilize this kind of knowledge are hardly brought back to the original knowledge holders (producers). This has led to proposals of “benefit-sharing agreements” although narratives often oppose that intellectual property rights would be granted for indigenous knowledge.⁴⁹

Cultural narratives seek recognition for protecting innovations under alternative systems in developing countries. It would be important to add also non-European values into the international system. Okediji criticizes the current cultural narratives of overemphasizing the cultural differences between intellectual property rights and indigenous knowledge and putting too little attention on cultural relevance of intellectual property rights to all societies and especially cultural narratives role in developed countries. The creativity has arisen from different interest and reflects great variety of values. Copyright, for example is consequently reflecting cultural connections from Western cultures. The cultural narratives thus accept the artificial values that constitute e.g. copyrightable subject matter and cannot rightly hereby include the interest of people in developing countries. Regulations on intellectual property rights can restrict state sovereignty in the same way that human rights do if the governments are accountable for these regulations as they are under the human rights framework in international law.⁵⁰

⁴⁶ Okediji 2007, pp.372-373.

⁴⁷ “Substantive issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights and Intellectual Property” Statement by the Committee on Economic, Social and Cultural Rights, 14 December 2001, E/C.12/2001.13.

⁴⁸ Daes “Some Observations and Current Developments on the Protection of the Intellectual Property of Indigenous Peoples” (23 July 1998).

⁴⁹ Okediji 2007, p.374.

⁵⁰ Ibid. p. 375.

4.3 Current problems and further development

The term intellectual property is still mainly associated with patents. Other forms of IP such as trademarks, copyrights and design rights or trade secrets are continuously excluded from the discourse. The emphasis on patents is detrimental to considering solutions through other forms of IP rights. Consequently, questions about how e.g. collective trademarks could serve rural development in emerging economies are systematically eliminated.⁵¹ Most people cannot define what intellectual property means when asked, or associate it with negative adjectives, like arrogant.⁵² Academics do research on intellectual property mainly within the context of FDI and an open market paradigm.⁵³ While findings on the de facto impact of “stronger” IP regimes on increased trade and FDI provide various policy implications, it is surprising that none of the authors looks at IP and examines to what extent IP protection is capable of promoting indigenous innovation in developing countries.⁵⁴

Helfer has created three ways to approaching the human rights framework for intellectual property’s further development. These are 1) using human rights to expand intellectual property, 2) using human rights to impose external limit on intellectual property and 3) achieving human rights ends through intellectual property means.⁵⁵ In the first model, those actors that rely on intellectual property in order to succeed would draw on the author’s rights and property rights when they are mentioned in human right treaties to increase existing protection.⁵⁶ Some visible signs of acceptance of this version of the framework already exist, since for example Constitutional courts in different European countries have referred to the human rights section in their domestic constitutions in order to legitimize intellectual property protection.⁵⁷

The second approach relies on external limitations on intellectual property. This kind of approach would probably face resistance. These groups can namely rely on other fundamental rights and on a framework that uses human rights law to limit intellectual property. National courts and the European Court of Human Rights are using the right to freedom of expression for this purpose with the help of the European Convention on Human Rights.⁵⁸ Court decisions rely on human rights protection and try to tackle the problems arising from

⁵¹ Ghafele 2010, p.247.

⁵² Gallup Organization, “*Global Consumer Awareness, Attitudes, and Opinions on Counterfeiting and Piracy*”, Third Global Congress Combating Counterfeiting and Piracy (Geneva: WIPO, January 31, 2007)

⁵³ Yeates 2002.

⁵⁴ Ghafele 2010, p. 248.

⁵⁵ Helfer 2007, p. 971.

⁵⁶ Helfer 2007, p. 1015.

⁵⁷ See case about Germany, Straus 2005.

⁵⁸ Geiger 2004, pp. 268, 277.

intellectual property protection. Time will show where this approach will lead. The first two approaches, thus take the current framework of intellectual property protection, and bring in human rights law to strengthen arguments for moving that starting point in one direction or the other.⁵⁹

The third option has a different starting point, since it first analyzes the minimum outcomes in terms of poverty, education or health that are required of States through human rights law. Then it goes back to identify the tools that have helped states to reach these standards. Helfer points out that in this framework intellectual property has only minor role.⁶⁰ Nevertheless, governments should support those intellectual property laws that help improve the human rights situation, and change legislation that hinders fulfillment of human rights obligations.

A report by The U.N. High Commissioner for Human rights clarifies this goal-focused approach by examining the impact of the TRIPS on the right to health. According to CESCR Committee, the right to health means also that states have an obligation to enhance medical research and ease the access to lower-priced treatments and essential medicines. The report states that patent protection can decrease the affordability of drugs. However, affordability depends on other factors than intellectual property, “such as the level of import duties, taxes, and local market approval costs.”⁶¹ Consequently, governments can better access to patented pharmaceuticals in two ways. First, they could utilize the flexibilities that already exist in TRIPS, such as issuing compulsory licenses to manufacturers of generic drugs and importing cheaper drugs from other countries.⁶² Second, they could benefit from the mechanisms that could make the system affordable outside of the intellectual property system, for example through differential pricing.⁶³

It must be noted that for instance, the protection of public health has taken different forms and depends on the time, place and current international agreements. The most startling example is the protection of medicines in the Paris Convention that permitted member states to reject patent protection for drug compositions when promoting competition and innovation.⁶⁴ After the entry into force of the TRIPS Agreement, the pharmaceutical sector became one of the most active users of the patent system and the amount of patents applied for pharmaceutical products rose sharply.⁶⁵ Many of the human rights instruments consequently criticize the TRIPS Agreement, TRIPS-plus treaties and intellectual property rights generally. According to

⁵⁹ Helfer 2007, pp. 1017-1018.

⁶⁰ Ibid. p. 1018.

⁶¹ High Commissioner’s Report, P 43.

⁶² Ibid. PP 47-49.

⁶³ Helfer 2007, p. 1019.

⁶⁴ Roffe, Spennemann and Von Braun 2006, pp.10-11.

⁶⁵ Correa, 2007 p. 1.

Helfer, criticism and different studies fail in many cases, however, to provide a detailed textual analysis of human rights framework for intellectual property protection. It is hardly discussed how this framework interfaces with existing intellectual property protection standards in national and international law.⁶⁶

The existing conventions and agreements like the TRIPS Agreement fail to address successfully how development can take place in the current legal environment. There are many unanswered questions considering for example how to create balanced intellectual property system that takes into consideration different right-holders needs and uses the human rights doctrines in sustainable way to enable development. In addition, it is unclear whose responsibility it is to create such a policy that uses intellectual property as a development tool which regulations should also be monitored internationally.

5 Conclusions

Many problems remain unsolved even though the debate about the possibilities how human rights law could be reflecting to intellectual property law and vice versa is ongoing. It is important to notice the special features of the two different fields of law have to be taken into consideration especially when it comes to monitor mechanisms in the case of infringements. It is still an open question what kind of international institution that would supervise the legal proceedings would be optimal for the development.

The developing countries should actively take action and create institutions and local innovation systems that would support the country's own interests, cultural narratives, economic goals and local policies. The way to do this is with the help of the TRIPS Agreement, which includes harmonized system of mandatory rights. It is important to notice that changes in the IP framework can be done differently in the developing countries than they have been done in the developed countries. With the help of the TRIPS Agreement, states and communities can be held accountable for their claims in order to pursue development goals. By making the public also more aware of intellectual property rights and applying the TRIPS Agreement more and more, countries will have better access to technology that they need in order to reach development goals and support domestic innovations.

⁶⁶ Helfer 2007, p.987.

References

- Abdelgafar, *The illusive Trade-Off: Intellectual Property Rights, Innovation Systems and Egypt's Pharmaceutical industry* University of Toronto Press (2006)
- Alford, *to Steal a Book Is an Elegant Offence: Intellectual Property Law in Chinese Civilization* Stanford University Press, (1995)
- Anderson and Wager, Human rights, development, and the WTO: the cases of intellectual property and competition policy, *Journal of International Economic Law* 9(3) (2006)
- Cahoy, breaking patents, *Michigan Journal of International Law*, vol 32, spring (2011)
- Correa, Carlos M: "Guidelines for the Examination of Pharmaceutical Patents: Developing a Public Health Perspective" Working Paper, ICTSD-UNCTAD-WHO, Geneva, January (2007)
- Drahos, BITs and BIPs: Bilateralism in Intellectual Property, 4 J. World Intellectual Property Law 791 (2002)
- Daes "Some Observations and Current Developments on the Protection of the Intellectual Property of Indigenous Peoples" (23.July 1998)
- Geiger, Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?, 35 Int'l Rev. Intell. Prop. & Competition L (2004)
- Ghafele, *of war and peace: analyzing the international discourse on intellectual property law*, *Intellectual Property Quarterly*, 3 (2010)
- Helfer, Human Rights and Intellectual Property: Conflict or Coexistence? 5 Minnesota Intellectual Property Review 47 (2003)
- Helfer, toward a human rights framework for intellectual property, *U.C. Davis Law Review* March (2007)
- Kitch, the Patent policy of Developing Countries 13 UCLA Pac Basin LJ (1994)
- Meron, Norm Making and Supervision in International Human Rights: Reflections on Institutional Order, 76 Am. J. Int'l L. 754 (1982)
- Okediji, The limits of development strategies at the intersection intellectual property and human rights AND Gervais Daniel J: TRIPS and development in Daniel Gervais, *Intellectual property, trade and development, Strategies to optimize economic development in a TRIPS-plus era*. Oxford University press (2007)
- K Yu, TRIPS and Its Discontents, 10 Marquette Intellectual Property Law Review (2006)
- Roffe, Spennemann and Von Braun, "From Paris to Doha" in *Negotiating Health: Intellectual Property and Access to Medicines*, London, Sterling. VA(2006)
- Straus, Design Protection for Spare Parts Gone in Europe? Proposed Changes to the EC Directive: The Commission's Mandate and Its Doubtful Extension, 27 Eur. Intell. Prop. Rev (2005)
- Yeates "Globalization and Social Policy: From Global Neoliberal Hegemony to Global Political Pluralism" 2 Global Social Policy Bulletin 69 (2002)

Reports

Intellectual property rights and human rights: Report of the Secretary-general, ESCOR' Commission on Human rights, Sub-commission on the promotion and protection of human rights, 52nd Sess, Privisional agenda item 4, SII.B.", UN document E/CN.4/Sub.2/2001/12, at 7(2001), requested by Sub-commission and prepared by the office of the High Commission of Human Rights.

Maskus, Parallel Imports in Pharmaceuticals, implications for prices and competition in developing countries, Final report to World Intellectual Property Organisation, (2011). Available at: http://www.wipo.int/about-ip/en/studies/pdf/ssa_maskus_pi.pdf

Resolutions and general comments, statements

GA Res 2200A, International Covenant on Economic, Social and Cultural Rights UN GAOR, 21st Sess, Supp No 16 at 49, UN Doc A/6316 (1966) (entered into force 3 January 1976).

GA Res 41/128, 1986 Declaration on the Right to Development, adopted by the General Assembly at its 41st session, at the 97th plenary meeting on 4 December 1986.

U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm'n on Promotion & Protection. of Human Rights, Intellectual Property Rights and Human Rights, Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000).

GA Res 55/2/A, United Nations Millennium Declaration, adopted 18 September 2000.

ECOSOC's General comment 63 on Article 15.1(c) of the ICESCR, adopted 21.11.2005 by the UN Committee on Economic, Social and Cultural Rights, UN document E/C.12/GC717.

Substantive issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights and Intellectual Property, Statement by the Committee on Economic, Social and Cultural Rights, 14 December 2001, E/C.12/2001 13.

Gallup Organization, Global Consumer Awareness, Attitudes, and Opinions on Counterfeiting and Piracy", Third Global Congress Combating Counterfeiting and Piracy (Geneva: WIPO, January 31, 2007)

Internet

UN millennium development goals 2000, available: <http://www.un.org/millenniumgoals/>