THE ROLE OF HUMAN RIGHTS IN SAFEGUARDING AND RESTRICTING THE EXERCISE OF IP

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A.H.R.B. Conference Towards Utopia or Irreconcilable Tensions? The Interface between Intellectual Property, Competition and Human Rights

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OUTLINE

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I. PERSPECTIVES ON LAW

- EXTERNAL PERSPECTIVE
  • Context of justification

- INTERNAL PERSPECTIVE
  • Context of discovery
II. SEDES MATERIAE HUMAN RIGHTS

- 27 (2) jo 17 (1) UDHR 1948
- 15 (1) (c) ICESCR 1966
- PROTOCOL I (1952) ECHR (1950)
- II.17 CH EU CONV 2004

WORLD CONFERENCE ON HUMAN RIGHTS
VIENNA 1993

- THE UNIVERSAL NATURE OF HUMAN RIGHTS IS BEYOND QUESTION

- INTERNATIONAL HUMAN RIGHTS INSTRUMENTS LEAVE SOME MARGIN OF APPRECIATION FOR STATES WHEN APPLYING THEM
HAVE ALL HUMAN RIGHTS THE SAME STATUS AND SCOPE OF PROTECTION, E.G.

- PROHIBITION OF SLAVERY AND TORTURE
- RIGHTS TO LIFE, FOOD, AND DECENT HOUSING
- RIGHTS TO FREEDOM OF EXPRESSION
- RIGHTS TO PROPERTY
MAYBE HUMAN RIGHTS SHOULD BE DIVIDED IN TWO CATEGORIES

- FUNDAMENTAL HUMAN RIGHTS (e.g. prohibition of slavery)
  • beyond State interference; open to international enforcement

- NON-FUNDAMENTAL HUMAN RIGHTS (e.g. property)
  • open to State interference

H.G. Schermers (1988)
HUMAN RIGHTS’ RELATION TO THE PUBLIC SPHERE AND THE PRIVATE SPHERE

- TRADITIONALLY HUMAN RIGHTS REGULATE THE PUBLIC SPHERE
  • International human rights instruments address States not citizens

- ARE HUMAN RIGHTS ALSO APPLICABLE IN THE PRIVATE SPHERE?
  • Constitutionalisation of private law?
III. INTELLECTUAL PROPERTY RIGHTS AS HUMAN RIGHTS

- NO SPECIAL REFERENCE TO INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS?
- MAY INTELLECTUAL PROPERTY RIGHTS BE EQUALISED TO PROPERTY?
- BUT IF SO: ARE THEN INTELLECTUAL PROPERTY RIGHTS NON-FUNDAMENTAL HUMAN RIGHTS?
DIFFERENT APPROACHES IN DOCTRINE / BY NGO’S e.g.

- OSTERGARD (1999)
  • 27 (2) UDHR recognizes ipr’s as human rights but other human rights, i.e. those relating to physical well-being must take priority over the guarantee of ipr’s as universal human rights

- DRAHOS (1999)
  • ipr’s are universally recognised but that makes them not universal human rights, since they depend on legislative declaration, are for limited period of time, do not belong to all human beings, not all ipr’s protect personal interests of its originators
- CHAPMAN (2000)

  • 27 (2) UDHR jo 15 (1) (c) ICESCR recognize intellectual property claims of authors and inventors linking them to the rights to participate in cultural life and to enjoy the benefits of scientific progress

  • a human rights approach differs from a narrowly legal or economic interpretation of IPR’s in various ways
    * respect for moral and material interests of the author and inventor
    * acknowledging that the author or inventor can be a group/community as well as an individual; and of the value of cultural diversity
    * as a consequence IPR’s are not foremost economic commodities but have an intrinsic value as an expression of human dignity and creativity
    * as a consequence States are under the obligation to develop IPR’s regimes that have an explicit human rights orientation
- STATEMENT COMMITTEE ESCR UN (2001)

- the fact that the human person is the central subject and primary beneficiary of human rights distinguishes human rights from legal rights recognized in ipr systems

- human rights are fundamental as they derive from the human person as such, whereas ipr’s derived from ipr systems are instrumental, in that they are means by which States seek to provide incentives for inventiveness and creativity from which society benefits

- whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, ipr regimes, although they traditionally provide protection to individual authors and creators, are increasingly focussed on protecting business and corporate interests and investment.

- moreover the scope of protection of the moral and material interests of the author provided for under 15 ICESCR does not necessarily coincide with what is termed ipr’s under national legislation or international agreements
RIEDELM (2004)

• Idem as Statement Committee ESCR UN

• with regard to normative content 15 (2) (c)
  - author: individual person, not entrepreneur, i.e. author and inventor
  - scientific productions: not all objects of industrial property; link to a personal creator is required
  - moral interests: author and inventor may claim attribution to their products
  - material interests: author and inventor need an adequate standard of living to do their work

• States have immediate obligations to implement and enforce 15 (1) (c) in their domestic laws
CATEGORISATION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

- Human Rights Characteristics
  - public law
  - *ex persona*
  - universal
  - personal rights
  - immaterial interests
  - unlimited term
  - not-assignable
  - non-exploitable

- Intellectual Property Rights Characteristics
  - private law
  - *ex lege*
  - territorial
  - personal rights + corporate rights
  - material interests
  - limited term
  - assignable
  - exploitable
IV. HUMAN RIGHTS versus INTELLECTUAL PROPERTY RIGHTS

- HUMAN RIGHTS INFLUENCE ON EXERCISING INTELLECTUAL PROPERTY RIGHTS

  • Internal Limits on Intellectual Property Rights
  
  • External Limits on Intellectual Property Law
SOME CASE LAW

- FREEDOM OF EXPRESSION/ACCESS TO INFORMATION
  - Scientology (Court of Appeal, The Hague 4 October 2003, IER 2003/6, p. 352)

- PARODY
  - Pretty Woman (Campbell v Acuff-Rose Music, Inc. 510 US 569 (1994))
  - Gies/Adler (BGH Urt. V. 20 March 2003 – IZR 117/00 (OLG Köln))
V. HUMAN RIGHTS SAFEGUARDING AND RESTRICTING INTELLECTUAL PROPERTY RIGHTS

- THE HUMAN RIGHTS PARADOX

• INTELLECTUAL PROPERTY RIGHTS

As

HUMAN RIGHTS

Versus

HUMAN RIGHTS

INTELLECTUAL PROPERTY RIGHTS