

“Power, responsibility and norms: could and should human rights be used as a curb
on intellectual property rights”

**“Power, responsibility and norms: could and should human
rights be used as a curb on intellectual property rights?”**

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“Power, responsibility and norms: could and should human rights be used as a curb
on intellectual property rights”

‘Power tends to corrupt and absolute power corrupts absolutely’¹

‘Human rights and the equitable treatment of authors and inventors, on the one hand,
and public interest, on the other hand, remain the underpinning of IP systems’²

‘Human rights and intellectual property, two bodies of law that were once strangers,
are now becoming increasingly intimate bedfellows’.³

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¹ Lord Acton letter to Bishop Mandell Creighton, 1887 –

<http://www.phrases.org.uk/meanings/22900.html> - last accessed 16 June 2004

² UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human
Rights. Economic, Social and Cultural Rights, Intellectual Property and human rights. Report of the
Secretary-General. E/CN.4/Sub.2/2001/12 14 June 2001 from

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2001.12.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.En?Opendocument) –

last accessed 16 June 2004 (“Report on Economic, Social and Cultural Rights”): World Trade
Organisation, para II, B, 1

³ L. R. Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence”) 5 MINN. INTELL.
PROP. REV 47 (2003) at <http://mipr.umn.edu/archive/v5n1/Helfer.pdf> - last accessed 16 June 2004
 (“Helfer”), 47

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A. Introduction

B. Background

Intellectual property (“IP”) and human rights may seem disparate doctrines: neither conflicting nor potential collaborators. Some implications of IP’s attempt to encourage and reward innovation and creativity,⁴ however, reveal that the two fields are intertwined; and that the power of IP may come at the expense of human rights.⁵

⁴ W.R. Cornish, (2004) “*Intellectual Property. Omnipresent, Distracting, Irrelevant?*” Clarendon Law Lectures, Oxford University Press, Oxford, UK (“Cornish”), 9; J.S. Shikwati, “Invisible Wealth” 4 March 2004 <<http://www.techcentralstation.be/030404B.html>> (last accessed 16 June 2004); Report of the Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy” (“CIPR”) <<http://www.iprcommission.org>> (last accessed 16 June 2004) September 2002, 14-17

⁵ See Oxfam Discussion Paper 12/01 “Intellectual Property and the Knowledge Gap” (“Oxfam”), http://www.oxfam.org.uk/what_we_do/issues/trade/trips_wsf2002.htm (last accessed 16 June 2004); Section 1, paras 1 and 2; A.R. Chapman, “Approaching intellectual property as a human right: obligations related to Article 15(1)(c)” Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing (“Chapman”), 5, 6

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Examples of global challenges are the relationships between the right to life and restrictions on access to medicines for life threatening diseases imposed by patents;⁶ the use of patents to block both research and the rights of others to exploit skills and property, and increase scientific knowledge;⁷ the availability of materials on line and copyright, which may prevent some use and manipulation of these materials for education, information dissemination and free expression;⁸ groundbreaking developments which could be for the public benefit, and private patent ownership;⁹ and the growth of networked and software industries based on copyright, and the rights of enjoyment of property, free expression and development of users and potential market entrants.¹⁰

⁶ Oxfam Section 1, para 2

⁷ See Cornish, 8-9, CIPR, 126-130

⁸ See Oxfam Section 1, para 2, Cornish, 60-61, Chapman 22 re privatisation of public domain

⁹Eg, patenting by Celera re human genome of Human Genome Project under which all information should be publicly available; see J. Sulston, “Forever Free”

<<http://www.biotech.ubc.ca/db/bioethics/patentarticles.html>> (last accessed 16 June 2004), B.R.

Jasny, and D. Kennedy, “The Human Genome”<

<http://www.sciencemag.org/cgi/content/summary/291/5507/1153>> (last accessed 16 June 2004). See

also Greenpeace: Report on Economic, Social and Cultural Rights, para III, D, 1; Chapman 22 re privatisation of public domain.

¹⁰T.F. Cotter, (1999) “Intellectual Property and the Essential Facilities Doctrine” Antitrust Bulletin, XLIV (1) Spring, 211-50 (“Cotter”) in R. Towse, and R. Holzhammer, (eds) (2002) “*The Economics of Intellectual Property vol IV Competition and International Trade*” The International Library of

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To consider IP¹¹ in the light of this, one must shake off ‘blind adherence to dogma’;¹²
review the focus of IP rights; and explore the possibility of an international IP regime
which is morally, socially and economically justifiable, tempering power with
responsibility to produce practical solutions.

B.Overview

Is it valid for human rights to have priority over or restrict what are, at least arguably,
forms of property? If theoretical grounds exist for use of human rights to temper IP,
do relevant human rights exist? Is this required, given existing restrictions on IP at
international and national level?

If further restriction on IP by human rights is appropriate, how is this to be
accomplished, given the limits of international law and the realities of international

Critical Writing in Economics 145, Cheltenham, United Kingdom, Edward Elgar Publishing Ltd
 (“Towse”), 202-4

¹¹Given the concerns explored here, unless otherwise indicated “IP” refers only to patent and
copyright.

¹² Laddie J in CIPR, iii

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trade? Finally, should change be solely through the legal process, or can evolving
norms of society and corporate social responsibility be harnessed?¹³

A. Is there a role for human rights?

B. Validity of reliance on human rights

Use of human rights to curb IP would be a significant encroachment on a form of
property¹⁴ which has evolved over centuries, albeit largely in the developed world for
its own ends.¹⁵ IP rights are also now enshrined in international treaty, including
most recently the minimum standards prescribed by TRIPS within the WTO
system.¹⁶ This was again driven by the developed world,¹⁷ with developing countries

¹³ These matters will be considered in the light of the examples set out above.

¹⁴ See Cornish, 2; Sir N. MacCormick, “On the Very Idea of Intellectual Property: an Essay according
to the Institutional Theory of Law”, (“MacCormick”)

<http://www.law.ed.ac.uk/script/newscript/online.htm>> (last accessed 16 June 2004) 30, 32-34

¹⁵ See CIPR 14-21, Chapman, 7

¹⁶ Trade-Related Aspects of Intellectual Property Annex 1 C to Marrakesh WTO Agreements 1994
<http://www.wto.org/english/docs_e/legal_e/27-trips.pdf> - last accessed 16 June 2004

¹⁷ Due to concerns re free riding and piracy (see C.A.P. Braga, (1989) “The Economics of Intellectual
Property Rights and the GATT: a View from the South”, *Vanderbilt Journal of Transnational Law*,

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being obliged to comply with such standards¹⁸ if they wished to have other benefits
of WTO membership; more immediate alleged benefits for the developing world
remain largely unfulfilled.¹⁹

Thus additional restrictions on IP are proper only if jurisprudentially justified, with²⁰
a straightforward positivist decision being invalid, irrespective of motive.²¹ Further,

22 (2) 243-64 in Towse 243-64, and driven by the interests of large industry (see P. Drahos, and R.
Mayne, (eds) (2002) “*Global Intellectual Property Rights. Knowledge, Access and Development*”
Palgrave Macmillan, Basingstoke and New York (“Drahos/Mayne”) introduction, 4), and desire for
matters to be include in the WTO framework with its dispute resolutions procedures – see CIPR, 157.
Lack of proper dialogue in negotiations meant that developing interests not adequately considered (see
P. Drahos, “Negotiating Intellectual Property: Between Coercian and Dialogue” (“Drahos”) in
Drahos/Mayne, 167-9

¹⁸ National laws still being the main source of IP rights, although regional systems exist eg EC,
Community Trade Mark, Community Designs and long proposed Community Patent

¹⁹ See R. M. Sherwood, (1990) “*Intellectual Property and Economic Development*” Westview Press
Inc, Colorado, USA and Oxford, UK, 1, 5; H. Murakyembe, and G.M. Kanja, “Implications of the
TRIPS Agreement on the Access to Cheaper Pharma Drugs by Developing Countries: Case Study of
South Africa v The Pharmaceutical Companies” *Zambia Law Journal* vol 34, 2002, 111
 (“Murakyembe”), 133

²⁰ MacCormick, 34

²¹ While justice and morality may in some situations combine, they should not be merged lightly. See
Lee, (1917-18) 27 YLJ 721, footnote 3, 83 in K.A.B. Mackinnon, “Adam Smith on Delictual

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identifying an appropriate basis is complicated by lack of clarity as to the theoretical basis for human rights.²² Given developments in international human rights,²³ this should arguably not restrict progress. As any restriction on IP is likely to be met with resistance, however,²⁴ it is sensible to try to develop a model which at least minimises theoretical challenges.²⁵

B. A proper basis?

C. What rights

Liability” in R.P. Malloy and J. Evensky, (eds) (1994) *“Adam Smith and the Philosophy of Law and Economics”* Kluwer Academic Publishers The Netherlands (“Malloy”); Hume’s separation of “is” and “ought” (see S. Davidson, (1993) *“Human Rights”* Open University Press, Buckingham, UK and Bristol, PA, USA (“Davidson”) 30; and Hart’s theory that law and morality are independent (see Davidson, 31).

²² See Davidson 26, 43, 45, 164/5.

²³ Eg UN Charter 1945 reaffirming fundamental human right of dignity and worth of human person (preamble), and resolving to promote respect of human rights and fundamental freedoms for all (article 1) <<http://www.unhchr.ch/pdf/UNcharter.pdf>> - last accessed 16 June 2004

²⁴ See footnote 17

²⁵ See also Davidson, 24-5 regarding the importance of the underlying theory of human rights in respect of questions of ambit and enforceability.

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A basis for restriction of IP by human rights lies in a variation of natural rights, natural law and justice theories.²⁶ By this, some rights which are morally unchallengeable²⁷ (such as the right to life and medical treatment) would be deemed fundamental and inalienable, and would prevail over other rights.²⁸ The fact that such rights are not always delivered (for example in war time atrocities) would not make them less valid.

²⁶ Building on Lockean theories of inalienable natural rights (see J. Shestack, “The Philosophical Foundations of Human Rights” (“Shestack”) in J. Symonides, (ed) (2002) “*Human Rights: Concepts and Standards*” Dartmouth Publishing Co Ltd, Aldershot, England and Ashgrove Publishing Co, Vermont, USA and UNESCO, Paris, 36-8; Kant’s theory of natural necessity: identification of minimum rights and development of positivist system to deliver these (see Shestack, 42-4); Rawls’ justice theory, identifying fair rights and liberties which cannot be overridden (see Shestack, 46-52); McDougal’s theory of protecting human dignity, based on a broad basis of shared values, including social goals (see Davidson, 36/7 and Shestack, 53/4); and Dworkin’s theory of rights prevailing over utilitarian considerations when justified by social policy (see Shestack, 54-6).

²⁷ See R. P. Malloy, “Adam Smith and the Modern Disclosure of Law and Economics” (“Malloy1”) in Malloy, 114, 115/6, 123/4; R.P. Malloy, “Is Law and Economics Moral?” (Malloy2) in Malloy, 157; J. Evensky, “Professor Malloy, Judge Posner, and Adam Smith’s Moral Philosophy” (“Evensky”) in Malloy, 190/1; and J. Evensky “The Role of Law in Adam Smith’s Moral Philosophy: Natural Jurisprudence and Utility” (“Evensky1”) in Malloy, 211.

²⁸ Such as property and freedom of expression. See also CIPR, 6

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In addition, through evolution of society’s norms, new rights may in time acquire sufficient recognition to be deemed fundamental.²⁹ However, given the variety of cultures involved, this is likely to be problematic: consider the important western rights of education, property and free expression. Education is still not widespread in the developing world, partly through a lack of cultural recognition (for example regarding education for women);³⁰ and the rights to property and free expression are not accepted in Marxist/socialist theory.³¹

Given its basis, the proposed theory is independent of the various (positivist) human rights instruments. To the extent that these recognise, however, relevant rights, they bolster the theory in respect of the existence of fundamental rights and the possibility of others acquiring the same status.³² There is indeed useful consensus between instruments regarding the rights to life,³³ health,³⁴ freedom of expression,³⁵

²⁹ See footnote 27, MacCormick, 31

³⁰ See http://www.uis.unesco.org/ev_en.php?ID=5487_201&ID2=DO_TOPIC – last accessed 16 June 2004

³¹ See Shestack, 40-1

³² See A. E-S. Tay, “Human Rights Problems: Moral, Political, Philosophical” in B. Galligan and C. Sampford, (eds) *Rethinking Human Rights* (1997) The Federation Press, Sydney, Australia, 26/7

³³ European Convention on Human Rights 1950 (“ECHR”), article 2; International Covenant on Civil and Political Rights 1966 (“ICCPR”), article 6; American Declaration on Rights and Duties of Man 1948, (“ADRDM”), article 1; American Convention on Human Rights 1969 (“ACHR”), article 4(1);

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property³⁶ and education/information.³⁷ Although less widespread, there is some
consensus regarding the right to development³⁸ and the right to share in the benefit of
science.³⁹

C. How?

Once fundamental rights are established, the actual means of delivery will evolve
with society’s norms, values and standards.⁴⁰ These will likely vary between

Universal Declaration on Human Rights 1948 (“UDHR”), article 3; and African Charter of Human
and People’s Rights 1981 (“African Charter”), article 4.

³⁴ International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”), article 12;
ADRDM, article 11; Additional Protocol to ACHR, article 10; UDHR, articles 24 and 25; and African
Charter, article 16(1).

³⁵ ECHR, article 10; ICCPR, article 17; ADRDM, article 4; ACHR, article 13; UDHR, article 19; and
African Charter, article 9

³⁶ Protocol to ECHR, article 1; ACHR, article 21; UDHR, article 17; and African Charter, article 14

³⁷ Protocol to ECHR, article 2; ICESCR, article 13; ADRDM, article 12; Additional Protocol to
ACHR, article 13, UDHR, article 26; and African Charter, article 17

³⁸ Vienna Declaration and Programme of Action (“Vienna Declaration”), article 10; ACHR, article 26;
and African Charter, article 22

³⁹ Vienna Declaration, article 11; ICESCR, article 15(1)(b); Additional Protocol to ACHR, article
14(1)(b); and UDHR, article 27(1)

⁴⁰ Consistent with Kant’s theory: see footnote 26

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political, economic and belief systems, thus enabling appropriate recognition of
diversity and local needs.

The theory provides no guidance as to how fundamental rights are to relate to other
rights, and whether they are absolute.⁴¹ These questions are important, however,
given the prospect of conflict between a patent (right to property) and medical
treatment (rights to health and life); or between forms of use and development of
online material (rights to education, information and free expression) and copyright
(right to property). International instruments again assist here, including details as to
the relative nature of rights and how they interrelate, and decisions interpreting
these⁴² provide guidance in how to resolve such practical dilemmas. Examples
include the ECHR right to freedom of expression⁴³ being subject to restrictions as
necessary in a democratic society;⁴⁴ the ECHR right to peaceful enjoyment of

⁴¹Mirroring the results of the Vienna Declaration and Programme of Action (“Vienna Declaration”)
(last accessed 16 June 2004) – articles 1, 5, all human rights are universal

<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>

⁴² See below

⁴³ Article 10

⁴⁴ inter alia in the interests of natural security, for the protection of health and morals and the
protection of reputation of others

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property,⁴⁵ which may be removed through the public interest;⁴⁶ and the ICCPR right to life,⁴⁷ which is subject to capital punishment.

Finally, the analysis has proceeded so far on the assumption of a conflict, or at least the need for a balance, between IP and human rights. Arguably, however, IP is also a human right, given the protection it confers on authors and inventors.⁴⁸ This approach is not universally accepted⁴⁹ and such protection was controversial from the outset, particularly for developing and socialist countries.⁵⁰ In any event, however,

⁴⁵ Article 1 Protocol 1

⁴⁶ and law and taxation

⁴⁷ Article 6

⁴⁸ Consistent with article 27(2) UDHR and article 15(1)(c) ICESCR. See Chapman, 6; British Copyright Council in Addendum to the Report on Economic, Social and Cultural Rights, E/CN.4/Sub.2/2001/12/Add.1 3 July 2001, from

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2001.12.Add.1.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.Add.1.En?Opendocument) - last accessed 16 June 2004, para III, A, 4 (“Addendum to Report on Economic, Social and Cultural Rights”), and article 1, UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2000/7 (“2000 Resolution”) <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> - last accessed 16 June 2004 .

⁴⁹ See eg Quaker United Nations Office/Friends World Committee for Consultation in Addendum to Report on Economic, Social and Cultural Rights para B, 1.

⁵⁰ See Chapman, 10-12

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given the analysis above regarding the nature of and relationship between human rights, the question is likely to have little additional effect in the present rights framework.⁵¹

A. Is there a power problem?

Human rights theories and instruments can be seen to provide a normative and to some extent practical basis for a solution: but is there in fact a problem?

B. The nature of IP

Like instrumental human rights, IP rights are not absolute,⁵² being subject to threshold requirements. For patents, these are novelty, inventive step, industrial application and publication⁵³ (enabling the knowledge to be shared ultimately); and for copyright, the actual work must be recorded and original.⁵⁴ The rights also

⁵¹ Note that this is considered further below in the context of solutions.

⁵² See also Cotter, 185-90 .

⁵³ Articles 27(1) and 29 TRIPS

⁵⁴ Article 9(1) TRIPS, article 2 The Berne Convention for the Protection of Literary and Artistic Works 1971 (Paris Text) at <www.law.cornell.edu/treaties/berne> last accessed 18 May 2004 (“Berne Convention”)

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contain internal balancing acts, with categories of work, or activity, excluded from protection.⁵⁵ Finally, the rights are limited in term,⁵⁶ and specific infringement tests exist⁵⁷ as well as restrictions on remedies.^{58 59}

As a result, a pharmaceutical company does not obtain worldwide rights from a single patent application, nor can it simply recycle and then restrict existing public knowledge; publishing an article and exerting copyright over it does not confer ownership of the underlying idea or information.⁶⁰ Complaints of the power of IP owners in such cases do not stem directly from the IP right but from a complex interaction of society’s respect for and misunderstanding of IP rights, and of the desire of the consumer and competitor to have particular goods, but for free or more

⁵⁵ Article 27(2) (ordre public and morality) and (3) (methods of treatment and biological processes for production of plants and animals) TRIPS (patent); article 2 bis (political and legal speech and information), article 10 (fair practice) and 10bis (reporting current events) Berne Convention and article 9(2) TRIPS (ideas and knowledge) (copyright).

⁵⁶ Article 12 TRIPS (copyright), and article 33 TRIPS (patent)

⁵⁷ Article 28 TRIPS, and article 9 TRIPS and article 9 Berne Convention (copyright)

⁵⁸ Articles 44-46 and 50 TRIPS.

⁵⁹ Note that all references provided in this section relate to TRIPS – appropriate implementing provisions will exist in the different national laws.

⁶⁰ Article 9(2) TRIPS and see Cornish, 44; cf W.Stone III, “The Price of Liberty” 11 May 2004 <http://www.thepriceofliberty.org/04/03/09/stone.htm> - last accessed 16 June 2004.

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cheaply. These initial misconceptions should be borne in mind when considering at a fundamental level the responsibility to be borne, and price to be paid, by IP rights and owners.

B. Context and exceptions

In addition to the basic framework, TRIPS also includes some encouraging provisions given the present concern.⁶¹ These relate to measures necessary to protect public health;⁶² and the potential contribution of IP to innovation and technology transfer consistent with social and economic welfare, and to a balance of rights and obligations.⁶³

TRIPS also provides more specific guidance regarding permitted exceptions, with similar, though not identical, provisions exist regarding patent and copyright. These involve concepts of limited exception, lack of conflict with the normal exploitation

⁶¹ Positively acknowledged in: UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Economic, Social and Cultural Rights. The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights. Report of the High Commissioner. E/CN.4/Sub.2/2001/13 27 June 2001
<[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2001.13.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.13.En?Opendocument)
> - last accessed 16 June 2004 (“Report of High Commissioner”), paras 6, 16-21 .

⁶² Article 8(1)

⁶³ Article 7

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of the right and no unreasonable prejudice to legitimate interests of the owner.⁶⁴ The meaning and potential use of these provisions, however, is unclear, notwithstanding some consideration by WTO panels.⁶⁵ This very lack of clarity, when compared with the details in TRIPS as to protection to be provided, sends a message as to the relative importance of rights and exceptions.⁶⁶

The scope of the exceptions have yet to be considered, however, outwith a commercial context. There are encouraging signs that if asked to consider national exceptions which favoured the right to life or non-commercial free expression, perhaps also with reliance on the general provisions considered above, a WTO panel

⁶⁴ Articles 13 (copyright) and 30 (patent).

⁶⁵ Article 64 TRIPS provides that disputes relating to implementation are to be dealt with pursuant to articles XII and XXIII GATT 1994. The copyright test was considered in *DS 160* in http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk137 (last accessed 16 June 2004) and a wide and general interpretation provided - see J.C. Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions” January 2001, Columbia Law School, The Center for Law and Economic Studies Working Paper No. 181 from http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID253867_code010104520.pdf?abstractid=253867&mirid=1 – last accessed 16 June 2004 (“Ginsburg”), 5, 6, 8, 9. The patent exception was considered in *DS114* (“Canada”) in http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk137 (last accessed 16 June 2004) which more helpfully suggests that normal exploitation should not equate to simply exercising the exclusive rights conferred.

⁶⁶ See also Report of High Commissioner, para 23]

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may see the exception as consistent with TRIPS.⁶⁷ Given the lack of precedent and force of panel decisions, however, this may be of limited future and practical effect.⁶⁸

Notwithstanding the criticism above, the vagueness of TRIPS is double-sided as it can enable detailed exceptions to exist in national laws, so far without challenge - for example, the experimental use exception, which enables researchers to work with and share patented technology, balancing reward of past and encouragement of future innovation.⁶⁹ The failure of TRIPS to specifically prescribe the need for and

⁶⁷ See Canada - articles 7(1) and 8 of TRIPS should be taken into account in considering scope of exception. See also Ginsburg, 14

⁶⁸ If state wishes to ignore decision or continue with practice, the variety of options for sanction and remedies means that this is possible, particularly if state is in strong political position (see Dispute Settlement Understanding article 3(7) and 22 <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> - last accessed 16 June 2004; see also Ginsburg, 3, and P-L. Chang, “The Politics of WTO Enforcement Mechanism” 9 January 2004, 21
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=506442 (last accessed 16 June 2004).

⁶⁹ See Australian consultation process, paper at <www.acip.gov.au/library/patentsexpuse.PDF> - last accessed 16 June 2004 (“Australian Consultation”), 8-9.

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extent of this exception, however, means that it is not universal. Further, differing national applications exist, particularly regarding commercial trials.⁷⁰ I

Fair use and research exceptions⁷¹ could allay the concerns over copyright regarding educational materials and undue rights over knowledge and ideas. However, the exceptions in the EU and the US⁷² apply only to non commercial use. This is both limited and unclear, for example in the education field. There is also concern in the

⁷⁰ US, *Roche Products Inc v Bolar Pharmaceutical Co Inc* (1984) and *Madey v Duke University* (2002) - exception not available if testing not insubstantial commercial purposes and not solely for amusement, curiosity or philosophical enquiry; section 69.1 Japanese Patent Law - patent rights shall not extend into experiments or research; article 11.2 German Patent Act 1981 is liberal – patents do not cover acts for experimental purposes (*Clinical Trials I and II* – includes commercial trials on patented substance); sections 60(2)(a) and (b) Patents Act 1977 (UK) - unclear, but *Monsanto v Stauffer* (1985) suggests tests must be for private use, and not to show product works as claimed. (See Australian Consultation, 2-5 and Cornish, 28-30)

⁷¹ Eg EU Copyright and Information Society Directive 2001/29 articles 2, 5 and 6; section 29(1) UK Copyright Designs and Patents Act 1988 (“CDPA”) defence of fair dealing, however restricted to non-commercial research and private study, not general exception or discretion for court (*Pro Sieben Media AG v Carlton UK Television Ltd* [1998] FSR 43, 47) Cf US - exceptions in legislation only guidelines – see K. Garnett, J. Rayner James, G. Davies. (1999) (14th ed) “*Copinger and Skone James on Copyright*” (“Copinger”), 496

⁷² See Copinger, 498-9; US Copyright Act s107, Digital Millennium Copyright Act 1998 (“DMCA”) s1201(c).

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US anti-copyright lobby as to the impact of new legislation on the future of fair
use.⁷³

TRIPS also specifically does not provide for or against parallel importing and
exhaustion of rights⁷⁴ (by which goods the subject of the IP right may be purchased
in one country, usually at lower prices and freely imported into another, irrespective
of local rights.) This was because of much political and economic debate around the
benefits of parallel importing⁷⁵ Positively, this means it is open to developing
countries to make use of parallel importing to address problems such as public
health.⁷⁶ However, when South Africa introduced legislation to deal with HIV/AIDS

⁷³ DMCA anti-circumvention provisions (notwithstanding specific contrary provisions) – see eg
<<http://www.sethf.com/infothought/blog/archives/000551.html>> - last accessed 16 June 2004

⁷⁴ Article 6

⁷⁵ See J. Rhys, T. van Dijk, P. Goate, D. Lewis, F. Gerner, S. Holmes, D. Rose, T. Usher, D.
Spilsbury, (1999) “Executive Summary” in *The Economic Consequences of the Choice of Regime of
Exhaustion in the Area of Trademarks*, London: National Economic Research Associates, SJ Berwin
& Co and I.F.F Research, i-xxiv in Towse; 335-358; P.M Danzon, (1998) “The Economics of Parallel
Trade” *Pharmacoeconomics*, March, 13 (3), 293-304, in Towse, 359-370; F.M. Abbott, (1998) “First
Report (Final) to the Committee on International Trade Law of the International Law Association on
the Subject of Parallel Importation” *Journal of International Economic Law*, 1 (4) December, 607-36,
in Towse 305-334; and H.E. Bale, Jr, (1998) “The Conflicts between Parallel Trade and Product
Access and Innovation: The Case of Pharmaceuticals” *Journal of International Economic Law*, 1 (4)
December, 637-53, in Towse, 371-390

⁷⁶ C.M. Correa, “Pro-competitive Measures under TRIPS to Promote Technology Diffusion in
Developing Countries” in Drahos/Mayne, 44

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using both compulsory licensing and parallel importing,⁷⁷ it met with outcry from pharmaceutical companies, and legal challenge followed. Although the case ultimately settled, it is an example of obstacles faced when trying to exploit the opportunities which were included in TRIPS against the interests of IP owners.⁷⁸

In the copyright field, parallel importing is also of potential assistance in the battle for online material: it is arguable that by placing material online, rights have been exhausted. In the EU, however, this approach was rejected,⁷⁹ and although in the US when digital works are sold online (as opposed to downloaded or leased), this constitutes the first sale of the product, the exhaustion and value is limited.⁸⁰

Finally, TRIPS permits compulsory licensing (forced sharing) of IP rights, but does not require countries to introduce it.⁸¹ In the present context, compulsory licences could be used to obtain medicines to deal with developing world health emergencies,

⁷⁷ Medicines and Related Substances Control Act (As Amended) 1997

⁷⁸ Articles 6, 8(1), 31 TRIPS. See also Murakyembe.

⁷⁹ Software Directive (91/250), article 4; Copyright Directive (96/9) articles 5 and 7, Copyright and the Information Society Directive, 2001/29 (articles 3 and 4) – online copies services, not goods

⁸⁰ 17 U.S.C. para 109(a). See T.T.E. Tai, “Exhaustion and Online Delivery of Digital Works” 2003 E.I.P.R 207, 207-9

⁸¹ Article 31

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following the clarification of TRIPS set out in the Doha Declaration;⁸² or to deal with more international challenges, as was seen with US fears of an anthrax attack and the need to secure sufficient medication.⁸³ There is also potential for use in the information field, particularly in respect of the internet.⁸⁴ Again, the lack of prescription in TRIPS has meant that there has been little use of this potentially valuable tool.

⁸² Declaration on the TRIPS agreement and public health, adopted 14 November 2001, WT/MIN(01)/DEC/2 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> - last accessed 16 June 2004 (“the Doha Declaration”), articles 5b, c and 6. However, attempts continue to enable import of generics where no manufacturing capability to exploit compulsory licence. See “Implementation of paragraph 6 of the Doha Declaration on the TRIPS agreement and public health” Decision of the General Council on 30 August 2003 <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> (last accessed 16 June 2004) and CIPR 44-6 - progress remains limited

⁸³ Although ultimately access negotiated. There is debate as to whether, for political reasons, US would have imposed a licence - see www.flonnet.com/fl1824/18241020.htm - last accessed 16 June 2004

⁸⁴ See Copinger, 1584. Attempts to introduce compulsory licence in EC Database Directive (96/9) failed after lobbying from publishers – see D. Mirchin, “The European Database Directive Sets the Worldwide Agenda”, http://www.nfais.org/publications/white_papers_2.htm (last accessed 16 June 2004), 3. See C. Colston, “*Sui Generis* Database Right: Ripe for Review?” <<http://elj.warwick.ac.uk/jilt/01-3/colston.html>> (last accessed 16 June 2004) and S. J. Liebowitz, “Alternative Copyright Systems: The Problems with a Compulsory License” 31 August 2003 <http://www.utdallas.edu/~liebowit/intprop/complpff.pdf> - last accessed 16 June 2004

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In addition to the limits of TRIPS, there has been insufficient exploration of the opportunities it brings. This failure to make the best of TRIPS is partly due to a lack of resources and understanding of the options, particularly on the part of countries having to build radically different systems without disinterested assistance.⁸⁵ A key factor, however, has been pressure from countries supporting strong IP protection, given the interests of their national industries.⁸⁶ As a result, the US and the EU have entered into bilateral trade agreements which require protection in excess of that required by TRIPS (TRIPS PLUS regimes) in return for other concessions, including international aid.⁸⁷ These include prohibition on compulsory licensing and parallel importing to deal with national health emergencies, notwithstanding the creative use of these doctrines for more prosaic commercial purposes in the US and the EU.⁸⁸ Not surprisingly, this has been criticised by the UN⁸⁹

⁸⁵ CIPR 138-40, 157-8, 160

⁸⁶ CIPR, 163

⁸⁷ See CIPR, 162-3, Chapman, 30, Drahos, 169

⁸⁸ EU - if IP right being used but consumer demand in separate market not being satisfied: *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* (“IMS”) 29 April 2004

<<http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959570#c19010418&doc>> (“IMS”); 28

U.S.C 1498. See I. Mercer, “Patent Wrongs” 29 March 2001, CIPR 42

<<http://www.mises.org/fullstory.asp?control=641&FS=Patent+Wrongs>> - last accessed 16 June 2004

(“Mercer”) and S. Singh, “Compulsory Licensing Good for US Public, Not Others”

<<http://www.twinside.org.sg/title/public-cn.htm>> - last accessed 16 June 2004, (“Singh”) 2 .

⁸⁹ Report of High Commissioner recommendation 69

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Where countries do have more creative regimes, there is the possibility of direct sanctions from the US or EU on the basis of their trade laws⁹⁰ or a WTO challenge.⁹¹ Finally, even if useful exceptions survive, notwithstanding TRIPS’ reference to fair enforcement procedures,⁹² national IP owners are likely to be better placed, and more inclined, than many potential users to fight costly battles to establish and restrict the scope of exceptions in individual cases.

B. Conclusion

In both TRIPS and national laws, there limits on, and helpful exceptions to, IP rights, and potential solutions to problems of the type recognised at the outset.⁹³ However, these are not being, and are not likely to be, allowed to be properly explored in

⁹⁰US based on section 301 Tariff Act; and EU Regulation 264/84 enabling unilateral declarations and sanctions if it is a state’s laws breaches US or EU rights under WTO rules. See Murkyembe, 113 and Drahos, 167/8. Note that a partially successful challenge to the US legislation led to assurances that future US conduct would follow WTO rules and procedures: *DS 152* in http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk137 (last accessed 16 June 2004)

⁹¹ US challenged compulsory licensing of Brazil in *DS 199* in http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk137 (last accessed 16 June 2004) ultimately settled provided Brazil agreed to consult US before introducing future regimes. See generally footnote 65.

⁹² Article 41

⁹³ See also WTO in Report on Economic, Social and Cultural Rights para II, B, 7

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situations and countries where they may be of most help. Accordingly, the present international IP regime does not adequately deal with the situation.

A. Is there already a solution?

If IP regimes do not provide the answer, do other legal solutions exist? Two avenues are public policy and human rights.

B. The courts

C. Public policy restrictions

English courts have in the past engaged in judicial activism to remedy what they considered excesses of particular IP rights.⁹⁴ They have retreated from this approach, however, categorising previous law as based only on public policy, which should only take precedence over legislation with great caution,⁹⁵ and not where there had been careful consideration of the appropriate scope of the right.⁹⁶ The volume of IP legislation and debate suggests that such a situation is unlikely to arise. Confirmation, however, of the inherent jurisdiction of the court to refuse to enforce

⁹⁴ *British Leyland Motor Corporation v Armstrong Patents Company Limited* [1986] R.P.C 279, 360-1, 374-6 - development of right to repair and concept of non derogation from grant (House of Lords)

⁹⁵ *Canon Kabushiki Kaisha v Green Cartridge Company (Hong Kong) Limited* [1997] F.S.R 817, 823-4 (Privy Council)

⁹⁶ *Mars UK Ltd v Teknowledge Ltd* [2000] E.C.D.R 99, 105 (“Mars”) when it is “reasonably certain that no right-thinking member of society would quarrel with the result” (108)

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IP rights if they offend against the policy of the law⁹⁷ suggests that there may be scope for this area to be expanded.

C. Human rights restrictions

More specifically, direct recourse has already been had to human rights principles in several jurisdictions⁹⁸ to try to restrict copyright. These cases are both encouraging and limited from the human rights perspective: while they support the possible use of freedom of expression as a counter to IP, the focus is on balancing copyright, freedom of expression, and the existing balances in copyright legislation. This generally has not produced an outcome different from that which would have been achieved using the legislation.⁹⁹

The English Court of Appeal confirmed, however, that there may be “rare circumstances” where freedom of expression could conflict with copyright; and that the court should then apply the legislation in a “manner which accommodated the

⁹⁷ *Hyde Park v Yelland* [2000] R.P.C. 604, para 64

⁹⁸ based on legislation implementing conventions – eg sections 3, 6(1) UK Human Rights Act 1998 (“HRA”), requiring courts to act consistently with ECHR and interpret legislation accordingly, or constitutions protecting human rights.

⁹⁹ See *Uitgeverij Byblos B.V. v Joanne Kathleen Rowling, Uiteverij De Harmonie B.V. and Time Warner Entertainment Company, LP* [2004] E.C.D.R 7 (Netherlands), para 4.7.10; *Ashdown v Telegraph Group Ltd* [2002] R.P.C.5 (“Ashdown”): H7-9, paras 25, 28, 31-34; *Eldred v Ashcroft* (US) (“Eldred”) see <http://www.techlawjournal.com/topstories/2003/20030115.asp> - last accessed 16 June 2004.

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right of freedom of expression”,¹⁰⁰ using the public interest defence within the existing matrix.¹⁰¹ Such a rare case may be found in the Netherlands, where freedom of expression prevailed over copyright of the Church of Scientology. While it would appear that much of this decision hinged on the facts, it is still a useful basis for future argument.¹⁰²

IP and human rights cases also provide guidance in the relationship between human rights. The focus is again on weighing the strengths in each case, with no right having “presumptive priority”.¹⁰³ While this does not provide an easy solution, it confirms that the future in this field lies in balance, rather than in straightforward solutions.

B. The International Arena

¹⁰⁰ Ashdown, H10, para 45, H11, para 46, para 47

¹⁰¹Section 171(3) UK CDPA; Ashdown, H12, para 58, H15, para 71; *Douglas v Hello! (Ltd) No.5* [2003] E.M.L.R 31 (“Douglas”) para 204 - no public interest claim key factor

¹⁰² J. Krikke, Case Comment *re Church of Scientology v XS4ALL* [2004] E.I.P.R. N50 (“Scientology”)

¹⁰³ Douglas, H17 for quotation, para 186 relying on *Douglas v Hello! Ltd* [2001] E.M.L.R 9 (“Douglas1”); *Campbell v MGN Limited* [2004] UKHL 22 (“Campbell”), paras 12, 20, 55, 106, 115; *Levi Strauss & Co v Tesco Stores Ltd* [2003] R.P.C. 18 (“Levi”) H12-15, paras 40-41

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Further support for use of human rights as a counter to IP comes from recent activity of the UN. Notwithstanding the existence of relevant rights for some time,¹⁰⁴ the UN focussed on IP only in 2000. Since then, the Sub-Commission on Human Rights,¹⁰⁵ the High Commissioner and the Commission on Economic, Social and Cultural Rights have considered the matter. Their conclusions include that a conflict exists between implementation of TRIPS and article 27 UDHR and article 15(1)(c) ICESCR;¹⁰⁶ that there is a need for a more human rights based, non commercial, focus in implementing TRIPS; that there is a need to develop the more helpful provisions of TRIPS; and that governments were reminded of the primacy of human rights obligations, and urged them to ensure that TRIPS implementation did not negatively impact on enjoyment of human rights.¹⁰⁷

¹⁰⁴ See footnotes 33 - 37; and Helfer 49, Chapman, 13

¹⁰⁵ See 2000 Resolution, which requested Report of High Commissioner (article 10).

¹⁰⁶ See consideration above of articles as basis for IP being human right

¹⁰⁷ Report on Economic, Social and Cultural Rights paras I, B, 3 (b), (f); I.B, 2, 4(b); I, B, 4(d); Report of High Commissioner, paras 10-13, 21-27; 2000 Resolution final recital and articles 2, 6; UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2001/21 (“2001 Resolution”)

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.RES.2001.21.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.RES.2001.21.En?Opendocument) (last accessed 16 June 2004), articles 3 and 5.

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These are positive findings from the present perspective. The lack, however, of a more forceful sanction or suggestions for improvement, notwithstanding the primacy accorded to human rights in the UN Charter and the Vienna Declaration,¹⁰⁸ is a reminder of the legal limits of the international community. That said, it may still be a useful catalyst for practical action.¹⁰⁹

B. Conclusion

While encouraging in some cases, case law regarding IP and human rights suggests that in most cases reliance on human rights will not produce new outcomes.

Additional, and arguably more fundamental and flexible, options lie in public policy and public interest concepts. The reasoning of the English courts in respect of both, however, confirms their limits. Only in extreme and, importantly, as yet unclear cases, will they prevail over IP.¹¹⁰ It is also unlikely that they will so do unless statute provides for recourse to the public interest. Finally, if statute clearly excludes additional exceptions, use of public policy arguments will be difficult.

¹⁰⁸ See above

¹⁰⁹ Eg World Summit on Information Society – Geneva 2003 – Tunis 2005 – Declaration of Principles WSIS-03/GENEVA/DOC/4-E, see generally <<http://www.itu.int/wsis/>> (last accessed 16 June 2004) and see further below regarding solutions.

¹¹⁰ thus mirroring exception provisions in TRIPS

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Further, the suggested use of public interest in the case law is not independent, but tied to the right to free expression.¹¹¹ As has been considered above, this right is not universally accepted. While from an IP perspective this is attractive, potentially further limiting situations when copyright may take second place, the nature of the copyright related dilemmas identified at the outset means that the potential for restriction may be too rare. Similarly, although the case law may found a basis for arguing that a necessary rare circumstance exists when considering the right to life (which is more universally accepted) and patents, the situation is still uncertain. This is particularly so when it is considered that IP rights are likely to be in the hands of owners who are willing and able to fight to enforce them. As a result, IP is likely to prevail against the vague opponents of a possible rare circumstance and an accepted relevant human right.

A. A creative human rights based solution?

If additional or clearer restrictions on IP are necessary, what model could be adopted and how could it be implemented?

¹¹¹ See Ashdown

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B. Framework

Given the present international IP regime, the global nature of trade in IP related activities and the international nature of concern about IP, a global approach is appropriate.¹¹² One option is to reopen TRIPS,¹¹³ to provide increased prescribed limits on rights¹¹⁴ and also to provide for residual recourse to the public interest, which should include observance of the main human rights instruments. While this would still involve a balance, such specification would remove the present uncertainties regarding comparative weight of rights and exceptions. It is unlikely, however, that countries, even those who may stand to gain, would agree to reopening the WTO Round.¹¹⁵ Even if agreement could be reached, it is also likely that the same round of litigation and bilateral agreements would reduce its effectiveness.

¹¹² See also H.L. MacQueen, “Intellectual Property in a Peripheral Jurisdiction”, 6
<<http://www.law.ed.ac.uk/script/newscript/online.htm>>

¹¹³ as suggested in Report on Economic, Social and Cultural Rights, paras II, B, 8-9; see also Helfer, 48, 57-9 (proposing maximum protection levels).

¹¹⁴ Eg details of when compulsory licences are to be granted, parallel importing or specific use permitted; see also Chapman, 15-16 (re national laws)

¹¹⁵ See CIPR, 160

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An alternative is for the present system to combine with a human rights based interpretation of IP and TRIPS,¹¹⁶ building on such approaches in health and social development,¹¹⁷ and the argument that IP rights are human rights.¹¹⁸ Such a solution should enable the power of IP to be exercised responsibly and equitably.¹¹⁹

For this to occur, national policy and legislation may need to be reviewed,¹²⁰ and courts would need to interpret IP legislation to give effect to human rights, which would be consistent with their existing status as peremptory norms of international law.¹²¹ This would also be consistent with those national laws and constitutions which require delivery of human rights.¹²² I

¹¹⁶ See also Helfer, 48, 58, CIPR 163

¹¹⁷ UN Declaration on Right to Development and see <http://www.unhcr.ch/development/approaches.html> - last accessed 16 June 2004

¹¹⁸ See above

¹¹⁹ See also WIPO: the Addendum to the Report on Economic, Social and Cultural Rights, paras II, 1-17. See Chapman, 13 re article 27(2) UDHR and article 15(1)(c) ICESCR

¹²⁰ consistent with articles 4 and 5, 2001 Resolution. Given that most states are signatories to both IP and human rights treaties one might naively hope support would be forthcoming: see Report of High Commissioner para 28: from 141 members of the WTO, 111 have ratified ICESCR.

¹²¹ See Davidson, 52-59. Although international law is unhelpful as to practical implications of another treaty, or national law, which is inconsistent with human rights. Treaties are assumed not to conflict, and will be interpreted in good faith to produce consistent outcome (article 31 Vienna

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In addition, however, the approach should build on the international growth of both corporate social responsibility (and the power of corporations as opposed to the state),¹²³ and individual activism. The combination of these factors should support delivery of effective solutions which would not be easily circumvented.¹²⁴ Such an approach may also ultimately provide a groundswell of support for international IP

Convention on the Law of Treaties 1969); but if national law is clearly inconsistent it will prevail due to national sovereignty (eg Levi, H12, para 40)

¹²² Eg sections 3 and 6(1) HRA. .

¹²³ Speeches of The 2003 Business and Human Rights Seminar 9 December 2003, London, <http://www.business-and-human-rights-seminar.org/docs/Speeches.pdf> (last accessed 16 June 2004)

(“Business and Human Rights Seminar”) 3, 8; M. Robinson, “Human Rights, Development and Business – An Introduction” 27 November 2003

http://www.novartisfoundation.com/pdf/speech_mary_robinson.pdf (last accessed 16 June 2004)

(“Robinson”), 7; Chapman, 23

¹²⁴ Unlike the present regime. See also Davidson, 170 – legal instruments alone cannot protect rights, the political and social environment of the state are relevant; Report of High Commissioner, para 35 while states are “ultimately responsible for compliance with the [ICESCR], all members of society, including the private business sector, have responsibilities regarding the realization of the right to health”; Business and Human Rights Seminar 9, 10, 15, 16; and footnote 27 regarding evolving norms.

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legislation to indeed be revisited, producing a regime which has greater validity from
such wider recognition.¹²⁵

In support of this, it should be noted that the growth of corporate social responsibility
within both the international community¹²⁶ and investor objectives¹²⁷ has already had
practical results:¹²⁸ delivery of some pharmaceuticals to the developing world;¹²⁹
changes in environmental practices;¹³⁰ and changes regarding genetically modified

¹²⁵ See Hart in Davidson, 31

¹²⁶ Eg United Nations Global Compact (see
<http://www.humanrightsfirst.org/workers_rights/wr_other/wr_other.htm> - last accessed 16 June
2004), Norms of Responsibility of Transnational Corporations and Other Business Enterprises in
Regard to Human Rights for the United Nations (“UN Norms”)
<<http://www1.umn.edu/humanrts/links/norms-Aug2003.html>> (last accessed 16 June 2004) of UN
Human Rights Sub-Commission (August 2003), to bring about greater accountability of business -
See also Business and Human Rights Seminar, 20-2, particularly regarding ultimate goal of treaty.

¹²⁷ Eg ethically concerned pension funds: www.ethicalinvestors.co.uk (last accessed 15 June 2004)

¹²⁸ See generally <<http://web.amnesty.org/mavp/av.nsf/pages/csr>> (last accessed 15 June 2004)

¹²⁹ See reduced prices in Africa of Merck and Bristol Myers - Mercer; and activities of Centre for the
Management of Intellectual Property and Health Research and Development – see
<http://www.mihp.org/> - last accessed 15 June 2004)

¹³⁰ Eg Brent Spar protest

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crops.¹³¹ Further, some goals of the present exercise (protection of life, health and education for those most in need) are not controversial – it is concern at floodgates and importation of cheap goods on other markets which leads to objection.¹³²

Regarding individuals, the growth of such a new source of power has been compared to the momentous and spontaneous events and protests of 1968 (*les evenements* in Paris, the Prague Spring and the rise of the women’s and civil rights movements in the US) as bringing fundamental changes in attitudes, expectations and behaviours.¹³³ Today’s activism may be the foundation stone for similar changes in approach to global IP rights, particularly to influence behaviour in cases such as patenting of groundbreaking developments, impact on other research and methods of exploitation of online materials, where it is less likely that corporations would willingly agree not to rely on or seek IP rights.¹³⁴

¹³¹ See Monsanto’s decision in May 2004 to cease commercialisation of Roundup Ready, due to pressure from activists, consumers and US and Canadian farmers: P. Philips, “Seeds of doubt over Monsanto decision” 12 May 2004 <<http://www.globeandmail.com>>

¹³² See Singh 3 re implications for pricing of patented products

¹³³ See M. Kurlanksy, (2004) “1968: The Year That Shook The World”, Jonathon Cape, UK (reviewed at http://www.economist.com/books/displayStory.cfm?story_id=2312896) – last accessed 15 June 2004

¹³⁴ See Oxfam, Section 2, paras 1 and 2; Business and Human Rights Seminar, 9, 17, 18; CIPR 165-6, Robinson 10

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B. Model

Building on human rights interpretations of IP, and existing balancing regimes, the above regime should implement a sliding scale of delivery of IP and human rights. Key factors would be the nature of the human right(s) involved and the relevant social, cultural and commercial environment.¹³⁵

Thus in the examples considered, fundamental human rights¹³⁶ should prevail over IP rights in accessing critical medicines. Other possibilities, regarding online materials and education, patents and blocking research, and public ownership of groundbreaking scientific developments, have instrumental support for the prevalence for human rights. As considered above, however, there is less theoretical basis for relevant human rights being fundamental. In addition, at a more practical level, likely a driver for corporate and individual support on any scale, it is unclear how a new system would operate - particularly regarding sources of funding for groundbreaking research. Positions in both respects, however, may evolve over time.

¹³⁵ See Ginsburg, 3 re importance of context; see also Chapman, 14

¹³⁶ According to theory set out above

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At the other extreme, in commercial disputes between network or software businesses about market access, or large pharmaceutical companies over who should gain from research, a human rights based approach would have limited effect. The competing right to property of the IP owner should prevail over the rights to enjoy property of the competitor.

In between these two extremes, where issues concern new activities enabled by the internet (such as downloading music and the ability to adapt software for own purposes), the position is less clear and evolving norms most fundamental. Society may evolve, as it did regarding genetically modified foods and the environment,¹³⁷ (and indeed may do regarding education, research and groundbreaking developments) such that it is a tenable expectation to be able to engage an activity.¹³⁸ This would be a new norm which would enable the right to information, expression or property enjoyment to be delivered and to prevail over the IP right. Again, with the emergence would need to come solutions for funding and appropriate restriction of impact of the new norm.¹³⁹ This stage has not yet been reached, however, outside

¹³⁷ Although query again international nature of these concerns, in comparison with those in first category.

¹³⁸ See Malloy 1, 137 in Malloy

¹³⁹ See J.D. Miller, “Wasting Away Again in Free-Riderville” 9 February 2004

<http://www.techcentralstation.com/020904C.html> (last accessed 15 June 2004); and J.V. Delong,

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a sophisticated western minority, although the movement continues to gather
momentum.¹⁴⁰

A. Conclusion

While the power of IP can and in some situations has been seen to corrupt, the basic
framework is good. There is potential to build on existing evidence of responsible
exercise and interpretation of IP by right owners and courts, producing an effective
equitable relationship between IP and human rights for the global good.

“Today Linux, Tomorrow the World” 22 January 2004

<http://www.techcentralstation.com/012204A.html> (last accessed 15 June 2004)

¹⁴⁰ Eg, objections to Eldred (see T. Mauro, “Supreme Court downplays First Amendment argument in
copyright ruling” 16 January 2003

<<http://www.freedomforum.org/templates/document.asp?documentID=17466>> (last accessed 15 June
2004) and implications for fair use, to prevention of music downloading (www.boycott-riaa.com – last
accessed 15 June 2004) and to perceived challenge to the open source movement in *SCO v IBM*

<<http://www.opensource.org/sco-vs-ibm.html>> (last accessed 15 June 2004)