

Human rights: in the real world

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## **Abstract**

**An analysis of the relevance of human rights to litigation and exploitation of intellectual property rights in the UK. The paper considers the impact of the Human Rights Act 1998, and other human rights instruments, materials and case law. The paper concludes that while human rights are now firmly located in the IP landscape, only in limited cases will they necessarily be effective to prevail over IP, or reshape it. The paper suggests a more pervasive role for human rights in statutory interpretation, which may alter the underlying balance of interests.**

## **Introduction**

The combination of the UK Human Rights Act 1998 (HRA) and human rights-based criticism of intellectual property raises complex questions as to the proper relationship between human rights and IP which have exercised UK IP owners, those seeking access to IP and their advisers. But do human rights have a real practical impact on IP? Or are they merely a useful negotiating tool<sup>1</sup> or policy concern?

This paper considers, on the basis of case law and principles of statutory interpretation, the extent to which, within the UK litigation framework, human rights can reshape, or attack, IP; and whether, from the human rights perspective, a more fundamental reframing of IP at national and international level is required. Reference is made to the European Convention on Human Rights (ECHR)<sup>2</sup> and associated case law; international human rights treaties to which the UK is a party; case law from other jurisdictions; documents from United Nations human rights bodies; and academic and policy writings. The paper concludes that there is at present a limited role for human rights-based interpretation in IP disputes, in respect of the existence of a right, its scope, the meeting of infringement tests or exceptions or defences; and that a greater role for human rights in influencing the exercise and impact of IP would need to be pursued through other channels.

## **Problems on the ground<sup>3</sup>**

There are three main areas in which human rights impact negatively on IP: the commercial, the non-commercial and the hybrid.

The “non-commercial” comprises those circumstances which most would find it difficult to justify, beyond their professional persona: reliance on patents to restrict access to essential medicines, interfering with rights to life and health and reliance on copyright and database rights to prevent downloading of essential information, which can be inconsistent with rights to health and education. The “commercial” category includes disputes between parallel importers asserting rights to enjoy property in purchased goods (or, indeed, competitors wishing to exploit business assets) and IP owners, relying on their national IP rights to prevent parallel importing and competition. The “hybrids” include disputes based on freedom of expression: between publishers and authors, or indeed publishers and publishers, over copyright and particular content; and between critics/activists and trade mark or copyright owners regarding adverse comment and “sucks” sites.

The first category has been seized upon by activists, NGOs and the United Nations. Significant developments include resolutions of a UN High Commissioner for Human Rights’ Sub-Commission expressing concern as to the impact of IP on human rights, in particular regarding health and food.<sup>4</sup> Such engagement of society and the international community, although of no immediate impact on national infringement actions, may lead to further policy work, shift in attitudes and change – potentially culminating in new national and international IP law. Some such change has been seen, with the WTO declarations at Doha and Cancun, and decisions regarding amendment of TRIPs,<sup>5</sup> confirming the (legal) legitimacy of compulsory licensing in access to medicines. Another example is consideration of IP the World Summit on the Information Society.<sup>6</sup> But what of the more direct legal position?

## **An (existing) legal solution?**

### ***IP says no***

An IP perspective provides two powerful counter arguments to the claims set out above. First, unless (or until) an IP right is declared invalid or revoked, the relevant statute gives the IP owner particular rights, subject to limits. There would appear no scope to take other concepts (not least a rather vague concept of human rights) into account in considering infringement and remedy. Secondly, even if the UK Parliament wished to address such questions, its options are limited because of obligations under TRIPs<sup>7</sup> to provide minimum levels of protection (with optional exceptions).<sup>8</sup> Further, given the amount of relevant European Community (“EC”) legislation, UK membership of the European Patent Convention (“EPC”), and the European Commission’s interest in the field (given its potential impact on the internal market), there is little scope for creative national action.

### ***Human rights says yes***

The HRA provides, however, a limited solution. It states that, “so far as possible”, legislation “must” be interpreted so as “to be compatible with the Convention rights”.<sup>9</sup> It also forbids courts<sup>10</sup> from acting in a manner incompatible with particular Convention rights.<sup>11</sup> Accordingly, the fact that Convention rights include rights to life,<sup>12</sup> expression and information,<sup>13</sup> and education,<sup>14</sup> may have heralded a new era of IP litigation and exploitation.

Three points, however, at least limited this, and provided a basis for counterattack by IP owners. Firstly, there exists a Convention right to enjoyment of property<sup>15</sup> (the application of which in the IP context was confirmed by the European Court of Human Rights in *Anheuser Busch Inc v Portugal* (“*Anheuser Busch*”))<sup>16</sup> - and there are also argument that IP is itself a human right;<sup>17</sup> secondly, the fact that no relevant Convention rights (including the right to property) are absolute; thirdly, the fact that the HRA does not incorporate the ECHR into the laws of the UK but merely imposes an interpretive obligation “where possible”. Contrary views still exist as to what this

Human rights: in the real world means: however, once the line is crossed, there will be no role for Convention rights in interpreting IP legislation.

More broadly, it could be argued that “fundamental rights” (including but not limited to ECHR rights, again raising some basic uncertainties), must be respected under EC law;<sup>18</sup> and if EC legislation is inconsistent with such rights, it could be attacked in the European Court of Justice (“ECJ”). While possibly unattractive when faced with a commercial dispute, the argument could be raised; it can also support alternative interpretations of EC legislation, which may affect national implementing legislation.<sup>19</sup>

### ***Courts say rarely***

Existing IP and human rights case law of the UK jurisdictions reveals a limited role for human rights in restricting and reshaping IP. The three main cases<sup>20</sup> are *Ashdown v Telegraph Group Ltd* (“Ashdown”),<sup>21</sup> *Levi Strauss v Tesco Stores Ltd* (“Levi”)<sup>22</sup> and *ITP SA v Coflexip Stena Offshore Ltd* (“Coflexip”).<sup>23</sup>

#### Ashdown

The “hybrid” case of *Ashdown* concerned the publication of extracts of notes of meetings with Tony Blair from the diary of Paddy Ashdown. It was argued on the basis of the HRA that exceptions to copyright, most relevantly the residual public interest defence,<sup>24</sup> must be interpreted so as to preserve the Convention right to free expression.<sup>25</sup>

The Court of Appeal noted that copyright infringement would be a breach of the copyright owner’s property right—contravention of a human right. In such cases, the

Convention right to free expression could properly be restricted “as necessary in a democratic society.” This was not a complete justification for copyright infringement, however, as copyright contains its own restrictions on when there may be infringement. The key question was how, when copyright and free expression conflict - as the Court of Appeal thought they may do in rare cases notwithstanding the exceptions in each right, - they are to be balanced.<sup>26</sup>

The Court of Appeal found there to be a case of conflict, after analysis of the different rationales and functions of both rights:<sup>27</sup> for free expression, it could sometimes be necessary to refer to precise words from a work.<sup>28</sup> In such a case, because of the HRA, the Court was bound to apply the CDPA as far as possible in a manner consistent with freedom of expression.<sup>29</sup> To achieve this, the Court of Appeal considered that the public interest defence could protect the public interest in free expression.<sup>30</sup>

This decision was a breakthrough from the human rights perspective. Where, on an analysis of both sets of rights, their exceptions and the circumstances in question, an IP right and a human right are in conflict, human rights will prevail. The HRA enables human rights to prevail in principle and provides an interpretative route, where possible, for human rights to prevail.

Here, the CDPA converts possibility to reality, through the vehicle of the public interest provision. However, a vehicle will not always be there. In the context of an IP system deemed by an international (though not unchallenged) consensus to serve the public interest,<sup>31</sup> there may not be many cases of conflict. However, the *Ashdown* focus on exceptions, balances and facts may empower Courts to identify appropriate cases without fear of upsetting IP’s broader balance of public and private interests.<sup>32</sup>

Levi

This “commercial” case concerned parallel importation of branded jeans from outside the European Economic Area. It raised questions of Levi’s trade mark and human rights to property (in the trade mark), and Tesco’s rights to property (jeans) and free expression (to describe the jeans as originating from Levi). The Court was asked to consider whether the relevant legislation<sup>33</sup> must be interpreted in a manner which permitted parallel importing, so as to protect Tesco’s fundamental rights under the HRA and EC law: if not, that the legislation was invalid and unlawful.<sup>34</sup>

The Court rejected both parts of this argument, holding that the Convention rights relied upon by Tesco both included exceptions and conferred a discretion on legislatures as to implementation. Accordingly, it was for the legislature to balance competing interests. It considered there was no basis for finding that the outcome, and resulting limits on Tesco’s rights, conflicted with the restrictions permitted within those rights. There was no basis, therefore, for Tesco’s argument that the HRA required a more creative interpretation of those rights<sup>35</sup> and no need to consider whether, without such interpretation, the legislation was unlawful.

The court stated *obiter*, however, that the HRA did not affect established UK principles of interpreting national legislation against the backdrop of EC legislation:<sup>36</sup> the courts should strive to achieve the end and purpose pursued by the Directive in question, even if they produced an outcome inconsistent with Convention rights. The supremacy of Parliament, and the role it had created for EC principles, was unchanged by the HRA—which merely permitted a principle of benevolent construction.<sup>37</sup>

This decision must be read in context. It provides no basis to argue that, because IP owners have their own human rights, there is no place for the human rights of others. Further, the decision does not address, perhaps because of Tesco’s arguments,<sup>38</sup> the



Human rights: in the real world extent to which it would be possible, but not necessary, to submit human rights-based interpretative arguments. Finally, *Levi* leaves open a much weakened fundamental rights priority argument where there is a conflict between IP and human rights, and no apparent vehicle to explore possible interpretations. This relationship between the European Communities Act 1972 (“ECA”), parliamentary sovereignty and fundamental rights has long been, and is likely to remain, the subject of debate.<sup>39</sup>

### Coflexip

In this Scottish case, patent owners sought to rely on their human right to property to sist (similar to the English stay) a patent infringement action pending an appeal to the European Court of Human Rights against the European Patent Office Board of Appeal’s revocation of the patent. They argued on the basis of section 3(1) HRA that the relevant provision of the Patents Act 1977 (“PA”)<sup>40</sup> should be interpreted to include the term “unless to do so would be contrary to any Convention right.” No such words were included or suggested in the section, and the interpretation would have meant that section 3 HRA prevailed over the operation of the EPC.<sup>41</sup>

This argument is an example of the most extreme human rights-based approach to section 3, permitting an interpretation if it would not cut down the fundamental features of the legislation. The Inner House of the Court of Session held, however, that it was not possible to read in such a phrase, which would require courts to ignore decisions of an international tribunal.<sup>42</sup> The decision is a reminder of the limits of creative human rights-based interpretation arguments.

### The wider European angle

Notwithstanding *Levi* one may still raise a fundamental human rights-based challenge to EC legislation in the ECJ. The Netherlands challenged the validity of the EC Directive on Legal Protection of Biotechnological Inventions,<sup>43</sup> alleging that

it was inconsistent with fundamental EC rights. Although it is unclear what rights other than those in the ECHR come within this category,<sup>44</sup> the ECJ and Advocate General<sup>45</sup> both considered that it did include the right to human dignity. Even this, however, did not provide a basis for invalidating the Biotechnology Directive, since the exceptions to patenting were considered an adequate protection of dignity. Although this decision has been much criticised,<sup>46</sup> it is a reminder that IP, with its inbuilt limits, can seem impregnable to the most robust of challengers.

## **Overview**

The following lessons can be gleaned from these cases:

- (a) human rights must be borne in mind when dealing with IP;
- (b) where human rights and IP conflict, legislation should be interpreted such that human rights prevail, where there is a legislative basis for this – and see (d) below;
- (c) when challenging the validity of legislation, in considering whether there is a conflict in principle a careful balancing act must be carried out between IP and human rights and their respective exceptions;
- (d) in considering particular circumstances, this same balancing act, as well as a factual analysis should be carried out before considering whether there is a legislative basis to enable the human right to prevail; and
- (e) if there is an argument of no conflict, human rights arguments are unlikely to succeed.

How can this be applied to the three scenarios considered?

### ***Some Practical Applications***

#### Patents and life

In non-commercial cases a hypothetical balancing act between, say, patents, the right to property<sup>47</sup> and the right to life<sup>48</sup> may well suggest that the right to life should prevail. Although the scope for such a situation in the UK is limited, a possibility could be the importation from outside the EEA, by a charitable centre, of patented drugs to combat rare diseases, which treatment would not be funded by the National Health Service.

From the legal perspective, however, for the right to life to prevail it would need to be arguable that (a) the PA must be interpreted to give effect to the right to life as it would otherwise be invalid, building on the arguments in *Levi*; or (b) that (i) there was a conflict between the patent/right to property and right to life, properly construed in all the circumstances and (ii) there was a vehicle upon which it was “possible” to import an interpretation favouring the right to life.

In respect of (a), the PA was not introduced to give effect to an EC Directive but, under the ECA,<sup>49</sup> it must have effect subject to EC rights. This raises the (slim) possibility of fundamental rights arguments in national courts and the ECJ.

Regarding (b), there is clearly a conflict between IP and human rights, which would seem a rare circumstance where possible interpretations should be pursued. There appears, however, no obviously relevant exception to infringement, unclear infringement provision or basis for revocation in respect of this example; that said, there are some possibilities to pursue - although, as discussed below, difficulties exist in each case.

It could be argued that a compulsory licence to import could be sought. This would be on the basis of unmet demand, on reasonable terms, for the patented product in the UK.<sup>50</sup> Alternatively, it could be argued that the activity, of a charity at its own centre for no payment, being private and non-commercial, was non-infringing;<sup>51</sup> or that the patent should be revoked on the basis that commercial exploitation of the invention was contrary to public policy and morality<sup>52</sup> (although the issue here is as to the manner of exploitation, rather than commercial exploitation *per se*).

Another example could be groundbreaking research carried out in the UK in a profit-making operation, on the basis that the output would be donated, or licensed free of charge, for export to the developing world, or distributed on a needs basis in the UK. The research could involve activities which would appear to infringe a patent.<sup>53</sup> In such a conflict, it could be argued that the experimental purposes exception to infringement<sup>54</sup> permitted the research to be carried out - although the research looks beyond the patent and could be construed as being for commercial purposes.<sup>55</sup> If the product was immediately exported, one might argue that all potentially infringing acts would come under the umbrella of the experimental purposes exception. If sale, keeping, disposal and use is intended in the UK in respect of the “needs basis” activity, however, there is no relevant exception to found any tenable argument.

### Trade marks and speech

In the “hybrid” field, in terms of situation (a) a possible source of conflict could exist when use of a trade marked word (IP right and right to property) is considered necessary to engage in critical comment (free expression). As has been seen, the Convention rights to freedom of expression and property contain exceptions, and there are also restrictions on when a trade mark may be granted and infringed.<sup>56</sup> Thus, although one could raise a fundamental rights argument similar to that made in *Levi*, it is again unlikely to get past the first stage.

For situation (b), if use of the term was necessary, for example if the trade mark is also the name of a company, this might seem an *Ashdown* type circumstance: a conflict between two legitimate, albeit different fields. Thus, pursuant to the HRA, free expression should prevail if the legislation made this “possible”. Here, vehicles could be found in “use in the course of trade”;<sup>57</sup> the “comparative advertising” provision – use of a term to identify goods or services as belonging to the proprietor, in accordance with honest practices in industrial and commercial matters;<sup>58</sup> and use of a term to describe the “kind” or “other characteristics” of goods or services, again in accordance with honest practices in industrial and commercial matters.<sup>59</sup>

Each of these arguments is less innovative than those suggested in respect of the PA and could, on the basis of the cited provision alone, result in the conduct being excluded from infringement. However, the reference to Convention rights and the interpretive obligation where “possible” could shift the emphasis from trade mark rights, further increasing the likelihood of a finding of non infringement.

### Copyright and competition

In the “commercial” field, one might argue that, without access to copyright or database protected material or systems, a first competitor in a market would be unable to establish itself and provide a service of benefit to both itself and consumers. In the media and telecommunications, this could involve the rights to property of the competitor, and the rights to expression and information of the consumer, being in conflict with the property and IP rights of the IP owner.

Regarding situation (a), the CDPA implements EC Directives and must also be interpreted, as considered above, in the light of the ECA. The initial *Levi*-type argument is again possible. However, given the perceived benefits of copyright,<sup>60</sup> the reflection of competing interests already encompassed in it, and the exceptions in ECHR rights to expression and information, the legislative balances are unlikely to

be considered to reflect a disproportionate balance of interests. As in *Levi*, the first stage would not be reached.

However, in terms of situation (b), if an *Ashdown*-type conflict arises, reliance on the public interest provisions may again enable free expression to prevail, for example, if enabling new market entry was considered necessary to reduce prices and raise service levels in respect of fifth generation mobile phone software. However, difficulties already encountered with similar questions in the competition field,<sup>61</sup> and the existence of specialist industry regulators,<sup>62</sup> suggest that courts may be unlikely to embark on human rights activism on the “commercial” field. Further, if the relevant material in fact involved a database right, there is no relevant exception to pursue.<sup>63</sup>

## Summary

Given the present structure of UK IP legislation, it is in “hybrid” cases that courts will be most likely to give effect to an alleged infringer’s human rights. However, these may be rare cases, depending on their particular circumstances.

Final assistance might be gained from the ECHR “abuse of rights” clause:<sup>64</sup> the Convention may not be interpreted as providing a basis for any person to destroy Convention rights or limit them to an extent not permitted by the Convention. In the context of IP and human rights, if there is a legitimate balancing question in respect of relevant permitted limits, this could not assist. It may, however, provide a final argument in respect of cases concerning the right to life, to which there is no such limit. That said, this provision relates to interpretation or application of the Convention rights – query whether it could be extended to prevent a patent owner’s arguments for creative interpretation of other legislation, or the adoption of those arguments by a court. Further, although there is no relevant exception to the right

to life, the question is what use can be made of this within the PA. *Levi* would suggest the answer to be none.

## **Restacking the decks**

### ***A greater role for human rights....***

In the examples considered above, some suggested human rights-based interpretations of some IP provisions appear unlikely to succeed. If this is because of the presumptive priority and validity of IP when faced with attack, a more pervasive role for human rights might redress the balance.

### ***....but when?***

But however attractive arguments for an approach to IP legislation using human rights as a basic starting point may seem from a theoretical or policy<sup>65</sup> perspective, in both Scotland and England the essential position is clear. Statutory interpretation requires analysis of the wording of a statute in context (although the finer points of the judicial role attract much commentary and jurisprudential analysis)<sup>66</sup> As *Levi* and *Coflexip* have shown, although the HRA has had a radical impact on principles of statutory interpretation, it does not empower courts and advocates to engage in a human rights-fuelled frolic. A more fundamental role for human rights in IP legislation remains dependent upon the interpretation sought being “possible” (perhaps to fill a (newly identified?) gap or clarify an ambiguity), or human rights being accepted as part of the proper legislative context.

However, to those engaged in protecting or attacking IP rights, and in advising such persons, these should not prove unsurmountable hurdles. In respect of the latter, the broad acceptance of IP rights, at least in the developed world,<sup>67</sup> stems from their encouragement of generation of information, material and knowledge which may be used for public benefit in science, education and health. Thus they are properly situated in a context to which human rights are relevant.

Regarding the first requirement, while UK IP legislation appears to state clearly when rights will exist, when they will be infringed and what, if any, exceptions and defences exist, there is still a steady stream of litigation and case law. There are likely, therefore, to be further opportunities to explore new “possible” approaches to statutory interpretation. This is particularly so as, since the HRA, there is scope for a more flexible approach to interpretation and application of existing precedent of all courts.<sup>68</sup>

Recent case law<sup>69</sup> favours an approach to “possible” which requires the suggested interpretation to be grounded (at least) in the context, and fundamental purposes, of the legislation. The purpose of IP legislation is to create and protect IP rights, albeit while striking a balance between competing interests. From this perspective, the suggested interpretations above regarding the “commercial” categories, and possibly the “non commercial” (although this raises questions about the various aims of IP), are unlikely to appeal.

### ***....and how?***

If there is basis for a more pervasive role for human rights in interpreting IP legislation, what sources could be put before the court in arguing for particular approaches? As is considered below, in the most general sense, many possibilities exist.



HRA - again

Where “possible”, on the basis of section 3 HRA legislation must continue to be interpreted to be compatible with relevant Convention rights. This will require reference to decisions of the European Court of Human Rights<sup>70</sup> and consideration of decisions of other courts applying the ECHR. Examples, together with an overview, are provided below under “other jurisdictions”.

Further support for reference to the ECHR comes from a novel argument in the patent field. The PA implements the UK’s obligations under the European Patent Convention. It has been argued that as the parties creating the EPC were also parties to the ECHR and, as the ECHR is part of the European legal order, ECHR rights should lie at the centre of the EPC.<sup>71</sup>

The cavalry

A second line of support for human rights arguments can come from the wider sources considered in this section (international treaty, the Charter of Fundamental Rights of the European Union, TRIPs, decisions of other jurisdictions and UN activity) - although there is not an (even limited) obligation on courts to consider them, unlike the position with ECHR jurisprudence. It is proper, however, for a court to have regard to such sources to clarify the context of, and potential ambiguities in, IP legislation, and in developing tests and approaches as to how it should be interpreted in new and evolving environments of all kinds.

## **International Treaty**

## General

International treaties (and their *travaux préparatoires*) to which the UK is a party, but in respect of which there is no implementing legislation, can be persuasive and used to fill ambiguities in legislation. It is presumed that Parliament does not intend to legislate in breach of its treaty obligations; treaties should be considered in a purposive way.<sup>72</sup>

In the present field, the International Covenant on Civil and Political Rights 1966<sup>73</sup> (“ICCPR”) and the International Covenant on Economic Social and Cultural Rights 1966<sup>74</sup> (“ICESCR”) are relevant. In addition to rights similar to those protected by the ECHR,<sup>75</sup> reference to these treaties could support arguments relating to food,<sup>76</sup> health,<sup>77</sup> and participating in cultural life and the benefits of scientific progress<sup>78</sup> – potentially relevant in cases involving patents, plant varieties and copyright.

## The Charter of Fundamental Rights of the European Union<sup>79</sup> (“EU Charter”)

The EU Charter includes rights also present in the ECHR and the ICESCR: rights to life<sup>80</sup> and expression;<sup>81</sup> with some qualification, rights to health<sup>82</sup> and education;<sup>83</sup> and with detailed restriction, the right to property.<sup>84</sup> Thus, particularly given its present status, the EU Charter adds little in itself to the human rights armoury - although it could be used in combination with those other instruments to bolster the existing arguments.

More interesting, however, is the property right provision (article 17), which states that “intellectual property shall be protected.”<sup>85</sup> Despite the absence of restriction regarding IP, it is reasonable to assume that IP will be subject to the same ambit of protection as other property rights.<sup>86</sup> That said, a recital to the EC Directive on enforcement of IP rights, while respecting and observing all EU Charter and

fundamental rights, seeks specifically “to ensure full respect for intellectual property, in accordance with Article 17(2).”<sup>87</sup>

## **TRIPs**

Reference could be made to those provisions of TRIPs which make clear the wider place of IP in the international economic, social and cultural environment - not simply concerning the private interests of multinational corporations.<sup>88</sup> The so far few IP decisions of the WTO dispute settlement body could also be used. These suggest that a less property orientated approach may be possible.<sup>89</sup> However, given the ultimate pro-IP balance within TRIPs, and the wealth of background material in respect of it,<sup>90</sup> the TRIPs route is likely merely to contribute to, and consolidate, arguments already drawing from other sources.

## **Other jurisdictions**

Reference could be made to decisions of other courts interpreting the same or similar IP or human rights provisions.<sup>91</sup> There is a wealth of relevant authority: some introductory references are provided below in relation to free expression, copyright<sup>92</sup> and trade marks.<sup>93</sup> Although no clear themes can be identified, with decisions conflicting often within jurisdictions, it is evident that the same struggle is being enacted all over the world and that sometimes the interests of the IP owner do not prevail.

In respect of patents, in addition to interpretative obligations under the HRA and ECA, the PA requires courts to look to other jurisdictions. Much of the PA (including subsistence and infringement provisions) is framed so as to have “as nearly as practicable” (note again the restriction) the same effects in the UK as the

EPC, Community Patent Convention and Patent Co-operation Treaty in the territories to which those Conventions apply.<sup>94</sup> Accordingly, the Court of Appeal and Patents Court have both considered themselves compelled to look at the application and history of provisions in other countries, and to base their decisions on this.<sup>95</sup>

## **The United Nations**

As considered at the outset, United Nations human rights bodies have considered the impact of IP on human rights, and the proper relationship of the fields. Their work provides useful summaries of the negative impact of IP in some cases and the need to remedy this.<sup>96</sup> Resolutions refer to the pre-eminent status of human rights in international law and call on States to ensure that TRIPs is applied in a manner consistent with human rights. However, the United Nations work provides little guidance on how to do this. Likewise, the Vienna Declaration and Programme of Action 1993, which asserts the indivisibility, interdependence and universality of all human rights, neither recognises, nor gives guidance on, conflicts between such rights.<sup>97</sup> Thus, while, as considered, United Nations work can helpfully fuel challenges to IP, it has little practical effect in the present context.

## **Overview**

These sets of sources, together with commentaries referred to above, and the output of events such as the 1998 WIPO workshop on IP and human rights,<sup>98</sup> could provide valuable interpretive tools and support for courts<sup>99</sup> considering or proposing creative human rights approaches to IP legislation. They can assist, each as part of the jigsaw, in properly contextualising IP in its wider global and societal role.

### ***Always subject to limits***

While human rights can fuel new approaches to, or a tilt in the balance of, interpretation of IP – they cannot, at least on the approach suggested here, result in IP's wholesale rewriting or abandonment. Thus a direct paper photocopy of the whole of a document, in circumstances outside the exceptions to copyright infringement, will infringe, irrespective of motive or circumstance.<sup>100</sup> There is no basis to call in other sources to argue that there should be no infringement.

If proceedings were commenced, the defendant might instead consider admitting the conduct but arguing that this could not constitute infringement, or should continue without sanction, because it was carried out in furtherance of its human rights, or to protect those of others: and that these rights should, as a matter of international law, prevail over all other rights. However, this argument cannot succeed in UK IP law: obligations under international law which have not been the subject of UK legislation can only be relevant to statutory interpretation. Notwithstanding some more creative possibilities considered above, in cases such as this photocopy, there would seem no role for human rights-based defences or interpretations.

## **Conclusion**

This paper has explored the extent to which it is appropriate to consider human rights in conjunction with IP; when human rights should prevail over IP; when the two fields, including their exceptions, should be balanced; those cases in which, when they conflict, human rights should prevail; and the arguments for a more pervasive place for human rights, using a broad range of sources, in interpreting IP legislation.

Human rights have indeed occupied centre stage in managing and litigating IP. They can have practical and legal impact. However, they are not and cannot be a single solution for those launching holistic attacks on IP and what are seen as its negative social aspects. Before such a mission could be pursued in the UK courts, wholesale review of UK and EC legislation and TRIPs would be required.

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<sup>1</sup> See H. Jehoram "Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Approaches" [2004] EIPR 275.

<sup>2</sup> European Convention on Human Rights and Fundamental Freedoms 1951 213 UNTS 222.

<sup>3</sup> For an overview see W.R. Cornish, *Intellectual Property. Omnipresent, Distracting, Irrelevant?* (OUP, 2004) and Commission on Intellectual Property Rights (2002), "Integrating Intellectual Property Rights and Development Policy" London, UK ("CIPR").

<sup>4</sup> UN High Commissioner for Human Rights, Intellectual Property and Human Rights, Sub-Commission on Human Rights Resolutions 2000/7 ("2000 Resolution") and Resolution 2001/21 ("2001 Resolution"). See also 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.

<sup>5</sup> "Declaration on the TRIPs agreement and Public Health" DOHA WTO MINISTERIAL 2001: TRIPs. Adopted on 14 November 2001. WT/MIN(01)/DEC/2 20 November 2001 [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm); "Implementation of paragraph 6 of the Doha Declaration on the TRIPs agreement and public health" Decision of the General Council, 30 August 2003, [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm); and Decision of the General Council 6 December 2005 on amendment to TRIPs by addition article 31 bis (details at [http://www.wto.org/english/news\\_e/pres05\\_e/pr426\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr426_e.htm)) (last accessed 6 February 2006). See also British Academy lecture by Judge Edwin Cameron October 2004 "Patents and Public Health: Principle, Politics and Paradox" at <http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp> (last accessed 16 March 2005), ("Cameron") Section V.

<sup>6</sup> See Art.4 Declaration of Principles World Summit on Information Society ("WSIS") at <http://www.itu.int/wsis/docs/geneva/official/dop.html> (last accessed 10 March 2005). Wider relevant aspirations of the WSIS are at Arts 1,2, 7, 8, 24-28; re IP see Art.42. Note however the lack of focus on IP in the Tunis Commitment and Tunis Agenda for the Information Society – see <http://www.itu.int/wsis/> (last accessed 6 February 2006).

<sup>7</sup> Trade-Related Aspects of Intellectual Property Rights 1994, Annex 1C of the Marrakech Agreement Establishing the World Trade Organization. 1869 UNTS. 299.

<sup>8</sup> See eg TRIPs Arts 13, 30.

<sup>9</sup> HRA, s.3(1). HRA, s.1 sets out those ECHR rights which are “Convention rights”, including all ECHR rights relevant to IP.

<sup>10</sup> HRA, s.6(3)(a).

<sup>11</sup> HRA, s.6(1).

<sup>12</sup> ECHR, Art.2.

<sup>13</sup> ECHR, Art.10.

<sup>14</sup> ECHR Art.2, Protocol 1.

<sup>15</sup> ECHR, Art.1, Protocol 1, re right to property.

<sup>16</sup> Application No. 73049/01

[http://www.echr.coe.int/Eng/Press/2005/Oct/ChamberJudgmentAnheuser-BuschIncvPortugal111005.htm#\\_ftn1](http://www.echr.coe.int/Eng/Press/2005/Oct/ChamberJudgmentAnheuser-BuschIncvPortugal111005.htm#_ftn1) (last accessed 6 February 2006)

<sup>17</sup> On IP as a human right see A.R. Chapman “Approaching intellectual property as a human right: obligations related to Article 15(1)(c)” (2001) 35 Copyright Bulletin at 6 and L. Helfer “Human Rights and Intellectual Property: Conflict or Coexistence” (2003) 5 *Minnesota Intellectual Property Review* 47 at <http://mipr.umn.edu/archive/v5n1/Helfer.pdf>, last accessed 16 March 2005, considering, inter alia, Art.27(2) Universal Declaration on Human Rights 1948 UNGA Resolution 217 (LXIII) (“UDHR”) (non binding) and Art.15(1)(c) International Covenant on Economic Social and Cultural Rights 1966 993 UNTS 2 (“ICESCR”).

<sup>18</sup> See *Internationale Handelsgesellschaft v Einfuhr* [1974] 2 CMLR 540: fundamental rights stemming from the German constitution part of Community law; the Treaty on European Union (Consolidated version 2002 O.J. C325/5). Art.6(2) states that these include ECHR rights and fundamental rights resulting from constitutional traditions of member states.

<sup>19</sup> This raises complex questions of EC and constitutional law, considered below in the context of *Levi Strauss v Tesco Stores Ltd* [2003] RPC 18 (“*Levi*”).

<sup>20</sup> The author considers these and other cases concerning IP and human rights issues in a paper for the BILETA 2005 Belfast conference, <http://www.bileta.ac.uk/pages/Conference%20Papers.aspx>.

<sup>21</sup> [2002] RPC 5.

<sup>22</sup> [2003] RPC 18

<sup>23</sup> [2004] SLT 1285.

<sup>24</sup> Copyright Designs and Patents Act 1988 (“CDPA”), s.171(3).

<sup>25</sup> *Ashdown*, para.H5.

<sup>26</sup> *Ashdown*, paras H10,28, 45.

<sup>27</sup> *Ashdown*, para.29-31.

<sup>28</sup> *Ashdown*, paras 39, 40 and 43.

<sup>29</sup> *Ashdown*, paras 45, 58. Para.45 does not specifically mention the HRA as the basis for free expression prevailing over copyright).

<sup>30</sup> *Ashdown*, paras 47, 58.

<sup>31</sup> For various approaches see P. Drahos “Biotechnology Patents, Markets and Morality” EIPR 1999, 21(9), 441-449; critical analysis in the CIPR; and the World Intellectual Property Organization (“WIPO”) “WIPO Intellectual Property Handbook: Law, Policy and Use”, <http://www.wipo.int/about-ip/en/iprm/index.htm> (last accessed 3 August 2005).

<sup>32</sup> See examples in J. Griffiths “Copyright Law After Ashdown – Time to Deal Fairly with the Public” [2002] IPQ 240, T. Pinto “The Influence of the European Convention on Human Rights on Intellectual Property Rights” [2002] EIPR 209. See interesting analysis in M. Birnhack, “Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act” [2003] Ent. L. Rev. 24.

<sup>33</sup> First Council Directive 89/104 (“the Directive”) implemented by the Trade Marks Act 1994 (“TMA”).

<sup>34</sup> *Levi*, paras 4, 22, 23, 38.

<sup>35</sup> *Levi*, H12-15, paras 39-42.

<sup>36</sup> *Marleasing* Case C-106/89 [1990] ECR I-4135, discussed at *Levi*, paras 27-9. See also *Thoburn v Sunderland District Council* [2002] 1 CMLR 50, which considered that this supremacy of EC law comes from the ECA.

<sup>37</sup> *Levi*, H21, paras 43-44.

<sup>38</sup> *Levi*, paras 22, 38.

- <sup>39</sup> See for brief overview C. Manchester et al., *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation*, Sweet & Maxwell (2<sup>nd</sup> ed., 2000) (“Manchester”) 100, 144; and P. Johnson “The public interest: is it still a defence to copyright infringement” Ent. L.R. 2005 16(1), 1-6.
- <sup>40</sup> S 77(4A), providing that if a European Patent (UK) is revoked in accordance with the EPC, the patent will be treated as having been revoked under the PA.
- <sup>41</sup> *Coflexip*, para. 16.
- <sup>42</sup> See *Coflexip*, paras 20, 24-5 (reliance on *Lenzing AG’s European Patent* [1997] RPC 245 (“*Lenzing*”).
- <sup>43</sup> (98/44) O.J. L 213/13 (“Biotechnology Directive”).
- <sup>44</sup> See Treaty on European Union, Art.6(2).
- <sup>45</sup> [2001] ECR I-7079.
- <sup>46</sup> See D. Beyleveld and R. Brownsword “Is Patent Law Part of the EC Legal Order? A Critical Commentary on the Interpretation of Article 6(1) of Directive 98/44/EC in Case C-377/98” [2003] IPQ, 97.
- <sup>47</sup> Art.1, Protocol 1 ECHR right to peaceful enjoyment of property, which may be removed through the public interest, law and general principles of international law, and be controlled by the state as necessary in accordance with the general interest.
- <sup>48</sup> Article 2 ECHR, with some limited exceptions which are not relevant here.
- <sup>49</sup> ECA, ss 2(1), 2(4).
- <sup>50</sup> PA, ss 48, 48A(1)(a). The demand is unmet through decisions of those other than the patent owner. The decision would lie at the Comptroller’s discretion: see PA, s.50.
- <sup>51</sup> See PA, s.60(5)(a) and *Smith Kline & French Ltd v Evans Medical* [1989] 1 FSR 513: the question of whether use is “non-commercial” is subjective; and “private” means private as opposed to public.
- <sup>52</sup> PA, ss1(3), 72(1)(a), 74.
- <sup>53</sup> PA, s.60(1)(a).
- <sup>54</sup> PA, s.60(5)(b).
- <sup>55</sup> *Cf Monsanto v Stauffer* [1985] RPC 515.
- <sup>56</sup> TMA, ss 1, 3, 4, 5, 11.
- <sup>57</sup> TMA, s.10(1); *Reed Executive Plc v Reed Information Ltd* [2005] FSR 3.
- <sup>58</sup> TMA, s.10(6); *Vodafone Group v Orange Personal Communications* [1997] FSR 34.
- <sup>59</sup> TMA, s.11(2)(b); *British Airways v Ryanair* [2001] FSR 32.
- <sup>60</sup> Eg as considered in *Ashdown*.
- <sup>61</sup> See *RTE and ITP v Commission (‘Magill’)* [1995] ECR I-743, and *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (Case C-418/01) [2004] 4 CMLR 28) and an EC Commission Decision relating to a proceeding under Art.82 of the EC Treaty: Case COMP/C-3/37.792 *Microsoft* [2004] 5 CMLR 21.
- <sup>62</sup> See eg <http://www.ofcom.org.uk/>.
- <sup>63</sup> See Copyright and Rights in Databases Regulations 1997.
- <sup>64</sup> ECHR, Art.17 and a Convention Right (HRA, s.1).
- <sup>65</sup> Eg on the basis of the UN Millennium Goals  
<<http://www.un.org/millennium/declaration/ares552e.pdf>> (last accessed 3 August 2005).
- <sup>66</sup> For excellent overviews see Hon Justice Michael Kirby, *Judicial Activism*, Hamlyn Lectures (Sweet & Maxwell, 2004), 31-4, 65-66, 70-71, 74-76; Manchester 33, 37-76; M. Zander, *The Law Making Process* (Cambridge University Press, 6<sup>th</sup> ed. 2004: “Zander”), 127-147, 184-202, 330-370; and D.M. Walker, *The Scottish Legal System. An Introduction to the Study of Scots Law*, Sweet & Maxwell (8<sup>th</sup> ed., 2001), 413-432.
- <sup>67</sup> For further information in this regard, see eg P. Drahos “Negotiating Intellectual Property: Between Coercion and Dialogue” in P. Drahos and R. Mayne (eds) (2002) *Global Intellectual Property Rights. Knowledge, Access and Development* (Palgrave MacMillan) and also CIPR.
- <sup>68</sup> See eg Manchester, 148-151; *Ashdown*, para.71.
- <sup>69</sup> *Ghaidan v Godin Mendoza* [2004] UKHL 30, *Coflexip*.
- <sup>70</sup> HRA, s.2.
- <sup>71</sup> See D. Beyleveld and R. Brownsword, *Mice, Morality and Patents. The Onco-mouse Application and Article 53(a) of the European Patent Convention* (Common Law Institute of Intellectual Property, 1993), 40, 68, 69.



<sup>72</sup> See Zander, 157; Manchester, 52, 92, 97-8. *James Buchanan v Babco Forwarding* [1978] AC 141, *Fothergill v Monarch Airlines* [1981] AC 251, *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871; and Vienna Convention on the Law of Treaties 1951, Art.31.

<sup>73</sup> 999 UNTS 171.

<sup>74</sup> 993 UNTS 2.

<sup>75</sup> Rights to life and expression/information: ICCPR Arts 6 and 19(2), and right to education ICESCR Art.13.

<sup>76</sup> ICESCR, Art.11.

<sup>77</sup> ICESCR, Art.12.

<sup>78</sup> ICESCR, Art.15.

<sup>79</sup> Charter of Fundamental Rights of the European Union O.J. (C 364) 20 2000, not binding pending the outcome of EU Member States' constitutional referendums. For further analysis of the EU Charter see de la Rochere "The EU Charter of Fundamental Rights" [http://www.ecln.net/elements/constitutional\\_debate/perspective2004/part1/1\\_04.html](http://www.ecln.net/elements/constitutional_debate/perspective2004/part1/1_04.html) (last accessed 24 May 2005).

<sup>80</sup> EU Charter Art.2 (unrestricted).

<sup>81</sup> EU Charter Art.11 (unrestricted).

<sup>82</sup> EU Charter Art.14.

<sup>83</sup> EU Charter Art.35.

<sup>84</sup> Right to property is subject to the public interest, law (with compensation if it is removed being paid fairly and in good time), and the fact that property ownership may be regulated by law as necessary in the general interest (EU Charter, Art.17(1))

<sup>85</sup> EU Charter, Art.17(2).

<sup>86</sup> See also H.L.MacQueen "Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law" (2005) 2:4 *SCRIPT-ed* 486 @ <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-4/hlm.asp> (last accessed 6 February 2006) For a general consideration of the impact of the apparent lack of restriction, in comparison with the similar ECHR rights, see N MacCormick "Human Rights and Competition Law: Possible Impact of the Proposed EU Constitution" (2005) 2:4 *SCRIPT-ed* 478 @ <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-4/maccormick.asp> (last accessed 6 February 2006)

<sup>87</sup> Directive 2004/48 on the enforcement of intellectual property rights O.J. L 157 30 April 2004.

<sup>88</sup> TRIPs, Arts 7, 8(1). See *Parfums Christian Dior v Tuk* [2000] ECR I-11307, paras 42-44, 49: TRIPs does not have direct effect but, as the European Community is a party to TRIPs, national courts are required by European Community law, in an area where the Community has legislated, to interpret legislation, as far as possible, to give effect to the object and purpose of TRIPs; in other situations, *Lenzing*, 269-271 argues that TRIPs is not directly effective in the UK.

<sup>89</sup> Eg *WT/DS 160* (regarding the three step test exception to copyright (not conflict with a normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author) within TRIPs Art.9(1) and the Berne Convention for the Protection of Literary and Artistic Works, Art.9(2); and the encouraging, from a wider human rights perspective, *WT/DS/114 R* regarding steps for generic testing before patent expiry (decisions available at <http://www.wto.org> under Disputes).

<sup>90</sup> See eg Drahos.

<sup>91</sup> See generally Manchester, 22.

<sup>92</sup> Regarding the ECHR, there are conflicting cases in the Netherlands *J.K. Rowling, Uitgeverij De Harmonie B.V. and Time Warner Entertainment Company, LP v Uitgeverij Byblos B.V* cf *Church of Scientology v XS4ALL* See <http://www.xs4all.nl/nieuws/bericht.php?id=625&taal=en&msect=Nieuws&year=2005> (last accessed 7 February 2006) and re decision of Supreme Court December 2005 see <http://www.edri.org/edriagram/number4.1/scientologycase> (last accessed 6 February 2006). See also B. Hugenholtz "Copyright and Freedom of Expression in Europe" <http://www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc> ("Hugenholtz", last accessed 25 May 2005) for overview of other decisions on similar facts, again reaching conflicting views, of European national courts. An introverted IP based approach was seen in France: see C. Geiger "France. Intellectual Property Code, AT&L 122-5-3; European Convention on Human Rights Art. 10 "Utrillo" (2004) 6 IIC 716.

<sup>93</sup> Regarding trade marks and free speech, see the greater success for free speech in France (*Societe Gervais Danone v Societe le Reseau Voltaire* [2003] ETMR 26 TGI, Paris and *Association Greenpeace France v S A Societe Esso* Cour d'Appel de Paris [2003] ETMR 66 and the Constitutional Court of South Africa in *Laugh it Off v South African Breweries* (2005)

<http://www.constitutionalcourt.org.za/site/laughitoff.html> (last accessed 2 August 2005). See also consideration by the European Court of Human Rights of human right to property in respect of use of the "Budweiser" trade mark in Portugal, notwithstanding a contrary treaty, in *Anheuser Busch* – under the HRA, s.2, the decision must be taken into account when interpreting the right to property.

<sup>94</sup> PA, s.130(7).

<sup>95</sup> See *Pioneer v Warner* [1995] RPC 487 and [1997] RPC 757.

<sup>96</sup> See 2000 Resolution and 2001 Resolution; note also Statement on Intellectual Property and Human Rights of UN Committee on Economic Social and Cultural Rights of December 2001

(<http://www1.umn.edu/humanrts/esc/escstatements2001.html>) and commentary on General Comment (<http://www.ip-watch.org/weblog/index.php?p=145&res=1024&print=0>) (both last accessed 6 February 2006)

<sup>97</sup> See [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) (last accessed 24 May 2005), Art.5.

<sup>98</sup> See [http://www.wipo.int/tk/en/activities/1998/human rights/papers](http://www.wipo.int/tk/en/activities/1998/human%20rights/papers).

<sup>99</sup> See generally Zander, 442-5.

<sup>100</sup> CDPA, ss 16(1), (3).