

**Expert Meeting: “Towards Utopia or Irreconcilable Tensions?
The interface between Intellectual Property,
Competition and Human Rights”**

held in the Playfair Library Hall, The University of Edinburgh,
2nd and 3rd December 2004

Edited Note of Discussions provided by Dr Charlotte Waelde (Chair), Abbe Brown (co-chair), Nadine Eriksson-Smith (minutes)

Background and Format

The meeting, convened by Dr Charlotte Waelde, Co-Director of the AHRB (Arts and Humanities Research Board) Centre for Studies Intellectual Property and Technology Law, and Abbe Brown, Ph.D Student, The University of Edinburgh involved the participation of approximately twenty experts from the developed and developing world. The experts were drawn from academia; the World Intellectual Property Organisation; UNESCO; UN Sub Commission on Promotion and Protection of Human Rights; UK Competition Commission; UK Intellectual Property Advisory Committee and the World Trade Organisation. Participation was by invitation only. Speakers each made short presentations followed by discussion amongst the group of experts and an invited audience.

The meeting was introduced by Dr Charlotte Waelde who made reference to Judge Edwin Cameron’s lecture on “Patents and Public Health: Principles, Politics and Paradox”¹ the Inaugural British Academy Law Lecture held on the 19th October. This provided a timely work from which to take forward the debate about the interplay between the themes of intellectual property, competition and human rights. Dr Waelde thanked all participants for attending the meeting and talked of her hopes for using the meeting as a platform from which to take forward the key themes under discussion. Thanks were given to the British Academy and the Arts and Humanities Research Board for supporting the initiative.

Participants

Dr Charlotte Waelde (chair); Abbe Brown (co-chair); Professor Sir Neil MacCormick (keynote speaker); Professor Hector MacQueen; Professor Paul Geroski; Professor Enyinna Nwauche; Professor Thomas Cottier; Professor Valentine Korah; Mr Antony Taubman; Ms Petya Totcharova; Professor Alan Miller; Mr Rob Anderson; Ms Francoise-Jane Hampson; Professor Willem Grosheide; Nadine Eriksson-Smith (minutes)

Key Points:

Intellectual Property Focus

¹ Judge Edwin Cameron’s paper can be downloaded from <http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp>

- Transformation in the role and importance of intellectual property law partly due to changes in technologies, scientific advances and societal expectations.
- Not all intellectual contributions are afforded the protection of intellectual property laws.
- Difficulties in treating intellectual property as “property”, and as such being perceived as a human right, although instruments do protect the right to property (eg ECHR) and intellectual property as property (draft EU Constitution).
- Intellectual property could be seen as creating monopolies, inconsistent with the goals of competition policy.
- To what extent does intellectual property actually foster or inhibit innovation in different fields – e.g. the case of “patent thickets”?
- UDHR and ICESCR arguably treat intellectual property rights as human rights and natural rights theory supports (some) intellectual property as a human right; the ECHR does not deal with human rights but potentially covers copyright/moral rights concerns in the context of freedom of expression.
- Much balancing between intellectual property and the public interest has already taken place – e.g. Berne Convention, work of WIPO (currently developing norms for protection of traditional knowledge)
- More sui generis rights: just a piecemeal solution storing up problems?

Competition Focus

- Debate as to the proper function of competition law and policy: protect consumers, protect competitors or promote competition. Is it about outcomes or mechanisms? What is the proper role of business, consumers and government?
- Are intellectual property, encouragement of innovation and competition policy inconsistent? Competition opposes monopolies, however monopolists may raise prices to finance research and development, both increasing the likelihood of it being carried out, and absorbing risk
- Different types of innovation (sustaining, radical) to be dealt with differently by competition law and policy and intellectual property?
- The essential facilities doctrine may be relevant in redressing imbalances arising from intellectual property rights – but consideration of this in EU has proved complex and it has been rejected in US. In any event, the doctrine has no human rights dimension. Could this be addressed?
- Competition law produces outcomes that are not necessarily, and do not aspire to be, ‘fair’. However, it offers useful tools, such as parallel importing and compulsory licensing.
- Some movement to international competition law cooperation – WTO/OECD

Human Rights Focus

- ‘Human rights’ has become increasingly incorporated in the general consciousness, through instruments such as ECHR, ICESCR. Likewise, growing focus of UN bodies (UNESCO, UNHCHR) on IP and human rights
- More work still to be done in creating environment where human rights underpin matters such as intellectual property and competition .
- Need for respecting different perspectives from various jurisdictions.
- Still basic question of the appropriate relationship between some/all human rights and economic rights – when should the latter trump the former, if at all.

- Is enforcement and development of human rights a vertical question? But note developments e.g. Naomi Campbell case, re horizontal impact: individuals have human rights which should be respected by other individuals
- Individualistic perspectives towards human rights present difficulties for the definition of ‘communities’ and the values associated therein. Are people part of multiple communities?
- The difference between human rights laws and human rights principles. The principles were viewed as fundamental with the potential to trump all others – but how is this to work in practice and be enforced? Distinction between law and role in policy making.
- Corporate Social Responsibility and civil society activism could have practical and legal impact, although healthy scepticism is required. Efforts required to develop conduct (e.g. Business Leaders Initiatives) and a legal framework, directing conduct against the background of governance codes and international human rights obligations of states.
- States still have primary human rights responsibilities under international law and any progress should not replace these.
- There was a danger of applying human rights laws across the board when potentially other laws were more suited – human rights is not always relevant.

‘Trade’ was highlighted as the fourth basic element in discussions of intellectual property, competition and human rights in addressing perceived challenges. Key issues are the need for equal treatment, posing an obstacle to creative solutions, and the appropriate use of preference schemes and waivers. Human rights has previously been relevant here, e.g. abolition of slavery. What is the most effective way forward?

Outcomes

Theoretical and practical suggestions to assist in balancing the tensions inherent in the interplay between intellectual property, competition and human rights, and challenges which may be faced, were offered during the course of discussions over the two day period and in consideration of the case studies.

Possible Utopia

Consider moving away from concepts of tensions, conflict and priority, and focus more on what should be key values reflected in any solution. Is a spectrum of continuous rights, with different weightings, more appropriate?

Goal could be sustainable orderly market economy subject to government controls to prevent too great a focus on market interests: this would require concrete, practical and specific measures together with enforcement regimes. Is a solution to use market economy as the best way of ordering society, while utilising economic the benefits accruing from this to promote social welfare?

One possibility might be that for each commercial patent granted to an organisation for the purpose of both meeting a demand and generating a profit (e.g. obesity),

another would be granted to benefit humankind (e.g. malaria). This could lead towards a more inclusive and profitable healthcare business for private stakeholders while still benefiting those in need. The most successful practical solutions presently available are found outwith the traditional legal framework eg PPP/PFI Malaria treatment initiatives. Another of these, the open source initiative, can be seen as an expression of human rights concerns.

Exemptions in intellectual property rights were also mentioned as a potential means of overcoming tensions. There was discussion of appropriate means of framing and utilising these, and of the cosmetic impact of further, possibly strictly unnecessary, exceptions (e.g. impact of Doha on compulsory licences and essential medicines).

Dialogue with trans-national corporations and NGOs was viewed as necessary to settle both public and private interests; corporate social responsibility may be a useful mechanism. However, government action will also be required.

Irreconcilable Tensions

Difficulties inherent in Dystopia included the need to enforce national intellectual property rights in individual territories, with different legal and social cultures and economic environments. Inconsistency (at the very least) is therefore inevitable._

Unlike intellectual property rights, human rights are humanitarian, bypassing the traditional confines of national boundaries. However breaches of human rights are enforced either through limited geographical frameworks or are the subject of limited international means of monitoring and policing adherence. This should not be the case, as observance of human rights by states is an obligation of international law. In either case, however, economic rights and interests, often of a multinational corporation owning intellectual property rights, are likely to take precedence. Reasons for this include the (un)willingness to pursue litigation, lobbying strength and the perceived imbalance in framing intellectual property rights and exceptions.

Given the above, even adoption of human rights approaches will not necessarily result in human rights being a constant agenda focus.

There are perceptions that international organisations are either “for” or “against” intellectual property or human rights. The reality is that most are trying to seek a balance. The challenge is in pursuing this and engaging with right holders and civil society.

Present systems of competition law are of limited creative use (strict tests for compulsory licence etc).

The Way Forward

Given the diversity of geographical and specialist interests a clear picture is required of:

- the desirable outcome(s);
- the ends to be achieved; and

- how the challenges will be managed.

A framework could then be built which would address and respect different interests and concerns as well as making an assessment of the likelihood of implementation. Further meetings were needed between the experts. These should focus on a variety of case studies and over time, and with the experience of the coming together of the different disciplines, assess whether it was possible to move towards consensus. In addition to the representatives present at the meeting, a corporate lawyer should be invited.

Papers from contributors would be invited and published in due course on the website along with the available conference presentations.

Closing thoughts:

Intellectual Property is properly subject to both human rights and competition law, and should so far as possible be made congruent with them. Nothing in either can be taken as necessarily inimical to intellectual property ownership and exploitation.

These three areas of law and policy shade into one another in some well discussed ways, and in other ways less well explored. This may provide unpleasant surprises for those seeking fundamental conflict, but points to the way that these forms of discourse and analysis can illuminate and enhance a shared policy space, to yield robust and more broadly based legal instruments that in turn serve a more inclusive conception of public welfare.

As long as human rights standards or norms (which is not the same as having regard to the public interest) are not (or not sufficiently) internationalised into international and national intellectual property institutions, human rights can play an important role in arriving at a more or less balanced exercise of intellectual property rights. Competition law can play under the circumstances the same or a similar role.

The notion of a spectrum of human rights dealing with or addressing different interests with the consequence that States may have room for manoeuvre in which to adjust human rights, or to harmonise human rights with other societal interests according to the particular interest under consideration is illuminating.

I am encouraged to continue to look for the interfaces between human rights, intellectual property, competition and trade having drawn important insights and met new players in the field.

Dr Charlotte Waelde
January 2005

Programme

The programme consisted of a series of presentations followed by questions and discussion at the end. Where available, presentations can be downloaded directly from the conference web pages.² The format was as follows:

Day 1 - Session 1:

Keynote: Professor Sir Neil MacCormick, University of Edinburgh

Chair – *Abbe Brown, AHRB Research Centre for Studies in Intellectual Property and Technology Law, University of Edinburgh*

Professor Hector MacQueen, AHRB Research Centre for Studies in Intellectual Property and Technology Law and Intellectual Property Advisory Committee, UK Patent Office

Intellectual Property - relevant considerations in respect of Competition Law and Human Rights

Professor Paul Geroski, UK Competition Commission

Competition Law – relevant considerations in respect of IP and Human Rights

Professor Enyinna Nwauche, Rivers State University of Science and Technology, Nigeria

Human Rights – relevant considerations in respect of IP and Competition Law

Session 2:

Chair: *Professor Paul Geroski, UK Competition Commission*

Professor Valentine Korah, University of London

The interface between IP and Competition in the developed world

Professor Thomas Cottier, University of Berne

The interface between competition and human rights in the developed and developing world

Session 3:

Chair: *Professor Hector MacQueen, AHRB Research Centre for Studies in Intellectual Property and Technology Law and Intellectual Property Advisory Committee, UK Patent Office*

² Presentations are available from <http://www.law.ed.ac.uk/ahrb/conference/programme.asp> or by contacting the AHRB Research Centre for Studies in Intellectual Property and Technology Law on 00 44 (0)131 650 2014.

Professor Willem Grosheide, Utrecht University

The role of human rights in safeguarding and restricting the exercise of IP

Professor Alan Miller, University of Strathclyde

The role of corporate social responsibility in the exercise of IP

Day 2 – Session 1:

Chair: *Professor Willem Grosheide, Utrecht University*

Mr Antony Taubman, Head of Traditional Knowledge Division, World Intellectual Property Organisation

Activities and initiatives of WIPO regarding IP, Competition and Human Rights

Ms Petya Totcharova, Legal Officer, Cultural Enterprise and Copyright Section, UNESCO

Activities and initiatives of UNESCO regarding IP and human rights

Mr Rob Anderson, IP Division, World Trade Organisation

Activities and Initiatives of WTO regarding IP, competition and human rights, with particular focus on TRIPS and links with WIPO

Ms Françoise-Jane Hampson – University of Essex, UK delegate on UN Sub Commission on Promotion and Protection of Human Rights,

IP and human rights

Case Studies

Case Study A

Pregnant woman A, in African country X, suffers from HIV/AIDS. There is as yet no pharmaceutical patent system in country X, although it is a member of the WTO.

A would be able to pay a limited amount for treatment. An international NGO would also be able to help.

The necessary antiretroviral drugs to treat A are not available at all in country X. They are available in neighbouring country Y where they are the subject of a patent. There is a generic equivalent in another African country, where there is patent protection, made by a growing international generic manufacturer which recently relocated from India. The patent owner has threatened litigation, notwithstanding that requests have been repeatedly made for a compulsory licence, which, under national law, should provide a limited defence. The patent owner is being blatantly unreasonable. The generic manufacturer is also in the testing stage of work on a second generation drug, and has again been threatened with patent litigation.

A cannot afford to go to country Y for treatment or to buy in the patented product. A and the local healthcare system are also unwilling to explore importation of the generic drug– indeed the local doctors are largely reluctant to treat HIV/AIDS as they consider it may be linked to witchcraft. In contrast, the NGO has secured funding to set up a small local manufacturing operation and treatment centre and is anxious to assist.

Consider the options which are available to A, the NGO, the generic manufacturer and the patent owner, which is based in Japan; what would be a mutually acceptable solution; what changes in approach or law would be required; is this likely? Would the solution be enforceable?

Finally, consider whether your proposed solution could also be adapted to fit Case Studies B and C – should it?

Case Study B

B is an up and coming high quality Irish novelist who has achieved some local success. She believes strongly in sharing her work with others and has placed her work, and her works in progress, on her website.

B had previously secured a hard copy publishing deal with a large Canadian corporation for her existing output and 3 further novels. Hidden in the small print of the contract, which was concluded on line, is a clause which states (a) that only the Canadian corporation may publish her existing and any future work in any medium; (b) that no “fair dealing” use may be made of any of her works; (c) if B should ever publish elsewhere, then the contract will terminate, she will be liable to pay high compensation, and must never write anything again; (d) that the corporation will have the right to make any changes they see fit to her work; and (e) that the work will only be sold in the supermarket chain operated by the corporations sister company.

B’s second novel is very successful and has become a standard text in high schools throughout the United Kingdom and, through an exchange programme, in Bolivia.

The corporation becomes aware of B’s activity and wishes to enforce the contract and prevent the educational use. What options are available to B and the schools? Could any solution be used in case studies A and C? Is this an issue?

Case Study C

The Government of Narnia wishes to compile a database of key pieces of cutting edge information relating to treatment of obesity. Some information is already available but some requires to be created by further research or collection. The Government enters into a public/private partnership with STV company to compile this.

XYZ company is then granted an exclusive licence to administer all use of and access to the database, including any use of information contained in the database for

developing a new product or delivering a service. XYZ builds a very successful business, charging large fees for use of information and data.

Small new business, ABC Personal Trainers, wishes to offer its clients (which include businesses and individuals referred by the state funded health service) tailored nutrition programmes. As a result, ABC wishes to use and develop some of the information in the database (although insofar as the information is available elsewhere, they have obtained it from those other sources). XYZ demands extremely high licence fees and threatens to obtain an emergency court order preventing ABC from launching its new business initiative unless these are paid.

Can ABC obtain access to the information without the fee? Should it be able to? Would it be different if the database was of cancer cures? If the information was wholly secret, or wholly public? Does it/should it depend on the use to be made of it by ABC/the nature of ABC's customers? What if the venture was wholly private or government funded?

Consider the extent to which possible solutions to this scenario fit with the issues raised by Case Studies A and B.