

TOWARDS UTOPIA OR IRRECONCILABLE TENSIONS?

THOUGHTS ON INTELLECTUAL PROPERTY, HUMAN RIGHTS AND COMPETITION LAW

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Intellectual property is, on any view, in crisis.

In one perspective, there is not enough protection in intellectual property law for innovation and creativity, and therefore we need more than we have got. As the world grows smaller and more inter-connected economically, technologically and socially, so we need to expand the scope of existing intellectual property rights (IPRs), such as patents, copyright and trade marks, and to add new forms to protect new technologies undreamed of by those who created the existing forms of intellectual property (IP). On this view, we need the rewards of IP, and the returns they can generate for their owners, to encourage investment in innovation of all kinds, the only way to ensure continued social and material progress.

The other perspective is perhaps best caught in two quotations from our most eminent professors of IP in the United Kingdom. First, Bill Cornish:

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Freedom to compete should remain the norm from which any argument for a special case has to be made. That position is challenged by campaigns to make all investment values the subject of exclusive protection – the more so if the trademark model is followed, or indeed the e-commerce contract, so that no time limit is imposed on the investment right. It is IPRs and their relations which should be treated as exceptions, each with its own objectives, and each proportionate to the achievement of its particular goal. In stressing proportion, one is claiming that there will frequently be countervailing interests – of new competitors as well as consumers – which need to be brought into account in shaping the reach of legal rights. It is vital to resist the sanctimony of property language, let alone higher absolutist ideals, when it is deployed in order to claim that there is little or no room for mediating such conflicts.¹

Second, David Vaver:

Intellectual property cannot be treated as an absolute value. [As I have argued elsewhere,] against it “are ranged values of at least equal importance: the right of people to imitate others, to work, compete, talk, and write freely, and to nurture common cultures. The way intellectual property should be reconciled with these values – or vice versa – has changed much over time and continues to vary among countries and

¹ W R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004), 113-114.

among legal systems. The adjustments occur for social and economic reasons; they are not preordained by natural law. Where a particular line should be drawn can certainly not be answered by circularities like 'intellectual property is property'.²

In essence these quotations counter the play and pull of the idea of property in IP and emphasise instead the need for competition, freedom of speech and the spread of culture as equally weighty aspects of legal, indeed public policy. Both Cornish and Vaver, in the works from which I quote, tend however to focus upon the solutions to the issues thus identified which come from the shaping of IP law itself, rather than from those other areas of law that exist to promote and protect the other interests involved.

But Annette Kur, in a recent magisterial survey of the issues confronting IP now, and the research challenges that they present, has taken a different approach.³ She argues that key issues upon which we should focus include the following:

(1) the interface of IP with competition law.

Here the interface has developed particularly since the great Magill case was decided by the Court of Justice of the European Communities (ECJ)

² D Vaver, "Intellectual property: the state of the art", (2000) 116 *LQR* at 636.

³ A Kur, "A new framework for intellectual property rights – horizontal issues", (2004) 35 *IIC* 1.

in 1995.⁴ In that case, the manner of exploitation of a copyright to prevent new products reaching the marketplace in response to consumer demand was held to be abuse of a dominant position under what is now Article 82 of the EC Treaty. The issue of the capacity of competition law to regulate IP has been highlighted above all, however, by the ongoing cases against Microsoft, the world's leading software company, in both the USA and the European Union, which have succeeded to some extent in compelling the company to change its practices with regard to certain aspects of its programmes, thus enabling competitors to enter the market.⁵

(2) the ethical issues surrounding IP

Kur lists these as including:

- IP in genetic material;
- IP in pharmaceuticals in relation to their exploitation in developing countries;
- IP in traditional knowledge (TK);
- IP and freedom of speech, which has had impact, not only upon the obvious copyright, but also on trade marks;⁶

⁴ Case C-241/91, *Radio Telefis Eireann v Commission* [1995] ECR I-743, aff'g the Court of First instance [1991] ECR II-485.

⁵ For the European decision see BBC News Online, 24 March 2004: <http://news.bbc.co.uk/1/hi/business/3563697.stm>, and for subsequent developments, see below, note 24 for US developments, and cases elsewhere in the world, see BBC News Online, 22 December 2004, <http://news.bbc.co.uk/1/hi/business/3560537.stm>.

⁶ See also P B Hugenholtz, "Copyright and freedom of expression in Europe", in R C Dreyfuss, D L Zimmerman and H First (eds), *Expanding the Boundaries of Intellectual Property* (2001), 343-364; and further on the trade mark cases, which involved Greenpeace's satirical use of the

- IP in other human rights, such as privacy and education

The ethical issues have been highlighted by events in South Africa in particular, where in April 2001, after a long struggle, pharmaceutical companies dropped their court challenge to legislation which enabled the import of unlicensed drugs as part of the battle against the AIDS epidemic in the country.⁷ These drugs were of course much cheaper than the patented ones, and the case therefore raised significant issues about the relevance of rights to life and health under the South African Bill of Rights.⁸ In November of the same year there was published under the auspices of the World Trade Organisation the Doha Declaration, which recognised that “under WTO rules no country should be prevented from taking measures for the protection of human ... life or health” (para 6) and highlighted “the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines” (para 17).⁹ In the United Kingdom, these and other issues about IP and developing countries were

trademarks of certain well-known companies to highlight their allegedly disastrous activities in relation to the environment, Christophe Geiger, “Fundamental rights, a safeguard for the coherence of intellectual property law”, (2004) 35 *IIC* 268-280. Dr Geiger explores copyright and human rights in his 2003 Montpellier thesis, “Droit d’auteur et droit du public à l’information, approche de droit compare”, and I am grateful to him for sending me a copy of this valuable contribution.

⁷ See BBC News Online 19 April 2001: <http://news.bbc.co.uk/1/hi/world/africa/1285097.stm>.

⁸ See Articles 11 and 27.

⁹ Further on these issues, with especial reference to South Africa, see Judge Edwin Cameron’s British Academy Lecture in Law, written with Jonathan Berger and delivered in the AHRB Research Centre at Edinburgh University on 19 October 2004, “Patents and public health: principle, politics and paradox”, available in draft form on the Centre’s on-line journal, SCRIPT-ed: <http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp>.

explored in depth in the 2002 Report of the Commission on Intellectual Property Rights set up by the Government.¹⁰

With regard to these ethical issues, Kur urges researchers and commentators to be explicit about their own values in developing critiques of the law, from whatever perspective, and to be more critical of the assumed benefits of IP for the public. In a footnote, she also suggests that a more critical stance should also be taken towards the assumed detriments of IP as well.

Kur's agenda seems sound to me, as does the observation with which she opens her paper:

In order to face these challenges, it is no longer possible for IP lawyers and academics to work in an isolated fashion, but that research networks have to be established, and that these should also include participants from other disciplines.¹¹

That is exactly what this workshop is about.

In the spirit proposed by Kur, let me expose the (no doubt incoherent) values which I espouse generally in approaching public (and private) affairs:

¹⁰ See the Commission's website, <http://www.iprcommission.org/home.html>.

¹¹ *Ibid*, at 1.

- A belief in the fundamental importance of the individual, and of respect for individual dignity and liberty – do as you would be done by;
- A belief that individuals are not isolated atoms and have to be understood in the context of the (many) communities in which they live;
- The need to strive for an appropriate balance between the individual pursuit of self-interest and the interests of the various wider communities in which the individual participates;
- A belief in the market economy as in general the best way of ordering society to allow individuals to flourish while necessarily having regard for the interests of others; with free competition as the lifeblood of the market economy;
- A belief in the need for the State and laws to provide a framework that promotes recognition of individual interests and ensures as far as possible the maintenance of the competitive market economy. In pursuit of these objectives State activity is readily justifiable. It is also an important State function to provide means for the resolution of disputes according to law when parties are unable to work out their own solutions.

Many years ago, I realised that IPRs generally promoted both individual rights and competition. They recognised certain human achievements in a way that gave individuals an opportunity to participate in a competitive market economy and make profit there, while at the same time contributing to social welfare in various ways.

But, like all rights, IPRs were – and are – capable of ill or unwanted effects, either through the way in which they are used, or in their very existence. Sometimes this potential was dealt with in the IPR laws themselves. For example, copyright provides exceptions for fair dealing to allow use of works for education, private study, news reporting, criticism and comment. Patents in inventions are granted to support commercial exploitation, so there are exceptions for private, non-commercial uses and research exemptions.

Sometimes, however, it is legitimate and necessary to intervene from outside IP law. Competition law was the example I studied in most detail, in relation to the IP protection for industrial designs.¹² My conclusion was that –

in exceptional circumstances it is appropriate to bring competition considerations to bear upon intellectual property rights, since the principal economic justification for such rights is the public interest in competition by innovation and creative activity. Where intellectual property in fact stifles

¹² *Copyright, Competition and Industrial Design* (1st edition, 1989; 2nd edition 1995). I hope soon to complete a 3rd edition.

rather than facilitates such activity, control is legitimate and necessary. Further, the scope of intellectual property and its role in a market economy is always in need of supervision and review, to ensure that its goals continue to be achieved.¹³

But design law was not the only example of “the monopolistic tendencies of successful private enterprise”¹⁴ being challenged by competition law. Adam Smith’s celebrated remark in *The Wealth of Nations* – “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”¹⁵ – continues to be borne out by twenty-first century experience. As Cornish and Llewelyn put it in their IP textbook:

Intellectual property rights have often enough been one basis for powerful anti-competitive collaborations. Since their very purpose is to confer rights to exclude competitors, it is inevitable that they should have been combined into wider accretions of market power. Legislatures, competition authorities and courts have felt the need to impose restrictions upon at least the most evidently excessive arrangements of this kind: cartel-like patent pools, copyright collecting societies, international or

¹³ See the Foreword to the 2nd edition of *Copyright, Competition and Industrial Design*.

¹⁴ W R Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edition 2004), para 1.36.

¹⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Book 1, chapter 10, part 2.

regional divisions of marketing territories achieved by the splitting of rights and the suppression of the initiative and independence of licensees.¹⁶

The most famous application of competition law to IPRs was in the already mentioned Magill case in 1995.¹⁷ To elaborate a little upon my earlier summary, in that case the ECJ held that under Article 82 EC copyright owners could be required, against their will, to license others to reproduce their copyright material in different forms. The subject matter of the case was TV guides in the UK and Ireland. Before the case, in the UK the BBC and ITV exercised copyright in their programme schedules so that while daily listings appeared in newspapers, the only weekly guides were their own *Radio Times* and *TV Times*; and each publication gave only the programmes of the BBC and ITV respectively.¹⁸ The remarkable decision of the ECJ was heavily and widely criticised at the time, for equating a property right with a monopoly – for saying, in effect, that if I shut you out of my house, you can challenge me for abusing a dominant position with regard to that building.¹⁹ At the root of the decision, it seemed, was not so much the principles of competition law as a dislike of the IP regime which permitted

¹⁶ Cornish and Llewelyn, *Intellectual Property*, para 1.36.

¹⁷ Case C-241/91, *Radio Telefis Eireann v Commission* [1995] ECR I-743; above, text accompanying note 4. See also the earlier design right cases, Case 238/87 *Volvo* [1988] ECR 6211 and Case 53/87 *Renault* [1988] ECR 6039, discussed in MacQueen, *Copyright, Competition and Industrial Design*, pp. 42-45.

¹⁸ For the legal background see *BBC v Wireless League Gazette Publishing Co* [1926] Ch 433 and *Independent Television Publications Ltd v Time Out* [1984] FSR 64. The Broadcasting Act 1990 changed the law in the UK to require the BBC and ITP to grant licences and provide advance information about weekly programme schedules.

¹⁹ See e.g. Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law* (1996), pp. 149-150. For my own positive reaction, written on the day the decision was published and after it had been faxed to me by David Edward, then the British judge on the Court, see *Copyright, Competition and Industrial Design*, 2nd edition, p. 21. The case was also remarkable in that the Court did not follow the earlier opinion of the Advocate General.

copyright to exist in such ephemeral material as lists of TV and radio programmes.

Ever since 1995 the ECJ has emphasised how exceptional the Magill decision was. It is clear that a mere refusal to license an IPR is not an abuse of a dominant position. What remains unclear is what will constitute sufficient exceptionality in cases of this “refusal to license” kind to justify intervention. The Court has developed what is known as the “essential facilities” doctrine (not limited to IPRs in its scope), under which a dominant undertaking abuses its position when it denies others access to goods or services offered by it on an upstream market, such goods or services being indispensable for competing with it on a downstream market.²⁰ The ECJ has meantime spoken again on the subject in a completely different copyright case decided on 29 April 2004, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*.²¹ The case was between competitors in collecting, processing and interpreting data about regional sales of pharmaceutical products in Germany. IMS were first in the market and structured their market reports on divisions of German territory into either 1,860 or 2,847 segments known as ‘bricks’ (henceforth ‘the brick structures’). Although the divisions were based on political and postal boundaries, a working group of customers was also involved in the refinement and improvement of the brick structure. The structure had become an industry

²⁰ The other principal cases are Joined Cases 6/73 and 7/73, *Commercial Solvents I* [1974] ECR 223; Case 311/84 *Telemarketing* [1985] ECR 3261; Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case T-504/93 *Ladbroke* [1997] ECR II-923; Case C-7/97 *Bronner* [1998] ECR I-7791.

²¹ Case C-418/01, [2004] ECR I-000.

standard and the pharmaceutical industry adjusted its marketing and electronic retrieval data in line with it. In seeking to compete with IMS, NDC discovered that customers were reluctant to use structures that departed very far from the IMS one; but IMS took court action to prevent any copying of their structure. The German courts found that the brick structure constituted a database protected by copyright. The question for the ECJ was whether IMS's use of its copyright fell within the scope of Magill and the essential facilities doctrine.

The Court began with the question of when an essential facility existed, and held that the participation of customers and users in the creation of the brick structure was a relevant factor for the national court to consider, if proved that this had created a dependency by users in regard to that structure, especially at a technical level. "In such circumstances, it is likely that those laboratories would have to make exceptional organisational and financial efforts in order to acquire the studies on regional sales of pharmaceutical products presented on the basis of a structure other than that protected by copyright."²² The Court indicated that three cumulative conditions had to be satisfied to make a refusal to license abusive: it was preventing the emergence of a new product for which there is a potential consumer demand; objectively it was unjustified; and it was such as to exclude any competition on a secondary market. With regard to the first of these, there would not be abuse unless the would-be licensee intended to produce new goods or services not offered by the right-holder, rather than simply duplicating the products already on the market. As for excluding competition in a secondary

²² At para 29.

market, the identification of a potential or even hypothetical market would be enough.

The ECJ of course merely provides guidance for the national court rather than a decision on the facts: the effect of its remarks in the *IMS* case, and the significance of its rejection of all the arguments put forward on behalf of IMS, will fall to be decided in the German courts. But it seems clear that Magill is not be regarded as an isolated case but is rather a decision which can sometimes impose significant limitations on an IP right-holder's control and discretion of its property. A further important case is already under weigh, and has already been referred to in the introduction to this paper. In recent competition proceedings against Microsoft, the world's dominant supplier of software, the Commission held in March 2004 that bundling of programs and refusal to supply interface information constitutes abuse of position, justifying the imposition of a substantial fine;²³ but that view will undoubtedly be tested in court, and a final decision is far in the future, although Microsoft has meantime accepted the sanctions imposed.²⁴

Much less controversial than the use of Article 82 EC has been regulation of IPR exploitation under Article 81 EC, which deals with anti-competitive

²³ See BBC News Online, 24 March 2004: <http://news.bbc.co.uk/1/hi/business/3563697.stm>.

²⁴ See for the most recent developments, BBC News Online, 30 September 2004: <http://news.bbc.co.uk/1/hi/business/3703316.stm>; Case T-201/04 *Microsoft Corporation v Commission*, CFI, 22 December 2004, Celex No. 604B0201(01); BBC News Online, 22 December 2004: <http://news.bbc.co.uk/1/hi/business/4117217.stm>; 24 January 2005: <http://news.bbc.co.uk/1/hi/business/4203087.stm>.

agreements, especially horizontal ones between parties who would otherwise be competitors in the relevant market. Thus some kinds of IP licensing, the interactions of copyright collection societies and patent pools are all subject to scrutiny under this head. Greater difficulty has been experienced with vertical agreements that allow new players to enter a market, or to create it. IP licences are a classical instance of this problem, and it can be argued that their pro-competitive effects appreciably outweigh their anti-competitive ones. Professor Valentine Korah has been a notable exponent of this view over the years, criticising the rather different views taken by the Commission and the Court;²⁵ in recent times, there has clearly been official movement towards Professor Korah's position.²⁶

The most powerful effects on IP from EU competition law have come about, not through Articles 81 and 82 EC, but by way of the rules on free movement of goods (Articles 28-30 EC). Especially in the period between 1970 and 1990, these rules had a quite overwhelming limiting effect on the national IPR rules of Member States, driving market integration by removing IP barriers to parallel imports. Since about 1990, as Community IPRs have come into existence (trade marks, designs and plant variety rights), and national rights have

²⁵ See e.g. Professor Korah's justly celebrated *An Introductory Guide to EC Competition Law and Practice* (8th edition, 2004); and her *Technology Transfer Agreements and the EC Competition Rules* (1996).

²⁶ See in particular Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices; Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

been harmonised by way of Directives, so the perceived problem of blocks to free movement arising from variable IPRs across the EU has lessened, and Commission and Court have somewhat relaxed the pressure; but the topic continues to be a controversial and difficult one.²⁷

Nowadays, however, I have to admit that I find myself less engaged by competition law, the application of which to IPRs is relatively accepted and broadly understood, than with thoughts about a yet more elusive subject, how human rights law interacts with and regulates, not only IP, but private law in general. This is a subject which has forced itself upon me by way of the implementation of, first, the Scotland Act 1998, and second, the Human Rights Act 1998, which were the respective means by which the institutions of devolved government in Scotland and then public bodies in the UK generally were made subject to the European Convention on Human Rights (ECHR) in a way that could be enforced in the domestic courts and not just in the European Court of Human Rights at Strasbourg.²⁸ While the principal impact of these events is in public law, there is also an effect on private relationships and private law – and

²⁷ The topic is perceptively analysed by Irimi Nikiforaki in a University of Edinburgh PhD thesis of 2003, and in a recent book by Thomas Hays, *Parallel Importation under European Union Law* (2004).

²⁸ See my contributions to date on this subject in general: "Private rights, private law and the private domain", in A Boyle, C Himsworth, A Loux and H L MacQueen (eds), *Human Rights in Scots Law* (2002), 141-175 (with J D Brodie); "Human rights and private law in Scotland", (2003) 78 *Tulane Law Review* 363-378; "Delict, contract and the Bill of Rights: A perspective from the United Kingdom", (2004) 121 *South African Law Journal* 359-394.

this includes IP and the rights, relationships and transactions which spring therefrom.²⁹

In analysing the IP/human rights interface, it is important, I think, to focus on the legal texts we have, rather than those we might have or would wish to see. “Human rights” is clearly a highly political slogan as well as a legal concept; but as a lawyer I have to start with the way the political concept is currently expressed in the law. Another crucial point is that, although human rights laws have come to be seen as having horizontal effect, operating between private parties, they were originally conceived as protections of the individual against the State – generally in reaction to the horrible truths about Nazi Germany which began to become all too clear as the Second World War reached its tragic end. The result is that the language of the foundation documents – the Universal Declaration of Human Rights 1948 and the European Convention on Human Rights 1950 – is, however open-ended, sometimes difficult to apply precisely to private relationships, even if we adopt the appropriate interpretive stance which looks to the underlying spirit and adapts to social change and development.

It is now clear in the United Kingdom, however, that under the Human Rights Act the ECHR is to be given indirect horizontal effect. Section 6 of the Act includes courts and tribunals among the public bodies which must give effect to the ECHR in their actions, which includes deciding cases and developing the

²⁹ See already Paul Torremans (ed), *Copyright and Human Rights* (2004); J Griffiths and U Suthersanen, *Copyright and Freedom of Expression* (forthcoming, 2005).

common law. Sections 3 and 4 also require the courts to interpret legislation to give effect the Convention rights, with the ultimate right to declare it incompatible. Such declarations then put the onus on the UK parliament to revise the legislation in question to make it ECHR-compliant. Thus there is no doubt at all in the UK that Convention rights can have a bearing on IPR, whether these rights have a statutory or a common law origin.

So in *Ashdown v Telegraph Group Ltd*,³⁰ the Article 10 ECHR right of freedom of expression was brought to bear in a copyright case, by withholding from the plaintiff right-holder injunctive relief in respect of the defendant newspaper's infringement and leaving him to his monetary remedies only – in effect saying to the newspaper, publish and be damned. In *Campbell v Mirror Group Newspapers Ltd*,³¹ on the other hand, the common law protection of confidential information was extended so that Naomi Campbell's Article 8 ECHR right to privacy could give her a remedy against the publication of surreptitiously taken photographs of her leaving a meeting of Narcotics Anonymous. The cases illustrate how Convention rights can cut either way with regard to IPR: in the first case, limiting the scope of protection, in the other expanding it. In *Levi Strauss v Tesco*,³² human rights and competition law came together in a case about

³⁰ [2002] Ch 149 (CA).

³¹ [2004] 2 AC 457 (HL). Even before the Human Rights Act the House of Lords had taken account of Article 10 ECHR (freedom of expression) in developing the law of confidential information with regard to Government secrets: see *Attorney General v Guardian News papers (No 2)* [1990] 1 AC 109 and *Lord Advocate v Scotsman Publications Ltd* 1989 SC (HL) 122. This is now reinforced by the Freedom of Information Act 2002 and the Freedom of Information (Scotland) Act 2002, which came into force on 1 January 2005. For comment on *Campbell* see H L MacQueen, "Protecting privacy", (2004) 8 *Edinburgh Law Review* 420-423.

³² [2003] RPC 18 (Pumfrey J).

parallel importing, with Pumfrey J holding that Levi Strauss's Convention right to property (Article 1 First Protocol) prevailed over any reading of the Trade Marks Act 1994 which might be thought to support a principle of international exhaustion of trade mark rights.

In the week before the workshop took place, the Scottish Court of Session dealt with an IP case in which slightly more complex questions of inter-action with Convention rights arose for decision. *ITP SA v Coflexip Stena Offshore Ltd*³³ was a European patent infringement case, in which the first instance judge found that there had indeed been infringement. But then, in quite separate proceedings from the action in Scotland, the Board of Appeal in the European Patent Office (EPO) revoked the patent. This latter decision was challenged by the patentee in the European Court of Human Rights on the basis of the right to a fair trial under Article 6(1) ECHR and the protection of possessions under Article 1 of the First Protocol ECHR. The basic objection to the EPO proceedings was that there was no appeal outside the Office once the Board of Appeal had pronounced. The patentee therefore sought a sist (a stay or suspension) of the Scottish proceedings while he pursued his Strasbourg case as a way of giving effect to his Convention rights. The Patent Act 1977 provides that when a European patent is revoked in the EPO it is to be regarded as revoked in the UK. The patentee argued that this should be "read down" so as to be qualified with the words, "unless to do so would be contrary to any Convention rights". The First Division of the Court of Session held, however, that such reading down was not

³³ 2004 SLT 1285.

possible. Even with the extensive powers of interpretation provided by section 3 of the Human Rights Act 1998, courts could not read down legislation recognising an international tribunal's decision as final; section 3 is prefixed with the words, "So far as it is possible to do so".³⁴ Further, section 6 prevented a public authority – here the court - from giving effect to a Convention right if "as the result of one or more provisions of primary legislation, the authority could not have acted differently".³⁵ "It is plain," said the court, "that an enactment in a contracting state which required its courts to apply a certain interpretive principle to the legislation of that State could not confer on those courts any right or discretion to ignore or reduce the effect which they would otherwise have to attribute to the decision of an international tribunal such as the Board of Appeal."³⁶

The court added some interesting obiter remarks about what happens if the patentee succeeds in the European Court of Human Rights:

However, it is clear that, even if the application were held to be both admissible and well founded, this would not, of itself, have any effect on the revocation of the pursuers' European patent. The European Court of Human Rights cannot require the European Patent Office to reinstate the pursuers' patent. It might, at most, award monetary compensation for the loss of the patent. Whether, and with what effect, any measures might

³⁴ Human Rights Act 1998, s 3(1).

³⁵ Ibid, s 6(2)(a).

³⁶ 2004 SLT at 1290 (para 25).

subsequently be introduced to enable the decision of a Board of Appeal to be reviewed cannot, at this stage, be more than a matter for speculation.³⁷

This is not the place for a detailed analysis and discussion of the points raised by *ITP v Coflexip*, important and interesting though they are.³⁸ What matters for present purposes is the unquestioned legitimacy of discussing human rights in an IP context; and that the human rights in question were those of the IP right-holder, rather than being the basis for a challenge to the IP (which had in fact fallen through the application of the IP system itself).

Indeed, the classic human rights instruments – the UDHR and the ECHR – both offer plenty of solace for IP right-holders. If we take the UDHR, we find the following:

Article 27

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This is clearly of major significance for IP. So is Article 17, if IP is viewed as property:

³⁷ 2004 SLT at 1290 (para 28).

³⁸ The court relies on the somewhat similar English case of *Lenzing AG's European Patent* [1997] RPC 245.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Two further Articles appear capable of readings supportive of IPR:

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

I would suggest that these two Articles in particular support the sometimes controversial moral rights – principally, rights to attribution of authorship and the maintenance of the integrity of a work – which form part of copyright law.³⁹ And it is worth noting that respect for human dignity is the pre-eminent human right,

³⁹ See the Berne Convention Article 6 bis. Note also *Confetti Records v Warner Music* [2003] EMLR 35 at para 161: doubtful whether Article 10 ECHR requires narrow reading of moral rights.

within which are included liberty, equality and brotherhood (the classic triumvirate with a provenance stretching back to the French Revolution in 1789).

Articles in the UDHR capable of use to limit IP would include the following:

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

A footnote to this Article is the observation that the reference to “social security” appears to be the only basis for anything approaching the right to health which has lain at the heart of challenges to the use of pharmaceutical patents in developing countries.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Article 27

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

In reading and understanding these texts in the context of IPRs and their limitation, however, it is important to remember the “abuse of right” Articles in the UDHR, designed to prevent any right being absolute or used so as to destroy other or another’s rights.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others

and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The ECHR has a provision (Article 17) similar to Article 30 UDHR; and indeed when you look at the texts of its right-conferring Articles, you generally find that they are not unqualified. So, as was pointed out in *Campbell v Mirror Group Newspapers*, Article 8 ECHR (privacy) and Article 10 ECHR (freedom of expression) are drawn in such a way as to take account of each other, even if that balancing between them were not required by Article 17 ECHR. The ECHR accords the highest values to life (Article 2), the prohibition of torture, inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery and forced labour (Article 4), and the right to a fair trial (Article 6). Nearly every other right in the ECHR is restricted in some way, often by reference to the needs of a democratic society. While Article 18 ECHR makes clear that these restrictions must be applied only for the purposes for which they have been prescribed, they are sufficiently broad to make clear the less than absolute quality of the rights. It should also be noted that the ECHR has no express Article on rights to health.

All this makes the seemingly unqualified statement in Article II-17(2) of the Draft Constitution for the European Union – “Intellectual property shall be protected” – of particular interest in the present debates about IP. After all, there is no precedent for it in previous human rights instruments.⁴⁰ But perhaps it should not be treated in too alarmist a fashion. First of all, there is no prescription as to what constitutes intellectual property or as to how it is to be protected. Second, the paragraph occurs in the overall context of an Article headed “Right to property”. Moreover Article II-17(1) includes the important qualifying sentence, “The use of property may be regulated by law insofar as is necessary for the general interest”; and this presumably applies as much to intellectual as to any other form of property. Elsewhere the Draft Constitution contains the usual kinds of Article that offer potential for restraint upon the unbridled exercise of IP: freedom of expression and information (Article II-11); and the right to education (Article II-14). It introduces a right of access to preventive health care and to benefit from medical treatment (Article II-36). Under Article II-13, “the arts and scientific research shall be free of constraint. Academic freedom shall be respected.” And there is an abuse of rights Article (II-54):

⁴⁰ Section 8 of the US Constitution does famously give Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries”. This provision was most recently considered by the Supreme Court in *Eldred v Ashcroft* 537 US 186 (2003), but the phrase “for limited Times” did not prevent the court holding constitutional Congress’s extension of the copyright term to lifetime plus seventy years.

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein.

It should also be noted that the Draft Constitution (unlike the ECHR) is very much in tune with contemporary human rights thinking in placing human dignity at the head of its list of rights, and that in the strongest possible terms – “inviolable” and “must be protected” – without any qualification.

In conclusion, it seems plain that IPRs are capable of giving expression to both the values inherent in competition law (those of a competitive market economy) and to human rights. There is no necessary opposition here, and very often all three of these legal concepts will march hand-in-hand. But human rights without doubt have a higher value than IPRs (and indeed competition law rules), and in the perhaps rare cases of conflict it is a trump card. But human rights are themselves often in conflict and only occasionally absolute, so the trumping effect is by no means guaranteed. And sometimes, as the recent Scottish case well illustrates, it can be quite unclear how playing the trump will work out over the whole hand.

Overall then, competition law and human rights may help to confine or restrain the abuse or excess of IP, but one should not place too much faith in

their ability to do so in courts of law. But they can of course play a dynamic role in political debate about the content and effects of IPRs – and it is in that dimension, I suggest, that we should look to achieve their fullest effects.