

A2K4: Access to Knowledge and Human Rights
Workshop C: The Right to Development and the WIPO Development
Agenda: Bridging the Gap between Human Rights and IP?
Yale Law School, Saturday 13 February 2010, 2-3:30p, Room 128

Why frame IP with HR language and law?

1 Link between IP rules & human rights

Intellectual property (IP) protection is a deviation from the free-market paradigm, as it grants temporary monopoly power to the owner of IP (thus reducing competition). Why is this accepted? Because it is generally considered that a certain level of protection is needed to promote innovation and development (public good).

Usually, the link between IP and human rights is highlighted when IP has a negative impact on the enjoyment of human rights. Today, I will focus on how human rights standards and mechanisms could be used positively to design and implement IP policies in a way that is conducive to the advancement of human rights.

2 WIPO Development Agenda and Right to Development

The (WIPO DA) is “arguably the most important current global initiative to advance the Right to Development (R2D), qualified as “a major institutional innovation” and “breakthrough for bringing the R2D into the management of technological innovation.” Although the DA does not contain explicit R2D language, its basic motivations and objectives coincide with the R2D.¹

So why use human rights principles and law to frame the implementation of the WIPO DA? Why make them explicit and highlight the linkages? We argue that it would help achieve not just development in economic and institutional terms, but also realise the R2D. I will illustrate this with the example of the right to adequate food.

¹ Sakiko Fukuda-Parr, Report to the HLTF on the implementation of the Right to Development, 6th Session, 14-22 January 2010, Item 4(b)

3 An example: the right to adequate food

The right to adequate food is stated most explicitly under Article 25 of the Universal Declaration of Human Rights adopted by G.A. Res. 217 A (III) of 10 December 1948 and under Article 11 of the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966. It is also recognised in specific instruments, such as the Convention on the Rights of the Child (Art. 24(2)(c) and 27(3)), the Convention on the Elimination of All Forms of Discrimination against Women (Art. 12(2)), or the Convention on the Rights of Persons with Disabilities (Art. 25(f) and 28(1)).

The right to food is not primarily about being fed. It is about being guaranteed the right to feed oneself, which requires not only that food is available (that the ratio of production to the population is sufficient), but also that it is accessible – i.e., that each household either has the means to produce its own food, or has sufficient purchasing power to buy the food it needs. As recognized both under these provisions and in customary international law, the right to food imposes on all States obligations not only towards the persons living on their national territory, but also towards the populations of other States.²

Human rights law can inspire IP legislation in the field of food by:

- asserting the right to free, non-discriminatory physical and economic access at all times to adequate food or means for its procurement
- focusing on the importance of the agricultural sector as the main provider of food security
- calling for affirmative action in favour of small farmers and adoption of a country-tailored intellectual property legislation including adequate exceptions and flexibilities as well as a true *sui generis* system of protection of plant varieties
- assessing whether there are alternative choices to achieve the same policy goals
- holding governments accountable for their action individually and collectively, as well as for the action of subjects under their jurisdiction (see extra-territorial obligations).

² <http://www.srfood.org/index.php/en/right-to-food> (retrieved 10 Feb. 2010)

When states implement IP laws, both in multilateral and bilateral contexts, they should:

- make sure that the legislation they are implementing contribute to the enjoyment of non discriminatory, physical and economic access to adequate food or means for its procurement by their own citizens
- not jeopardize the enjoyment of non discriminatory access to adequate food in other states
- promote, as members of international organisations and the international community in general, the enjoyment of non-discriminatory, physical and economic access to adequate food
- call for and contribute to human rights impact assessment studies that help judge what would be the impact of IP legislation on the enjoyment of the right to food.

Human rights law and language can also guide WIPO technical assistance:

- Being part of the UN system, its activities should be consistent with HR principles and law.
- WIPO should do its best to promote the right to food and other rights and it should be held accountable under this perspective by the members
- promote participation of a wider range of representatives of civil society
- write a code of conduct for providers of IP technical assistance

Human rights law might also contribute to solving some of the outstanding issues under discussion at the Committee on Development and Intellectual Property (CDIP) tasked to implement the WIPO DA. These are, inter alia:

- traditional knowledge
- technology transfer
- monitoring, assessment and coordination mechanisms