

TPP vs. RCEP: The Battle to Define Asia's Intellectual Property Law

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A battle is under way to decide the intellectual property law for half the world's population. Two competing mega-trade agreements seek to write the rules for intellectual property for Asia. The TransPacific Partnership ("TPP") promoted by the United States seeks to create a free trade area among twelve Pacific Rim countries, from the United States to the north, to Chile to the south, and to Japan and Vietnam across the ocean. The 16 countries negotiating the Regional Comprehensive Economic Partnership ("RCEP") make up the bulk of Asia, including China, India, Japan, and South Korea, and stretch to Australia and New Zealand. A comparison of the intellectual property provisions in both agreements reveals more similarities than differences. It may come as a surprise though that the agreement that includes China as a pillar demands stronger intellectual property rights than the agreement that includes the United States. This Article appraises how the poor are likely to fare under the intellectual property provisions of each agreement.

Geographical Indications, Dispossessed Labor and Rights-based Development

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Geographical Indications (GIs) were established as a distinctive category of intellectual property (IP) in the 1994 Trade-Related Aspects of Intellectual Property (TRIPS) Agreement. Increasingly promoted in the Global South, GIs, or marks indicating conditions of origin (MICOs) include appellations of source, denominations of origin, collective trademarks and certification marks. Building upon Coombe's prior work exploring the limitations of MICOs which addresses the racial hierarchies they tend to entrench and the romantic and depoliticising social imaginaries they tend to project, we reiterate the need for greater empirical study of the regulations governing their use and rights-based norms for their governance contextualized within historical forms of dispossession and ongoing political struggles to transform relations of production. We need to investigate the social relations between laborers, landowners, producers, and GI institutions with particular reference to intersecting configurations of race, ethnicity, indigeneity, and the specificities of social movements for decolonisation. Considering Rooibos and Darjeeling teas as cautionary tales of GIs whose governance reflects the prevailing social and ideological tendencies of such systems, we address the potential relevance of revamped MICO systems for acknowledging the labors of place-making, social reproduction and alternative development norms. While recognizing the susceptibility of 'gourmet' branding strategies to elite capture, we draw upon utopian decolonizing agroecology and food sovereignty projects from Latin America to illustrate how peasant producers might use such IP vehicles to reverse racial hierarchies, engage in communal labors, incorporate indigenous technologies, and assert new autonomies rooted in pluricultural imaginaries. To what extent and under what conditions might these projects be shaped by, coincide with, or challenge dominant narratives to align with alternative visions of rights-based futures?

Freedom of Artistic Creativity and Copyright: A Compatible Combination?

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Copyright was originally intended as a mean to secure that authors could create freely, protecting them from the interference of others and from all risk of censorship. Copyright was meant to be “the engine of free expression”, to use the words of the US Supreme Court. To this end, a balance was conceived between exclusive control and freedom, with the overall aim of ensuring the common good: to enable future creativity, some uses were kept outside the control of the right owner through limitations to the exclusive right. These limitations have always played an essential role, alongside the exclusive right, in providing a good and vital creative environment. However, none of the existing systems of limitations in the various jurisdictions was specifically designed to address the creative reuse of copyrighted material in the context of derivative works. On the contrary, when an author intends to create a new work based on another and when some of the expression of a previous work needs to be borrowed, he often will need the authorization of the copyright owner of the original work. This situation might resemble private censorship, as private entities or individuals have the potential to decide what can be created or not and to block the dissemination of new works. It might thus be questionable how this situation can be reconciled with either the copyright’s rationale of incentivizing creativity or the obligations imposed on States by human rights such as freedom of expression and freedom of artistic creation. In this paper, the different options available for legislators and courts to secure creative uses in the context of derivative works will be assessed in order to develop a satisfying legal mechanism *de lege ferenda*.

Investor-State Dispute Settlements: Human Rights Lessons from *Lilly v Canada*

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The triangular interface between trade, IP and human rights has yet to be fully formed, both doctrinally and normatively. Theories of constitutionalization of international trade law, which emerged in the 1990s, suggest that state-to-state trade adjudicatory bodies, such as the WTO Dispute Settlement Body, can and should consider fundamental norms of international law. This is presented as consonant with the relinquishment of sovereignty through trade agreements and human rights treaties and as a way of limiting state abuses by applying a Kantian international order. With the emergence of investor-state dispute-settlement, the triangular situation has become even more difficult to solve. Doctrinal mechanisms developed in the state-to-state context may simply not work. This paper uses the recent *Lilly v Canada* case to illustrate the point.

The Marrakesh Treaty: Translating Human Rights Norms into IP Frames

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The relationship between the intellectual property regime and the human rights regime has a troubled history. Despite attempts to reconcile the competing tensions and complementary goals that exist between these regimes, human rights and intellectual property advocates still seem to be speaking different languages. Human rights advocates, particularly at the national level, have not by and large taken up the challenges posed by expanded intellectual property protections in regional and international trade agreements. Intellectual property regulators, despite the potential for alignment between the social justice goals of IP and human rights norms, largely do not see their jobs as implicating human rights.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled presents an opportunity to change this. Intended to help combat the lack of accessible reading materials for the estimated 300 million print disabled individuals around the world, the Marrakesh Treaty requires member states to enact copyright exceptions and limitations to allow the creation and sharing of literary and artistic works in accessible formats, including across borders. The purpose of this paper is to examine the unique features of the Marrakesh Treaty that may provide a basis for more effective “translating” between the human rights and intellectual property regimes.

The paper first assesses prior attempts to link the human rights and intellectual property regimes, including the access to medicines movement, the Doha Declaration, and interventions by human rights institutions and experts on the relationship between trade, intellectual property, and human rights. The paper argues that these efforts were most successful in bridging the regimes when they 1) focused on a concrete violation with an

easily understandable story, and 2) triggered the involvement of local interlocutors that explicitly framed the violation in human rights terms. Those interlocutors were able to raise the issue of human rights in national debates, where the otherwise diverging discourses of intellectual property and human rights were bridged.

The paper then uses this framework to discuss four features of the Marrakesh Treaty that situate it well to translate between the two regimes. The first is that the treaty marries copyright and human rights by “using the legal and policy tools of copyright” to advance human rights objectives.¹ The second is that the issue the treaty addresses—the global book famine experienced by individuals with print disabilities—is a clearly identifiable human rights violation. The third is that the treaty explicitly references the Convention on the Rights of Persons with Disabilities, which presents a range of opportunities to integrate the interpretive institutions and methodologies of human rights with intellectual property policy making. The fourth—and perhaps most important—is that the Marrakesh Treaty presents real and concrete opportunities for involving human rights advocates in discussions with intellectual property regulators about the implementation of the treaty.

The paper concludes by offering preliminary thoughts about places where further work to bring the human rights and intellectual property regimes into alignment might occur. Although few issues will present as clear and compelling of a case as the book famine, lack of access to information might be linked to violations of economic and social rights or contributing to situations of extreme poverty and thus as a violation of basic human rights. Further, the relationships that the implementation of the Marrakesh Treaty will foster between the human rights, disability rights, and intellectual property communities on the local level may lay the groundwork for future dialogue without the need of another international treaty.

¹ THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED (forthcoming).

The Intellectual Property Limits of Access to Medicine as a Human Right

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Since conclusion of the Uruguay Round in 1994, global rules for the protection of intellectual property (IP) rights have co-existed, even if uneasily, with a robust international human rights regime. The tension between the two bodies of law has been most visibly expressed in respect to access to essential medicines. In 2001, the Doha Declaration on TRIPS and Public Health clarified that TRIPS 'can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.' Since then, commentators in both fields consider that TRIPS-flexibilities, read in light of the Doha Declaration, provide an appropriate basis to reconcile and achieve the human welfare goals of both regimes. This paper explores this well-accepted premise.

Trademarks and Fundamental Rights in the EU

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In 2015 the EU adopted new trade mark rules. As one of the novelties these contain rules which explicitly state that the trade mark provisions should be applied in “a way that ensures full respect for fundamental rights and freedoms and, in particular the freedom of expression”. This contribution describes and analyzes the developments in EU law which have led to the inclusion of these principles and discusses the possible effects of the change. It is submitted that the explicit reference to fundamental rights and freedoms should be seen as part (and evidence) of a broader trend in EU law towards a “constitutionalization” of IPR which has served in part as response to the ongoing expansion of trade mark protection. The internalization of constitutional norms will enable (or rather: force) the CJEU and national courts to rely on arguments derived from constitutional provisions and principles when they apply trade mark law. This broadening of the normative space will require courts to expand their analyses and to balance opposing values and to consider new arguments in trade mark law disputes. The precise effects are difficult to predict because of the inherent broadness and general nature of the balancing of interests which courts will be engaging in. However, it will be argued that the development is most likely going to benefit those users (commercial and non-commercial) who rely on the limitations and exceptions and the open-ended provisions of trade mark law.

Internationalizing Fair Use

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The doctrine of “fair use” holds an important place within American copyright law, serving as a safety valve for First Amendment values and as a tool for balancing the rights of creators and users. Yet few countries have anything similar. Specific exceptions to copyright, such as an exception for quotation, are nearly universal. Yet only about a third of countries also have an open-ended or flexible limitation, and most are significantly less muscular than fair use. For a variety of reasons, however, international interest in flexible exceptions is on the rise. A growing number of countries are considering adopting such provisions, with American-style “fair use” as the leading model. Would-be importers should seize the opportunity not just to import the American model, but to improve upon it. This article explains why and how foreign jurisdictions can fix fair use. The heart of this proposal is to explicitly ground the exception within a theory of human rights balancing, including not just freedom of expression, but also the rights to education and cultural participation, as well as the rights of creators. The proposal also takes seriously the admonition that “for every right there must be a remedy,” and the need to ensure that exceptions comply with the “three-step test” of international copyright law.