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Rens, Andrew; Pfumorodze, Jimcall

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NEGLECT OF THE HUMAN RIGHTS DIMENSION IN AFRICAN IP POLICYMAKING

Andrew Rens
SJD Candidate, Duke Law School, Durham, NC; and Research Associate, IP Unit, Faculty of Law, University of Cape Town

Jimcall Pfumorodze
Senior Lecturer, University of Botswana; and LLD Candidate, University of Pretoria

ABSTRACT
In this thematic report, the authors, both members of the African Scholars for Knowledge Justice (ASK Justice) network, outline the neglect of human rights in IP policymaking; the need to end this neglect, particularly in the African context; and steps to be taken towards this goal.

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KEYWORDS
intellectual property (IP), human rights, public interest, development, Africa, access to medicines, access to knowledge (A2K)

INTRODUCTION
The year 2012 provided some setbacks for expansionist intellectual property (IP) policy. The Kenyan High Court, in its ruling on the *P.A.O. v Attorney General* case, struck down portions of newly introduced anti-counterfeiting legislation. An online protest against US bills for the proposed Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA) caused the bills to be postponed indefinitely. And the European Parliament voted against EU adoption of the Anti-Counterfeiting Trade Agreement (ACTA).

The Kenyan ruling was based on a finding that Kenya's Anti-Counterfeit Act failed to sufficiently safeguard the right to health. The right to health was also at the core of opposition to ACTA, and the protests against SOPA and PIPA were grounded in concerns about the right of freedom of expression. These events were notable victories for civil society activism as mobilised by the access to medicines and access to knowledge (A2K) movements – movements that since the mid-1990s have been seeking to stem the tide of upward harmonisation of IP[1] protections.

In our view, these events were also significant demonstrations that (1) human rights are integral to IP policy, and that (2) IP policymakers typically do not pay sufficient attention to the human rights dimension. In this note, we elaborate on both these claims, and we call for an end to neglect of human rights dimensions in IP policymaking, in particular on the African continent. There have been other instances, in addition to those just cited from 2012, when the human rights dimension has to some extent prevailed in the IP policy-legal space: e.g., the successful litigation in relation to access to patented antiretroviral drugs in South Africa in the early 2000s, the 2001 WTO Doha Declaration on the TRIPS Agreement and Public Health, and the 2013 WIPO Marrakesh Treaty on access to copyright works for visually impaired persons (WTO, 2001; WIPO, 2013). But it is our considered opinion that these instances, and the events of 2012 mentioned above, are the exceptions that prove the rule – with the rule being that IP policymaking generally neglects the human rights dimension.

IP policymakers in both developed and developing countries are often dismissive of human rights arguments, preferring technocratic debates on economic development. However, human rights claims have played a central role in increasing access to medicines and A2K.

Human rights are not simply an additional, hitherto overlooked factor in IP rule-making, but rather an entire dimension. The human rights dimension requires not simply re-weighting of existing policy considerations or even the introduction of one more policy variable, but rather expansion of the conceptual space of policymaking to include norms previously excluded from IP policy.

IP is too often viewed as a single dimension, an axis along which a balance is struck between, on one side, the power of those who hold rights, and, on the other side, what is often termed the "public interest" (concerned with the ends IP is intended to serve, such as education, research, innovation. news reporting and the like, often accommodated by exceptions and limitations). In developing countries, a second dimension must be (and increasingly is) added to IP policymaking: development. The demands of development add a wide range of issues unknown to the traditional proprietary versus public interest dimension of earlier IP doctrine. The development dimension may result in arguments unknown to Western IP; arguments, for example, for exclusive rights over traditional knowledge (TK), or for limits on patenting of genetic resources. The third necessary dimension is human rights, which introduces issues such as compulsory licensing for essential medicines.

Despite the recent developments cited above, incumbents in several industries continue to try to shape global and national IP policy away from development and human rights considerations towards norms favourable to their business models. For example, consultants for an association of multinational pharmaceutical companies reacted with alarm to proposals in the 2013 draft South African Intellectual Property Policy that would replace the current registration system

1 Use of the term "intellectual property (IP)" does not imply acceptance, rejection or evaluation of claims that copyrights, trademarks and patents are a species of property.

for patents with an examination system that would limit the awarding of dubious patents.[2] The consultants planned to set up a front organisation, made to look like a local non-profit, to raise the issue in the South African elections (Baker, 2014). According to the consultants, "South Africa is now ground zero for the debate on the value of strong IP protection. If the battle is lost here, the effects will resonate" (Baker, 2014). This demonstrates the grave importance of infusing African IP policy with the human rights dimension. At stake is whether to ensure or deny access to medicines and educational materials for millions of the world's poorest people. And when African IP policymaking processes are regarded as "ground zero" by global business alliances, African policy decisions can clearly have global repercussions.

In this thematic report, we highlight the consequences of failing to acknowledge that human rights apply to IP policy, and we suggest ways in which neglect of human rights in IP policymaking may be remedied in 21st century Africa. We do so from the standpoint that human rights, being *universal*, must be taken into account in IP policy. The encounter between human rights and IP cannot be re-framed as a question of *whether* IP *can* or *should* take human rights into account, because such questioning would represent a failure to acknowledge the inherent universality of human rights. Our standpoint is also grounded in cognisance that central features of IP that affect Africa and Africans have their origin outside the continent via, inter alia, the conceptual legacy of colonial IP theories and laws, and the more recent power plays of global trade negotiations. This inquiry, while linked to multiple other encounters between IP and human rights in global history (and their philosophical and legal antecedents), does not pretend to make sense of all such encounters and antecedents.

NEGLECT OF THE HUMAN RIGHTS DIMENSION

KENYA'S ANTI-COUNTERFEIT ACT

The petitioners in this case were all citizens of Kenya who described themselves as living positively with HIV/AIDS. They were challenging sections 2, 32 and 34 of Kenya's Anti-Counterfeit Act of 2008. They argued that these sections violated their fundamental rights as provided for by the Kenyan Constitution. Section 2 of the Anti-Counterfeit Act provided that:

> "counterfeiting" means taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods-
> […]
> (d) in relation to medicine, the deliberate and fraudulent mislabeling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging; […].

The main dispute before the court was whether by enacting section 2, and by providing the accompanying enforcement provisions in the Act's sections 32 and 34, the state was in violation of its duty to ensure conditions are in place for its citizens to lead a healthy life, i.e., whether these provisions would deny the petitioners access to essential medicines and thereby violate their rights under the Constitution.

The petitioners argued that the government had failed to acknowledge and specifically exempt generic drugs and medicines from the definition of counterfeit goods in the Act. Furthermore, they argued that the state had failed to provide a clear definition of counterfeit goods under section 2 of the Act by defining counterfeit goods in the section in such a manner as would allow generic drugs to be included in the said definition, thereby effectively prohibiting importation and manufacture of generic drugs and medicines in Kenya. The petitioners submitted that if the Act was applied and enforced, their rights to life, human dignity and health, as guaranteed under Articles 26(1), 28 and 43(1) of the Constitution, were likely to be infringed, since the availability of generic drugs would likely be severely restricted and petitioners forced to rely on more expensive brand name drugs. This, in turn, would result in fewer people having access to the essential drugs for treatment of HIV and AIDS.

The state contended that the term "generic drugs" is not synonymous with "counterfeit drugs", and that the state had enacted the Anti-Counterfeit Act because counterfeit drugs could lead to death. Thus, according to the state, the Act was intended to protect citizens and did not intend to bar generic drugs.

The Court reasoned that:

> the right to life, dignity and health of people like the petitioners who are infected with the HIV virus cannot be secured by a vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit medicine. *(P.A.O v Attorney General,* 2012, §84)

Furthermore, the Court stated that:

> [s]hould the Act be implemented as it is, the danger that it poses to the right of the petitioners to access essential medicine which they require on a daily basis in order to sustain life is far greater and more critical than the protection of the intellectual property rights that the Act seeks to protect. The right to life, dignity and health of the petitioners must take precedence over the intellectual property rights of patent holders. *(P.A.O v Attorney General,* 2012, §85)

2 South Africa, unlike developed economies such as the US and EU, and emerging economies such as India and Brazil, does not examine patents for compliance with patenting requirements.

Accordingly, the Court found that sections 2, 32 and 34 of the Anti-Counterfeit Act threatened to violate the right to life of the petitioners as protected by Article 26(1) of the Constitution, the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43(1) (*P.A.O v Attorney General,* 2012, §87).

ACTA

Although African countries, with the exception of Morocco, were excluded from negotiation of ACTA, there were aspects of ACTA, including the interdiction of goods in transit, that threatened lawful import of medicines by developing countries (Rens, 2011).

The rejection of ACTA in July 2012 was decisive; 478 Members of European Parliament (MEPs) voted against ACTA, with only 39 voting in favour and 165 abstentions. As a result, ACTA will likely not come into force. (ACTA was negotiated by the trade officials of the EU, Australia, Canada, Japan, Mexico, Morocco, New Zealand, South Korea, Switzerland and the US.).

The popular opposition to ACTA was initially prompted by A2K concerns among experts and civil society in developed countries, with a focus on copyrights rather than patents. Nevertheless, opponents of ACTA quickly took up criticisms of ACTA as inimical to access to medicines in developing countries (Rens, 2011) and allied themselves with access to medicines campaigners, resulting in the surprising defeat of ACTA.[3]

FINDINGS BY UN HUMAN RIGHTS SPECIAL RAPPORTEURS

A March 2015 report on copyright law by the UN Special Rapporteur to the Office of the High Commissioner for Human Rights (OHCHR) in the field of cultural rights, Farida Shaheed, found a structural gap between copyright and the requirements of international human rights (Special Rapporteur to UN OHCHR, 2015a).

The report focused on copyright policy in relation to the right to science and culture, surveying the ways in which copyright impedes A2K and suggesting that future efforts at copyright lawmaking should ensure compatibility with human rights. According to the report's Recommendation 94, "[i]nternational copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression, the right to science and culture, and other human rights." Similarly, Recommendation 96 calls for countries to conduct human rights impact assessments of domestic copyright law and policy (Special Rapporteur to UN OHCHR, 2015a, §94, §96).

A sister report on patent law in August 2015, by the same UN Special Rapporteur on cultural rights, recommended that international patent instruments should also be subject to human rights impact assessments, that that such instruments should "contain safeguards for human rights, including the right to health, food, science and culture", and that human rights impact assessments should be applied to domestic patent law and policy (Special Rapporteur to UN OHCHR, 2015b, §95, §97). Similarly, UN Special Rapporteurs on health have reported on IP undermining access to medicines, and have produced Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines (Special Rapporteur to UN OHCHR, 2008, 2009).

The clear implication in these UN recommendations is that international and national copyright and patent laws and policies typically do not give proof of taking human rights into account.

THE PRIMACY OF HUMAN RIGHTS

Some commentators see an appropriately balanced human right to IP as a means to re-establish the legitimacy of IP rights (Geiger, 2015). Others warn of capture of human rights institutions by an expansive corporatist view advocating an absolute human right to IP (Yu, 2007), or of mobilisation of human rights discourse against the weakest in society by powerful governments and corporations (Oguamanam, 2014). For instance, a stance that individual authors and inventors have fundamental human rights to their creativity could operate against indigenous communities seeking to reserve cultural knowledge for traditional rather than commercial uses (Oguamanam, 2014; Yu, 2007). It is not our purpose here to restate the debates on the extent to which human rights can or should be reconciled with IP.[4] We remain sceptical of claims that it is logically possible to reject the universality of human rights but then to use human rights in IP analysis either for rhetorical purposes or as simply one more consideration in the analysis. Our stance is that adding the human rights dimension to IP policymaking is a necessity for Africa, with profound implications.

Most discussions of human rights and IP begin with Article 15(1) of the International Covenant on Economic, Social and Cultural Rights of 1966, which states that

> The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Read baldly, this Article 15(1) has the potential to be construed as a basis for arguments either limiting *or* justifying IP. Some proponents of increasing the extent and power of IP rights contend that Article 15(1) establishes a human right to IP. Dean (1997) argues that the right to IP, properly recognised, would prevent a parliament from repealing

3 See Rens (2015) for lessons to be learned in Africa from the defeat of ACTA.

4 See Helfer (2003) for more on these debates.

IP laws; would sometimes require the passing of IP laws; and would necessarily involve "detrimental impact" on other human rights. Dean (2015) also argues for other human rights to be considered in IP proceedings primarily as defences to presumptively valid IP rights – and then only if there is a textual basis in the IP legislation to which to attach the human rights defence. In other words, the claim that there is an IP right that can be infringed without requiring evidence of damages is sufficient to shift the onus onto the defendant, who must then find a textual basis in the IP legislation at issue in order to raise a defence based on another human right.

By way of contrast, Nwauche (2005), in a pioneering analysis of human rights and IP intersecting in Africa, argues that a balance between other human rights and a human right to IP can be achieved through reading Article 15(1)(b) and (c) as equal. This approach, while appealing in the balance sought, collapses human rights into the aforementioned internal, one dimensional (private rights versus public interest) axis of IP analysis.

Human rights authorities reject interpretation of the International Covenant's Article 15(1) as grounding a human right to IP, because the drafting history and contemporary rights theories do not support such an interpretation; human rights are irrevocable whereas IP rights are revocable. The UN Committee on Economic, Social and Cultural Rights (UN CESCR) has found that the right in Article 15(1)(c) derives from the dignity of persons, and is closely linked to the rights to adequate compensation and to an adequate standard of living. Therefore, the Committee argues, it is "important not to equate intellectual property rights with the human right" (UN CESCR, 2006).

Taking up this theme, the aforementioned March 2015 report of the UN Special Rapporteur on cultural rights insists:

> It is sometimes claimed that intellectual property rights are human rights, or that article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights recognizes a human right to protection of intellectual property along the lines set out by the TRIPS Agreement and other intellectual property treaties. The Committee on Economic, Social and Cultural Rights has stressed that this equation is false and misleading. (Special Rapporteur to UN OHCHR, 2015a, §26)

The Special Rapporteur on cultural rights goes on to point out that while some aspects of contemporary IP laws are compatible with the right to science and culture, other aspects are incompatible. Since it is grounded in the dignity of the human person, a human right (unlike IP rights) can only be held by the human creator of a work, not by corporations or legal succesors; nor can a human right be transferred (while economic IP rights can be transferred). The right to protection of material interests does not necessarily equate to a claim to exclusive control, but rather to a claim for compensation (Special Rapporteur to UN OHCRH, 2015a, §49-50).

The crucial importance of applying the "human rights perspective" to copyright, according to the UN Special Rapporteur on cultural rights, is that it

> focuses attention on important themes that may be lost when copyright is treated primarily in terms of trade: the social function and human dimension of intellectual property, the public interests at stake, the importance of transparency and public participation in policymaking, the need to design copyright rules to genuinely benefit human authors, the importance of broad diffusion and cultural freedom, the importance of not-for-profit cultural production and innovation, and the special consideration for the impact of copyright law upon marginalised or vulnerable groups. (Special Rapporteur to UN OHCHR, 2015a, §90)

Similarly, according to the Special Rapporteur, the importance of applying the "human rights perspective" to patents is that it focuses attention on many of the same concerns as those produced by copyright and, in addition, on:

> the need to design patent and alternative incentive regimes to promote research, creativity and innovation, the importance of broad diffusion of technological advances and scientific freedom, the importance of not-for-profit scientific production and innovation […]. (Special Rapporteur to UN OHCHR, 2015b, §88)

As these statements by the Special Rapporteur make clear, the human rights field has developed a sophisticated framework for balancing competing legitimate interests, resource constraints, and the limits of rights. IP policies and laws can benefit from this framework, both in their design and interpretation. The human rights field, because it is able to make sense of non-utilitarian claims, offers ways to take into account a far wider range of claims than IP law and theory have traditionally acknowledged, thus offering the possibility of developing patent, copyright, and trademark regimes that conflict less, co-exist better, and perhaps even complement, human rights. Two closely-related IP contexts that clearly benefit from application of the human rights dimension are access to medicines and A2K.

ACCESS TO MEDICINES AND A2K

The access to medicines and A2K movements are responses to the creation of a global political economy mobilised for the extension of IP. This political economy is the result of an alliance between corporations reliant on patents (e.g., pharmaceutical manufacturers), corporations reliant on trademarks (e.g., manufacturers of consumer goods such as tobacco), and the retainers of corporations seeking ever greater extension of copyright (e.g., Hollywood's movie and music lobbies). The efforts of this alliance succeeded in moving the centre of IP policymaking from a dedicated UN agency, the World Intellectual Property Organisation (WIPO), to the World Trade Organisation (WTO), and embedded an IP agenda in the WTO enforcement mechanisms in the form of the WTO Agreement on Trade-Related

Aspects of Intellectual Property Rights (TRIPS Agreement) (Drahos & Braithwaite, 2002, p. 108). This new politics of IP, driven by the alliance of self-styled "rights-holders", includes not only TRIPS but also bilateral trade agreements and a drive to export developed-world national legislative models (e.g., the US Bayh-Dole Act on publicly funded research) to developing countries.

Although patents have been the primary focus of access-to-medicine analysis, copyrights and database rights as applied to scientific (especially medical) research also pose serious threats to access to medicines (Reichman & Okediji, 2012). African researchers too often cannot afford access to important copyrighted peer-reviewed publications, thus jeopardising the ability of their countries to develop medicines, including medicines for diseases neglected by the large pharmaceutical multinationals (Gold et al., 2010). Data exclusivity, a monopoly on data obtained from human trials on the safety and efficacy of new medicines that is included in TRIPS and other treaties, not only restricts access to medicines but problematically privatises benefits from the participation of volunteers. Recent trade negotiations, on instruments such as the Trans-Pacific Partnership (TPP), Transatlantic Free Trade Area (TAFTA) and Transatlantic Trade and Investment Partnership (TTIP), have been attempting to increase the scope of data exclusivity.[5] Thus, as access to medicines analysis extends to the entire value chain of drug discovery and manufacture, it increasingly converges with A2K concerns, and a key element of this convergence is the shared linkage to the human rights dimension.

THE WAY FORWARD

For the human rights dimension to become a systematic element of IP policymaking at global level and in African continental, regional and national settings, two elements of the way forward are as follows:

HUMAN RIGHTS IMPACT ASSESSMENT

We endorse the recommendation cited above, in the reports of the Special Rapporteur to the UN OHCHR on cultural rights, that international and national copyright and patent instruments be subject to human rights "impact assessments" aimed at ensuring safeguards for the rights to freedom of expression, science and culture, health, food, and other human rights. It is our view that this human rights impact assessment approach should be adopted not just for copyright and patent instruments, but for all IP policy and legal tools.

A SCHOLARLY NETWORK

Further research is needed on the role that the human rights dimension has, or has not, played to date in African IP policymaking. Accordingly, the African Scholars for Knowledge Justice (ASK Justice) network, of which we are both part, is developing a targeted research programme in Botswana, Kenya, South Africa and Uganda. The research will consider to what extent, and in which ways, human rights have influenced IP policy processes in these countries, and how these processes and policies measure up against human rights principles. This network of IP and human rights scholars will also create curricular and teaching resources, and offer expert inputs to policy processes.

This kind of work should not be dismissed as merely academic. The Centre for Human Rights at the University of Pretoria in South Africa has demonstrated the potential for influence on public policy through its work with the African Commission on Human and People's Rights, which resulted in a Resolution on Access to Medicines (ACHPR, 2008).

Furthermore, in addition to access to medicines and A2K, there are many other IP-connected challenges emerging in Africa – including food security, investor treaty dispute mechanisms, and traditional knowledge – that require the three-dimensional policy analysis we have argued for in this thematic report: analysis in terms of the public interest, development, and human rights.

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5 The assertion that these treaty negotiations include attempts to extend data exclusivity is based on partial information because of the controversial secrecy of the negotiations.

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