

The relationship between intellectual property and human rights international law...



The aim of this assignment is to consider the relationship between intellectual property and human rights. Intellectual property rights have spread out through many bilateral, regional and multilateral treaties and the importance of intellectual property is increasing with each passing day.

[1]However, the rights stemmed from intellectual property have started up a harsh discussion with a human rights aspect due to its affects on human rights.[2]

The problems derived from this relation have been developed in depth. In the first part, intellectual property-related human rights law and human rights-related intellectual property law are discussed. The TRIPS Agreement is analyzed and the discussion of whether intellectual property rights are human rights is examined according to the international instruments when appropriate. One of the more intriguing questions is whether intellectual property rights are human rights; to answer this, we should look at the international instruments. In part 2, the European Court of Human Right's decisions concerning whether the term ' possession' in Article 1[3]of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms includes intellectual property rights such as trade mark, copyright, patent. In part 3, TRIPS agreement and its impacts on the realization of human rights such as the tension between patents and right to health related to HIV and AIDS which mostly affects underdeveloped and developing countries are analyzed.

I would like to clarify in advance that all related subjects concerning the relationship between intellectual property and human rights is not analysed since there are numerous branches stemmed from that relationship.

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Therefore, it is required to choose the most important and relevant parts of that relationship. For instance, some international instruments which are related to both intellectual property and human rights are not examined. Moreover, TRIPS Agreement does not only have negative effects on right to health but also on other human rights however only right to life is analysed due to the same reason.

The relationship between human rights and intellectual property which were formerly strangers, are now becoming intimate bedfellows. This case is stated as

For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.[4]

The interplay of human rights and intellectual property rights has reached new heights since the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which was enacted in 1995 and hereafter states, courts scholar, intergovernmental and nongovernmental organizations (NGOs) such as the World Intellectual Property Organization (WIPO), the World Trade Organisation WTO), the U. N Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, The World Health Organization (WHO) and the Conference of the Parties to the Convention on Biological Diversity (CBD) has drawn more attention to this link.[5]

Moreover, before TRIPs Agreement was entered into effect, there had already been some impacts to create this intimate bedfellow. The first one is the adaptation of non-binding document named UDHR in 1948 by General Assembly of the United Nations. After the Second World War, the problem of disregard and contempt for human rights broke out and the declaration arose from these affects of the Second World War which represents the first global expression of right. In the UDHR, the significantly important article in terms of intellectual property is Article 27(2) which is analysed below.

In the mid-1960s, so as to make the UDHR binding, two covenants which are ICCPR and ICESCR were adopted. Under article 17 of the ICCPR and under article 15(1)(c) of ICESCR[6]the link between intellectual property and human rights is once more stated and more attention is drawn to that relationship and to the debates caused by this relationship.

As a result, the relationship between intellectual property rights and human rights which is quite complicated and controversial has been at the centre of the heated debates for both IP and HR specialists for over half a century. The effect of IP rules on the ability of States to comply with their obligations under international human rights such as the duty to guarantee everybody access to affordable medicines is at the core of the debate.[7]Despite the fact that it is commonly known a perfect balance is probably unattainable, some international intellectual property rights such as the TRIPS Agreement recognise that optimal balance has to be created between intellectual property rights and human rights.[8]On the other hand, it is also argued that whether intellectual property rights are human rights.

INTELLECTUAL PROPERTY-RELATED HUMAN RIGHTS LAW

The International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which were adopted in 1966, 1948 and 1966 respectively, form the International Bill of Human Rights. These instruments have always been used to argue that human rights covenants identify intellectual property rights as human rights.[9]

As it is stated above Article 15(1)(c) of the ICESCR is related to the intellectual property and it recognises the right of everyone to benefit from both moral and material interests resulting from any literary, scientific or artistic production of which he is the author. Moreover, Article 15 (1) does not only talk about the protection of the material benefits of the author but also recognizes the right of people to take part in cultural life, enjoy the benefits of scientific progress and its applications which means that article 15 impliedly mentions the need of balance between the rights of the author, who makes a specific contribution, with the individual and collective rights of society to benefit from this contribution.[10] According to some people this reading of the law is the proof of that the intellectual property rights are human rights.[11]12

Similarly, as it is stated above Article 27(2) of UDHR is related to the intellectual property and intellectual property rights are enshrined as human rights in the UDHR under that article which states that everyone has the right to protection of moral and material interests resulting from any

scientific, literary or artistic work of which he is the author.[13]However, Article 27 of UDHR and Article 15 of ICESCR lead to some questions such as all intellectual property rights are human rights. (instead of saying lead to some questions and giving only one example, say emphasizes that question whether intellectual property rights human rights?)

According to the intellectual property right advocates these articles show that all intellectual property rights such as patents, trademarks, plant breeders rights are human rights.[14]In order to give a reasonable answer to this question, these provisions have to be examined closely in terms of the meaning of the term ' author'.

According to the majority of specialists in both areas, the term ' author' does not contain only the word ' writer' but also the breeder and inventor.[15]In my point of view, these provisions refer to the word author and it covers the copyright protection due to the usage of term ' author' in copyright.(so from your point of view what is author containing and why? Only saying due to it covers protection of copyright is not enough. Make more comment)

However, the word ' authors' has to be interpreted narrowly according to the VCLT rules.[16]Therefore, for instance, the protection of moral and material benefits of authors cannot include the meaning of protection of the benefits of a patent. In other words, when we take into consideration of Article 27(2) of UDHR and article 15(1)(c) of ICESCR it is concluded from the interpretation of these two articles that all intellectual property rights are not accepted as human rights under these provisions. why? (mesela 15 in a b c fikralarından bahset bu fikraların getirdiklerine ve neyden bahsediyorlar, hr bağlantı var mı

yok mu, author dan bahsetmissin ama asil fikranin author icin etkisinden bahsetmemissin, yani author bu fikradan nasil etkilenecek ?)

At that point, General Comment No 17 which was adopted by the ECSR Committee has to be pointed out regarding the question whether Article 15(1) (c) refers to the protection of intellectual property. According to the General Comment on Article 15(1)(c) of ICESCR, it is not possible to conclude that article 15(1)(c) protects intellectual property rights or lift up intellectual property to the human rights stratosphere.[17] This case is mentioned in some paragraphs of General Comment such as paragraph 1 saying that ' it is important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)' by showing the reasons stated in paragraph 1 and 2 where it generally stresses the difference between human rights and intellectual property rights and paragraph 7 noting that '... intellectual property rights' entitlements, because of their different nature, are not protected at the level of human rights.'

Furthermore, the committee limits the scope of the author term by stating that no legal entity can be deemed to be an author through implementing the words ' everyone', ' he' and ' she' by indicating the drafters belief that authors of scientific, literary or artistic productions can only be natural persons.[18] This interpretation shows that intellectual property rights are neither recognized as human rights nor mentioned under that article. For, intellectual property right holders in most cases are legal entities such as the large companies holding patents that can have a potential to affect the medicine attainability and exempting these companies is against its nature.

On the other hand, in the light of general comment no 17, it can also be <https://assignbuster.com/the-relationship-between-intellectual-property-and-human-rights-international-law-essay/>

construed that not all intellectual property rights but only the natural owners' intellectual property rights are recognised as human rights.

Besides, article 12 of UDHR[19], which provides protection against arbitrary interference with privacy, family, home or correspondence and against attacks upon honour and reputation, is also accepted within the wider intellectual property framework, such as an action for violation of confidence, trade secrets, moral rights and even personality rights.[20](bu paragraph hem kisa biraz uzun olmasi lazim hemde biraz bu konu hakkinda sende yorum yap)

Moreover, the ICCPR does not provide a positive basis for the protection of intellectual property rights, but under article 17 it guarantees, indirectly, the protection of moral rights that there shall not be any unlawful attacks on a person's honour and repudiation and also Article 19 mentions the freedom of expression which contains right to receive and impart information and ideas which shows that there is further indirect protection for reputational rights. [21](Freedom of expression'nun insanin en temel haklarindan oldugundan vazgeçilemeyeceginden bahsedip Article 19 da da deginilmesi dolayli bir koruma getiridgine kanit oldugunu soylebilirsiniz)

THE EUROPEAN COURT OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Furthermore, the European Court of Human Rights has identified intellectual property rights as human rights when interpreting the term ' possession' in Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In *Anheuser-Busch Inc v Portugal*

case[22]which is related to the application of brought by Anheuser-Busch <https://assignbuster.com/the-relationship-between-intellectual-property-and-human-rights-international-law-essay/>

Company to register the 'Budweiser' as a trade mark which had already been registered as a designation of origin on behalf of a Czechoslovak Company, the Grand Chamber of ECHR held that IPRs 'undeniably attracted the protection of Article 1 of Protocol No. 1 of the ECHR and that it is clear a trade mark falls within the scope of the term possession under that article. Similar decision was held for copyrights by ECHR in *Basan v Moldova*[23] that the protection under article 1 also extends to copyrights.[24] Besides, in *Smith Kline and French Laboratories Ltd v the Netherlands*[25] the ECHR indicated that patent amounts to a 'possession' within the meaning of that article.[26] Thus, even if the scope of the term possession is not defined explicitly, there is no doubt that the intellectual property rights are protected by article 1 of protocol 1 of the convention. This interpretation is also mentioned by an author that:

The concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.[27] (concept of the possessions' i paragrafin baslarina al, caselar hakkinda cok detayli bilgi gerekmiyo bence ve sonlara dogru mahkemenin tutumunu kendi yorumunla acikca belirt)

TRIPS AGREEMENT AND REALIZATION OF HUMAN RIGHTS

After analysing the intellectual property-related human rights instruments, we should also examine the human rights related intellectual property

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agreement which is the Agreement on Trade Related Aspects of Intellectual Property Rights, more commonly known as TRIPS negotiated in 1994 at the Uruguay Round of GATT and the ratification of TRIPS became a compulsory requirement of WTO membership. Any countries willing to enter international markets facilitated by WTO have to comply with strictly enforced intellectual property law by TRIPS. This makes TRIPS a very critical instrument for maintaining intellectual property laws in the time of globalization.

The TRIPS agreement that has a so-called major aim to enhance the standards of intellectual property rights, particularly in under-developed countries, has huge impacts on the realization of human rights through its implementation.[28]For, under TRIPS the protection of patents is strengthened however this strengthening has started being harmful for fundamental human rights such as right to health.[29]In other words, the nexus between the intellectual property rights and realization of human rights in under-developed countries occurs with regard to a number of human rights such as rights to health particularly in the context of the HIV/AIDS epidemics in Africa and India.[30]This is due to the fact that medical patents force countries to introduce product patents in pharmaceuticals, thereby not allowing the generic medicines which leads to dramatic drop in the prices of these drugs, adversely affecting the medicines accessibility and endanger the life of a substantial number of persons, thereby the human rights to health.[31]

In my point of view, TRIPS Agreement fulfils its own obligations partly by emphasising, impliedly under article 7, the need to balance the human rights and intellectual property rights, by not providing any method on how to

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accomplish this balance.[32]Therefore, the ways of achieving that balance should be inserted by a clause into TRIPS Agreement since in terms of right to health, the affordability and accessibility of medicines, particularly by needy people, are the two major components of right to health. As a result, TRIPS Agreement, contrary to its so-called aim to enhance the standards of intellectual property rights particularly in under-developed countries, has brought benefits only to developed countries and this has done by preventing the development of developing countries. Therefore, TRIPS Agreement should be amended as soon as possible.

The reaction, against the impacts of intellectual property rights on the realization of human rights such as the significant changes in the drug prices, is also taken in hand by the Sub-Commission on the Promotion and Protection of Human Rights which declares that any intellectual property rights regime that which would make it more difficult for a state to comply with its core obligations in relation to the right to health and food would be inconsistent with the legally binding obligations[33]of the concerned state.

[34]

CONCLUSION

In my point of view, which is also the dominant view among people concerning the question whether intellectual property rights are human rights, intellectual property rights cannot be recognized as human rights[35]since they are incompatible to each other. After the WTO's TRIPS agreement was adopted which made WTO countries to include patent protection for pharmaceuticals, this dominant view among authorities has

strengthened and the view of adherents started to argue that the duties imposed by the TRIPS agreement, particularly in the form of medical patent, come in the way of countries fulfilling their international obligations towards fulfilling their citizens' right to health, which is a well recognised human right.[36]

Moreover, it is commonly accepted by many authorities, including authors and also the General Comment No 17[37] regarding the Article 15(1) (c) of ICESCR, that defining intellectual property rules as human rights is problematic at the theoretical level since on the one side human rights are the rights that are inalienable and part of universal entitlements that are not limited in time or space and cannot be suspended or curtailed. On the other side, Intellectual property rights are limited-duration statutory rights which are granted by the State. Furthermore, it is not really logical to recognise intellectual property rights as human rights whereas human rights such as right to health are recognized as rights that are inherent to mankind by virtue of their humanity. Besides, they can be curtailed in certain circumstances where they conflict with the larger interests of society.[38]

The reason of focusing on the underdeveloped and developing countries is that HIV and AIDS affect people living in poorer countries to an exponentially greater extent than people in rich countries.[39](bence, son cumleyi bu konuyu anlattigin yere eklersen daha iyi olacak gibi cunku genel bilgi verirken ozel bir aciklama yapmissin)