Human Rights and IP Law at the Bilateral and Plurilateral Level

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114 Regional or Free Trade Agreements with IP arts

Increasingly demanding and detailed IP bilaterals vs. HHRR multilaterals

Data generated in the context of the research project *IP enforcement and the public interest*, X. Seuba
Delimitation

• Context:
  – Several *international regimes* implied
  – *Public International Law*

• Addressing the relations between “HHRR and IP Law at Bilateral and Plurilateral Level” involves two sets of different but related issues
  – Relations between *primary norms*: Substantive issues, fundamentally to identify positive and conflictive relations.
  – Implementation of *secondary norms*: management of the primary norms and its relations
• Addressing the interactions HHRR and IP at bilateral and plurilateral level in its entirety would imply analyzing IIOO, courts and norms.
  – Our analysis is focused on norms, which to some extent imply IIOO and courts as well.
  – Increasingly complex relations between regimes
    • regimes that make up organizations, courts and treaties contain mechanisms on who is to rule and under what norms

• Relations between IP norms and HHRR
  – Can be positive, ambiguous or conflictive
  – Examples provided in the area of IP enforcement

• Human rights are rights of persons
  – but not legal persons
Overarching principle: International obligations implemented in good faith

A single operation of treaty interpretation (textual, teleological and contextual) that must take into account the entire international legal order:

Art. 31.3.c): systemic integration

Are they of any use with regards to human rights treaties?

Conflict clauses

Lex posterior / lex specialis

Collision clauses

Lex posterior / lex specialis

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Supportive relations
HHRR multilateral - IP enforcement in bilateral

- **Right to a remedy & right to a fair trial**, two faces of the same coin: access to justice + characteristics of the process and forum
  - IP enforcement norms fulfil both functions
- **Right to a remedy** and **IP enforcement** in bilaterals
  - Right to a remedy in the most important HHRR covenants
    - 14.1 ICCPR and 6.1 ECHR: *civil* and criminal proceedings
    - Obligation to set up appropriate judicial and administrative mechanisms to have the rights determined by a competent authority
  - Implementing this right, IP bilateral treaties order that “measures, procedures and remedies” must be available so as “to permit effective action against any act of infringement of intellectual property rights”
  - Criminal proceedings do not fall within this scope: obligation reserved for the most serious HHRR violations
Ambiguous relations
HHRR multilateral - IP enforcement in bilateral

• Frequently the relations won’t be clear-cut: there is need for interpretation
• In the area of IP enforcement, bilaterals enact ambiguous provisions and unbalanced regimes
• Ambiguous provisions:
  - Systemic interpretation
  - HHRR
  - Right to a fair trial
• Unbalanced regimes
  - the general content of the article creates an unbalanced situation which, in itself, is incompatible with human rights prescriptions
Defendant

No reference to:
• obligation to give notice immediately after the execution of the measure
• right (to be heard and) to ask for a review of the measure
• revocation of the measures if proceedings are not established in a reasonable period
• provide security or equivalent assurance
• awarded compensation in case measures are revoked or lapse

Rightholder: all the rights foreseen in the EU
What to do with ambiguous & unbalanced provisions?

• **Re-drafted** internationally or/and improved through **national implementation**.
  – HHRR standards are decisive in shaping IP (enforcement) legislation

• Measures for the preservation of evidence, right to a fair trial - privacy: *Chappel v. United Kingdom* (Anton Piller)
  – “this measure should be accompanied by adequate and effective **safeguards against arbitrary interference and abuse**” (Court)
  – “The phrase ‘in accordance with the law’ (...) relates to the **quality of the law**, requiring it to be compatible with the rule of law” (Commission)

• **Equality of arms**: “same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, **not entailing actual disadvantage or other unfairness** to the defendant” HHRRR Committee
Conflict

• If norms cannot be reconciled, norms on treaty conflict will come into play

• Principle of legality, article 7 ECHR: clarity, non-ambiguity
  – However, some criminal measures in FTAs contain ambiguous wording, for instance, the obligation to enact criminal measures in response to piracy and counterfeiting conducted “on a significant scale” or “more than de minimis financial harm”

• Conflict clauses: subordination or priority
  – ACTA: “Nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement”

• VCLT: *lex posterior*
  – Most of the occasions, FTAs
  – Regarding the others, relation of international responsability

• Will national courts accept this outcome? Are these rules applicable to conflicts with human rights norms?
Conclusions

- The coexistence of multilateral HHRR treaties and bilateral treaties laying down new IP obligations is frequently tense.
- Well-known and acknowledged conflicts in the areas of food, health and culture are also recurrent in the area of IP enforcement.
- From the point of view of general public international law, the preferred option is to reconcile through interpretation the conflicting provisions.
- However, if a conflict is confirmed, public international law doesn’t offer very conclusive solutions.
- It is very plausible to expect (more) national courts addressing these issues.