Hum Rights Rev (2008) 9:213–232
DOI 10.1007/s12142-007-0042-2

Human Rights, Intellectual Property, and Struggles for Recognition

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Published online: 30 November 2007
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Abstract This article examines recent controversies over the relationship between human rights and intellectual property rights (IPRs). Many activists have claimed that IPRs conflict with human rights. Others have argued that IPRs are themselves human rights. The article approaches the debate as an opportunity to clarify the nature of IPRs in relation to human rights, as well as the nature of contemporary struggles over these rights. After surveying the dual expansion of both human rights and IPRs and rejecting the view that IPRs are rooted in human rights, the author investigates the example of the HIV/AIDS crisis and the global Campaign for Access to Essential Medicines in order to illustrate attempts to represent IPRs as an outright threat to human rights. Highlighting the limitations of a human rights-based critique of IPRs, he concludes by proposing to study contemporary conflicts over IPRs and human rights as struggles for recognition and as struggles over the institutionalization of a transnational "recognition order."

Introduction

The "age of rights"[1] we live in has not only fostered *human* rights but also a host of new *property* rights, in particular rights protecting intellectual property. With the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is overseen by the World Trade Organization (WTO) and binding for all its members, these rights were significantly expanded in scope and authority. TRIPS guarantees property rights in trademarks, copyrights, industrial designs, geographical indications, plant varieties, and patents – the two most important being copyrights and patents.[2] During and after the negotiations leading to this agreement, many scholars and activists have claimed that intellectual property rights (IPRs) conflict with human

[1] Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

[2] On the context and history of this landmark treaty, see Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, Colo.: Lynne Rienner, 2006).

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rights. IPRs on medicines and plant varieties have been criticized for threatening the enjoyment of human rights like the right to health, food, or even self-determination.[3] The extended coverage of copyright laws is seen as jeopardizing freedom of speech.[4] On the other hand, there is a powerful discourse that claims that IPRs are themselves human rights. This discourse has been promoted not only by business representatives, but also by critics of capitalism who believe that, for example, indigenous peoples are being robbed of their "intellectual property," as their cultures are increasingly exposed to global market forces.[5] Some argue that these two sets of rights are fruits from the same tree of Enlightenment ideas, whereas others view IPRs as pests infesting that tree.

There can be no doubt that the entire controversy has compounded the already rampant confusion in the human rights debate, whether by ennobling intellectual property as a human right, or by rhetorically overstating the antagonism between human rights and IPRs.[6] Both views have shaped many of the exchanges between business lobbyists, nongovernmental organizations and others in recent years. This article approaches the debate as an opportunity to clarify the nature of IPRs in relation to human rights, as well as the nature of contemporary struggles over these rights.

My conclusion will be that casting the harm possibly done by the expansion of IPRs in the language of human rights' infringements has not contributed to bolster the consensus on the very meaning of this language. In fact, it has unduly narrowed the range of interpretations that can be employed to make sense of the important conflicts over a number of current intellectual property issues. I will reach this conclusion in four steps. First, I will briefly sketch the dual expansion of both human rights and IPRs. Second, I will criticize the contention that IPRs are rooted in human rights. Third, looking at the example of the HIV/AIDS crisis and the global Campaign for Access to Essential Medicines, I will comment on the alternative contention that attempts to represent IPRs as an outright threat to human rights. Fourth, after having examined potentials and limitations of a human rights-based critique of IPRs, I will propose to study contemporary conflicts over IPRs and

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[3] See, for example, the Resolutions 2000/7 and 2001/21 of the UN Sub-Commission for the Promotion and Protection of Human Rights; *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, Report of the High Commissioner for Human Rights, UNHCR, Geneva, E/CN.4/Sub.2/2001/13, June 27, 2001; *Human Rights and the Establishment of a WIPO Development Agenda*, June 2006, by the Geneva-based group 3D, available at: http://www.3dthree.org/en/. Among the numerous scholarly contributions to the debate, see Thomas Pogge, "Human Rights and Global Health: A Research Program," *Metaphilosophy* 36 (2005), 182–209; Philippe Cullet, "Patents and medicines: the relationship between TRIPS and the human right to health," *International Affairs* 79 (2003), 139–60. For more references, see also Jakob Cornides, "Human Rights and Intellectual Property: Conflict or Convergence?," *The Journal of World Intellectual Property* 7(2) (2004), 135–67, as well as the internet portals *IPRsonline.org*, *IP-watch.org* and *CPTech.org*.

[4] See, for example, Mark A. Lemley and Eugene Volokh, "Freedom of Speech and Injunctions in Intellectual Property Cases," *Duke Law Journal* 48 (1998), 147–242.

[5] See Rosemary J. Coombe, "Intellectual Property, Human Rights, and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity," *Indiana Journal of Global Legal Studies* 6 (1998), 59–115.

[6] See Gary B. Herbert, "Clarity and Confusion in the Human Rights Debate: An Editorial," *Human Rights Review* 5(1) (2003), 5–11.

human rights from a broader perspective as struggles for recognition and as struggles over the institutionalization of a transnational "recognition order."

The Expanding Universe of Rights

Over the last decades, we have witnessed an enormous expansion of human rights norms and assertions. There are at least five indications of this development. First, human rights are no longer only for citizens but also for noncitizens such as undocumented immigrants. Rights have become to some extent, although not yet entirely, independent from membership in territorially exclusive nation-states.[7] Second, human rights have entered a growing range of diverse organizations, from the agendas of international aid agencies to the curricula of military academies.[8] Third, they have ceased to be the domain of liberal elites in the West and have taken root in countless non-Western regions and movements.[9] Fourth, they have begun to cut across the old separation between the law of war and the law of peace, which had limited the applicability of human rights to the latter. This separation has been gradually replaced by legal opinions and treaties containing clear stipulations regarding "nonderogable" human rights obligations that cannot be suspended even in times of war or public emergencies.[10] And fifth, the appeal of human rights norms is such that, even where their observance cannot be directly enforced, they are still conveying powerful messages that can lead to an effective transformation of the situation on the ground, often by legitimizing widespread public anger and protest.[11]

Unfortunately, this expansion into ever new fields and dimensions of social life is not accompanied by an increasingly robust consensus on the meaning of human rights. On the contrary, the more the universe of human rights expands, the less these rights seem to work as an agreed-upon frame of reference. This negatively affects the ability to ease conflicts between groups and nations whose common humanity has been invoked in numerous Declarations and Covenants. It has been rightly remarked that, instead of bringing people together, the universal belief in human rights, ironically, "drives nations and peoples further apart."[12] This has partly to do with the belief that individual rights of personal empowerment are at loggerheads with collective rights of economic development or social well-being. Many Asian intellectuals and activists, who today often endorse a human rights vocabulary, still

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[7] See David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996).

[8] See Volker Heins, "Democratic States, Aid Agencies, and World Society: What's the Name of the Game?," *Global Society* 9 (2005), 361–84; Russell W. Ramsey and Antonio Raimondo, "Human Rights Instruction at the U.S. Army School of the Americas," *Human Rights Review* 2(3) (2001), 92–116.

[9] See Thomas Risse, Stephen Ropp and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

[10] See Tereya Koji, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights," *European Journal of International Law* 12 (2001), 917–941.

[11] See Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton, NJ: Princeton University Press, 2001); Amy L. Wax, "Expressive Law and Oppressive Norms," *Virginia Law Review* 86 (2000), 1731–79.

[12] Herbert, fn. 6 above at 9.

reject the "state-centredness" as well as the "individualistic ethic" of Western approaches to human rights.[13]

The situation is likely to become more complicated, as different categories of human rights will no longer to be pitted against each other along the traditional fault lines of East versus West or North versus South – fault lines that might soon be rendered obsolete by the "mega-trend" of globalization.[14] This was made clear when a worldwide controversy erupted over a Danish newspaper publishing cartoons of the prophet Muhammad in October 2005. The event revealed, among other things, a sense of uncertainty *within* Western societies about competing notions of respect as well as unprecedented *global–local* tensions. Note that, for the first time, UN human rights officials rebuked the government of the small Scandinavian democracy for its "intransigent defense of unlimited freedom of expression" at the expense of "religious freedom" and international "religious harmony."[15]

Another recent trend is the *trivialization* of human rights in the affluent West. A growing number of cases judged by human rights watchdogs no longer bear the faintest resemblance to the conscience-shaking "barbarous acts" mentioned in the Preamble of the Universal Declaration of Human Rights. Take the example of the hockey mom in British Columbia, Canada, who recently filed a complaint with the province's Human Rights Tribunal because the local hockey association did not allow her 14-year-old daughter to change in the same locker room as the boys on her co-ed sports team. Bizarre as it sounds, the tribunal dealt with this case in all seriousness and decreed that separate change rooms are indeed unjust and in contradiction with human rights.[16] This and similar instances – like the elevation of the notorious Swiss bank secret to a human right[17] – show that apart from conflicts between competing human rights, we are facing a worrying disconnect between people who suffer real rights abuses and other people who are completely out of touch with the realities of oppression against which the idea of human rights was originally brought into play. From this perspective, the rhetorical overuse of human rights is only the flip side of a yawning vacuum at the heart of that rhetoric.

This entire cauldron of conflict has been further stirred by the addition of *property rights* that have undergone an expansion in scope and authority quite similar to the expansion of human rights. The expansion of property rights cuts across the distinctions between mind and matter, nature and culture, North and South, and therefore raises a host of philosophical as well as political issues. Three aspects are worth highlighting.

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[13] Rajni Kothari, "Human Rights: A Movement in Search of a Theory," in Smitu Kothari and Harsh Sethi, eds., *Rethinking Human Rights: Challenges for Theory and Action* (Delhi: Lokayan, 1991), 19–30.

[14] See National Intelligence Council (NIC), *Mapping the Global Future: Report of the National Intelligence Council's 2020 Project* (Washington DC: Government Printing Office, 2004), 10.

[15] Commission on Human Rights, "Situation of Muslims and Arab peoples in various parts of the world" (Special Rapporteur Doudou Diène), UN Economic and Social Council, E/CN.4/2006/17; February 13, 2006, 10–11.

[16] See Naomi Lakritz, "Girls-in-locker-room ruling makes a mockery of rights law," *The Gazette*, Montreal, September 23, 2005.

[17] See Georg F. Krayer, "Privacy: a Human Right at Risk," Paper given at a media conference, September 19, 2002. Available at: http://www.swissbanking.org/krayer_e.pdf (last accessed June 1, 2006).

First, property rights made bold new strides into the vast area of *intellectual* activity. IPRs make sure that so-called non-rivalrous, copyable goods (like computer software, processes of manufacture, or genetic material) that can be used and possessed by an infinite number of individuals without losing their value, are nonetheless considered “scarce” so that they can be bought and sold like other commodities. Although patents and copyrights have been with us for centuries, more recent trends have led to the reframing of an increasing number of issues of authorship, originality, use, and access to ideas and expressions in terms of IPRs. Leaving older notions of copyright behind, the World Intellectual Property Organization, a specialized UN agency headquartered in Geneva, Switzerland, is now even pondering a special treaty that would protect new “broadcaster” or “webcaster” property rights in information distributed over radio, cable television, or through any wired or wireless computer network, including the Internet. All these trends have been spurred by the perception of a technological revolution in information and communication technologies and the concomitant perception of huge profits to be lost to “pirates,” or of equally huge rents to be gained through better intellectual property protection.

Second, patents today can be granted for things that have not been “invented” in a strict sense, but are already there, like components of life processes that are considered new, useful and nonobvious (as soon as they have been isolated or tinkered with a little). Thus, patent-like protection has been accorded to sexually reproducing plants, laboratory mice, an oyster with an extra set of chromosomes, and numerous compounds of living organisms that have been purified away from their sources. Various courts have confirmed that, with advancements in technology, plants and living organisms can be patented. The whole of the animal kingdom is now targeted, and the system is slowly closing in on the human body.

Third, with the establishment of a global regime for the enforcement of IPRs, a high and uniform level of intellectual property protection has expanded from developed to developing countries. Today, all WTO members have to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the ingredients for a medicine), although certain exceptions are allowed.

Similar to debates in the human rights field, intellectuals from non-Western backgrounds have contested the alleged cultural “chauvinism” of the emerging IPR regime and the pretense that the rights protected by this regime are universally applicable and beneficial.[18] Furthermore, like in the case of universal human rights, there is evidence that the globalization of property rights drives nations and peoples apart.

Intellectual Property Rights as Human Rights?

The business lobbyists, who since the mid-1980s pushed for the establishment of a new global intellectual property regime, have framed the issue in a way that

[18] See, for example, Akalemwa Ngenda, “The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?,” *Information & Communications Technology Law* 14(1) (2005), 59–79.

resonated with the broader normative context of a liberal culture deeply imbued with "rights talk."[19] IPRs were constructed as a subset of ordinary property rights that in turn were presented as a species of human rights. From early on, spokespersons of companies and business associations accused developing countries of encouraging or tolerating the imitation of pharmaceuticals or the infringement of copyrights and called for a treaty able to "stop their pirates from boarding our ships."[20] Others denounced organized "criminal gangs" for stealing "America's crown jewels."[21] By labeling infringers of intellectual property rules as "pirates," business activists transformed the mundane economic issue of IPRs into a symbol redolent with powerful moral meanings. Since ancient times, the pirate was declared an enemy of mankind itself – *hostis humani generis* – and even relatively, recent court rulings in the USA placed the pirate under the same rubric as the "torturer" and the "slave trader."[22] The prehistory of the TRIPS accord was strongly influenced by such kind of rhetoric that ultimately suggested that attacking intellectual properties is like attacking the property owners themselves. This rhetoric was further accentuated by the concomitant idea to apply "zero tolerance" to international trade policies – a notion that originated from the federal drug policy of the 1980s and then caught on throughout society.

This entire endeavor was certainly successful to a degree. The appropriation of intellectual property by anybody who is not officially recognized as its owner was stigmatized as piracy, and pirates were symbolically expurgated as "the Other," outside of the new international order.[23] Representing IPRs as akin to human rights helped mobilize power resources in favor of a new uniform international property regime that could coerce developing countries into compliance. However, the business discourse failed to remove the manifold meanings of legitimate property from public contestation. In this sense, things have not changed much since the nineteenth century in Europe, when people already fought bitterly over the question whether the gathering of fallen wood by poor people constituted "theft," "pilfering," or, as a would-be famous radical maintained, just the exercise of a "customary right."[24]

Unsurprisingly, opponents of the globalization of high levels of intellectual property protection quickly joined the global rights talk. Instead of relying only on utilitarian arguments, the critique of TRIPS was couched in terms of fundamental rights. A high-level expert from India, for example, asked "whether we as human beings do not have *a natural right to imitation*, the right to imitate each other, to learn from each other and to elaborate and develop each other's ideas and activities."

[19] See Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003), 50–1.

[20] C. L. Clemente, "A Pharmaceutical Industry Perspective," in C. Walker and M. Bloomfield, eds., *Intellectual Property Rights and Capital Formation in the Next Decade* (Lanham, MD: University Press of America, 1988), 133.

[21] Jack Valenti of the Motion Picture Association of America, quoted in Cornides, fn. 3 above at 136n.

[22] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Circuit, June 30, 1980); May and Sell, fn. 2 above at 164.

[23] This is what "ideologies" do. See John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Stanford, CA: Stanford University Press, 1990), 65.

[24] Karl Marx, "Debates on the law on theft of wood [1842]," in *Marx-Engels Collected Works* (New York: International Publishers, 1975), Vol. 1. Available at: http://www.marxists.org/archive/marx/works/1842/10/25.htm.

She added: "It is this activity that distinguished us from our hominid forebears."[25] There is nothing intrinsically anti-Western about this position, which is not too different from Thomas Jefferson's noted skepticism toward patents, and close to current *A2K* (Access to Knowledge) activists who sometimes romanticize the return of plebeian, anti-property traditions of "social banditry."[26] Some of these arguments reject rigid IPR systems as just another instance of the exclusivist institution of private property. Others challenge the construction of IPRs as a subset of ordinary property rights and underscore the fundamental differences between these two sorts of property.

Private property is controversial because it is synonymous with the power to *exclude* people from resources. Historically, an important side effect of the introduction of the right to private property has always been the effective *dispossession* of large groups of people who lost the few things they used to own and control.[27] For this and other reasons, and contrary to what many people believe, the "right to property" was included in the Universal Declaration, but not the right to *private* property.[28] Still, ordinary private property rights seem to be less controversial than IPRs. One reason may be that, again contrary to deeply held Western including Marxist beliefs, private property rights were always known beyond occidental capitalism. Non-Western property systems were (and still are) different, but the thesis of the nonexistence of private property in Asian social history has long been discredited.[29]

On the other hand, property rights in physical instantiations of the human mind are inherently controversial for at least two reasons. The main reason is that the scarcity of intellectual goods is *imposed* on them by law, unlike those things which are scarce in relation to given demands and desires. Like other private property rights, IPRs constitute "a relationship both *to* and *through* objects of social wealth."[30] However, intellectual property is a relationship to objects whose very "thingness" has first to be created as a legal artifice before the relationship between rightholders and dutyholders can be filtered through these peculiar things. This particular origin of IPRs increases the burden of legitimation that falls on them. A second reason is that, from a historical perspective, the scope of private property has *shrunk* over the last 200 years, whereas the scope of IPRs seems to be *ever-expanding*: at least in Western societies, you cannot legally own public offices or workers, but you may own parts of

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[25] Usha Menon, "Designing a regime of access to genetic resources: beyond the popular logic of Farmers' Rights and Breeders' Rights," in *Ethics and Equity in Conservation and Use of Genetic Resources for Sustainable Food Security*. Proceedings of a Workshop to Develop Guidelines for the CGIAR (Rome: International Plant Genetic Resources Institute, 1997), 101.

[26] Chris Rojek, "P2P Leisure Exchange: Net Banditry and the Policing of Intellectual Property," *Leisure Studies* 24 (2005), 357–69.

[27] See Stefan Andreasson, "Stand and Deliver: Private Property and the Politics of Global Dispossession," *Political Studies* 54 (2006), 3–22.

[28] See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1998), Chap. 4.

[29] See, for example, Dharma Kumar, "Private Property in Asia? The Case of Medieval South Asia," in *Colonialism, Property and the State* (Delhi: Oxford University Press, 1998), 135–70.

[30] David Lametti, "The concept of property: relations *through* objects of social wealth," *University of Toronto Law Journal* 53 (2003), 329.

the genetic map of a living organism, stock phrases and songlines or the compound that gives lemons their particular taste. Thus, although there is no clash of civilizations about the acceptance of private property as such, conflicts over the relationship between "real" property rights, IPRs, and other forms of rights are clearly on the increase, both in international society and within countries and cultures.

To elucidate differences between forms of proprietary and nonproprietary rights, I now draw on an analytical framework recently developed by Leif Wenar, who in turn leans heavily on the work of Wesley Hohfeld, an influential legal theorist in the early twentieth century.[31] Wenar first distinguishes *privileges* (exemptions) and *claims* as fundamental forms of rights-assertion. Privileges have the form "A has a right to phi," where "phi" is an active verb. An example is the right to free speech, which is the right not to follow the majority's ideas and opinions. Privilege rights have to be *exercised* to be effective.[32] Claims, by contrast, have the form "A has a right that B phi." They are enjoyed rather than exercised. In addition to claims and privileges, Wenar identifies *powers* and *immunities*. These are second-order "rights to *alter* our privileges and claims, and rights that our privileges and claims *not* be altered."[33] Most real rights are typically made up of several of these elementary assertions, although it is usually possible to isolate a dominant element in each right.

Thus, both real property rights and IPRs are, among other elements, made up of claims that entitle their holders to protection against harm or to a specific behavior on the part of dutyholders. Claim rights imply that somebody other than the rightholder has a duty to do something (to pay for access, to refrain from interference, etc.). As a consequence, property rights constrain the ways in which titleholders can be harmed. Competing them out of business is legitimate; simply taking their property is not. If the right to property were enshrined in constitutional law, property owners would also enjoy far-reaching *immunity* against expropriation or any other changes of their normative situation. Immunity means that others do not have any second-order right to change the rules that assign first-order rights to physical and juridical persons. Although American constitutional law, like most of its European counterparts, does not explicitly recognize private property as a fundamental right, property is today considered "a far more robust constitutional value than it was just twenty years ago."[34] It is thus fair to say that property rights confer at least a strong measure of immunity against demands and intrusions from non-rightholders and the general public. For some holders of property rights, in particular large corporations, these rights coincide with the (limited) *power* to create new rights of themselves or others, or to annul old rights. Again, this power right is not simply enjoyed, but actively exercised as the history of the TRIPS agreement illustrates, which is marked by the extraordinary mobilization of private companies trying to spin new rights out of their already existing ones.[35]

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[31] See Leif Wenar, "The Nature of Rights," *Philosophy & Public Affairs* 33 (2005), 223–52.

[32] Ibid, 233.

[33] Ibid, 230; emphasis added.

[34] Gregory S. Alexander, "Property as a Fundamental Constitutional Right? The German Example," *Cornell Law School Working Paper Series*, No. 4 (2003), 56.

[35] See Sell, fn. 19 above, chap. 5. See also Rodney Bruce Hall and Thomas J. Biersteker, eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

In themselves, IPRs are neither powers nor immunities, although they are increasingly well-entrenched and often treated on par with other property rights. In some cases, the rights of a patent holder were even seen as compromising the rights of owners of physical property.[36] Yet, the global IPR regime is still far from according an immunity right to intellectual property claimants. First, it is worth remembering that, unlike other property titles, patents (and copyrights) expire after some time. They entitle their holders only to *temporary* monopolies. *All* private property is, and has always been, conditioned by at least some rules limiting its use. There is no such thing as a nonderogable property right.[37] This is evidently even more so the case with regard to intellectual property. IPRs are premised on the idea that they ultimately do not restrict, but promote the dissemination of knowledge and wealth in society. Thus, IPRs contain a *privilege* granted by law, an "exemption from a general duty"[38] or normative expectation. Society expects the public disclosure of proprietary information and wants knowledge to flow freely; yet patent holders are temporarily shielded from this general expectation, because it is assumed that the granting of private rights in intellectual property is an incentive to innovate and to broaden the knowledge base of society.

Once granted, IPRs also function as claims against others who have to pay fees or royalties and who are not allowed to copy protected materials. These claims, however, are in turn subjected to a different set of privileges on the part of those *excluded* from intellectual property. These privileges or property-limiting principles are internal as well as external to the IPR system. The fact that IPRs are granted on the basis of an agreed-upon social purpose to be served by these rights is reflected in Article 27(2) of the TRIPS agreement, which allows the exclusion of a subject matter from patenting in order "to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment." More importantly, Articles 30 and 31 permit the compulsory licensing of patents (their use without the patent owners consent) in cases of national emergencies, but also in a range of other situations. Developing countries have not made much use of these perfectly legal exemptions and flexibilities, which have recently been confirmed, largely because of real or anticipated extra-institutional bilateral pressures from European and US governments or powerful businesses.[39]

Two external property-limiting principles are relevant to our discussion: *Farmers' Rights* and *Traditional Resource Rights*. The idea of Farmers' Rights was developed in the late 1980s within the UN Food and Agricultural Organization in response to strengthened legal protection of plant varieties and breeders' rights, sometimes

[36] A landmark ruling by the Federal Court of Canada in 2002 established that a farmers' ownership of a canola plant does not supersede the claim-rights of the holder of a patent for a stray gene found in that plant (*Monsanto Canada Inc. v. Schmeiser*, 2002 FCA 309 at para. 51).

[37] See Lametti, fn. 30 above at 369–70. On the essential "nonabsoluteness" of private property rights, see also Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), 170–98.

[38] Wenar, fn. 31 above at 226.

[39] Kenneth C. Shadlen, "Patents and Pills, Power and Procedure: The North–South Politics of Public Health in the WTO," *Studies in Comparative International Development* 39(3) (2004), 76–108.

explicitly with reference to the "right to food." The concept also entered the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture.[40]

Farmers' rights is a socio-economic right invented to entitle farmers – particularly small farmers in developing countries – to measures in support of their, so far, largely underrated contributions to the conservation and cultivation of agricultural plant varieties. As the work of these farmers is continuously needed for breeding high-yielding food crops, farmers' rights provisions, incorporated in a number of current plant variety protection laws, seek to redress the imbalance in the reward structure that favors the finished products of scientific plant breeding that are increasingly subject to IPRs.

Yet there is no consensual understanding of the content of these rights. Surveys among experts have found that farmers' rights are often conceived as *privilege rights* that allow farmers to save, exchange, or replant branded seeds of a protected variety. In addition, farmers' rights are seen as *claim rights* entitling farmers to improved participation in decision-making bodies as well as to some kind of compensation for their undervalued contribution to the production of new plants.[41] Unfortunately, given the complex pedigree of plants and the difficulties in accurately identifying the contributing farming communities, authorities in developing countries are faced with enormous, perhaps insurmountable problems in adjudicating on redistributive claims, provided that funds for redistribution can be mobilized at all.[42] As a consequence, farmers' rights are still largely aspirational and far from being firmly institutionalized.

The concept of Traditional Resource Rights was developed by Western activists in collaboration with indigenous groups, again mostly in response to imbalances in the modern patent and plant variety protection systems that recognize certain forms of creative activity, but not others.[43] Resource rights, which are also still largely aspirational, have moved to center stage recently. This is partly because of cases that proved the usefulness of indigenous knowledge in identifying compounds in plants that were later used to develop potentially lucrative pharmaceutical drugs.[44] Like farmers' rights, traditional resource rights entail both privileges that entitle groups to use their own biological resources as they see fit without interference by the state or other actors ("self-determination") and claims directed at these same actors who are expected to compensate indigenous groups for the misappropriation of resources.

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[40] See Regine Andersen, *The History of Farmers' Rights: A Guide to Central Documents and Literature*. The Farmers' Rights Project Background Study No. 1 (Lysaker, Norway: Fridtjof Nansen Institute, 2005).

[41] See Regine Andersen, *Results from an International Stakeholder Survey on Farmers' Rights*. The Farmers' Rights Project Background Study No. 2 (Lysaker, Norway: Fridtjof Nansen Institute, 2005), 6–15.

[42] See C. S. Srinivasan, "Exploring the Feasibility of Farmers' Rights," *Development Policy Review* 21(4) (2003, 429–34.

[43] See Graham Dutfield, "Indigenous Peoples and Traditional Resource Rights," in Sheldon Krimsky and Peter Shorett, eds., *Rights and Liberties in the Biotech Age: Why We Need a Genetic Bill of Rights* (Lanham, MD: Rowan & Littlefield, 2005), 107–13; Rosemary J. Coombe, "Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?," *Florida Journal of International Law* 17(1) (2005), 115–35.

[44] See, for example, Dutfield, ibid at 111; Coombe, fn. 5 above at 82–9.

Intellectual Property Rights as a Threat to Human Rights?

Contrasting Rights

In my view, human rights can be dissected so that they fit into the Hohfeld–Wenar scheme of rights assertions, although an additional dimension is needed to fully understand them. The first proposition of a primitive theory of human rights reads that certain things ought not to be done to a human being. Not only ought everybody be protected against persecution, torture, or censorship, but everybody should also enjoy a second-order right that her normative situation not be altered. In this sense, the idea of human rights is first and foremost about *immunity rights* for every single human being. Private property participated in the exalted status only until the seventeenth century when the term “property” still included our life, body, and spouses and was not yet narrowed down to “things.”[45] Human rights can be conceived as a *power right* able to generate new rights or new interpretations of old rights, as the foregoing discussion has demonstrated. In addition, human rights assertions have the form of *claim rights* against states and other entities. Finally, human rights are also about *privilege rights*. Where human rights are respected, individuals are free to opt out of the dominant religion or to act against prevailing opinions. Massive violations of human rights, on the other hand, have given rise to a different kind of privilege; they have conferred legitimacy to states that attack other states by military means to stop the atrocities. This is a privilege so long as the intervening state does not flatly deny the general duty to respect state sovereignty.

Thus, human rights cannot be reduced to single privileges or claims, powers or immunities. Rather, they encompass and transcend all these incidences in a way that led Hannah Arendt to characterize them as the “right to have rights.”[46] Human rights protect human agency itself, and hence the dignity of persons. Oscillating between moral and legal standing, they are defined by the struggle for translating them from merely aspirational rights into justiciable welfare and liberty rights. These latter rights are enjoyed or exercised. The point I want to stress, however, is that no legal articulation and no court ruling taking its cues from the Declarations and Covenants ever fully exhausts the scope of human rights. It is this unredeemed normative surplus that is invoked whenever individuals *stand up* and claim their right; at the same time, this very act of standing up underwrites their human dignity. In asserting claims, individuals do not address official dutyholders but rather the *world* – or the moral public – upon which they obtrude their claim to have a right.[47] That is what, for example, Nelson Mandela did when he turned to the world outside the court that tried and convicted him in 1962, denouncing the “lack of human dignity” under the apartheid regime, and calling for “equal political rights” and “a living wage.”[48]

[45] See C.B. Macpherson, “Human Rights as Property Rights,” in *The Rise and Fall of Economic Justice and Other Papers* (Oxford: Oxford University Press, 1985), Chap. 6.

[46] Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed. (Cleveland: Meridian, 1958), 296–7.

[47] For these formulations, see Joel Feinberg, “The Nature and Value of Rights,” in *Rights, Justice, and the Bonds of Liberty: Essays in Social Philosophy* (Princeton, NJ: Princeton University Press, 1980), 150–1.

[48] See James Boyd White, “Mandela’s Speech from the Dock and Lincoln’s Second Inaugural Address: Giving Meaning to Life in an Unjust World,” in *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: Chicago University Press, 1994), 290–1.

Table 1 A comparison of rights

	IPRs	Property rights	Traditional resource rights/farmers' rights	Human rights
Form of right	Privileges claims (*real*)	Claims Immunities Powers (*real*)	Privileges claims (*largely aspirational*)	All forms of right (*real and aspirational*)
Subject matter	Inventions, expressions, insignia, some discoveries	Created and discovered things	Underappreciated contributions to the conservation and cultivation of plant varieties, etc.	Human agency dignity
Rightholders	Corporations individuals	Individuals Corporations	Groups	Individuals groups
Dutyholders	All non-rightholders	All non-rightholders	States corporations	States corporations individuals
Duration	Limited	Unlimited	Unlimited	Unlimited
Mode of assertion	Enjoyed exercised	Enjoyed exercised	invoked	Exercised enjoyed invoked

At this point, I wish to come back to a shortcoming of the typology of elementary rights assertions introduced by Hohfeld and modified by Wenar. This typology has been criticized for being too simple, as it assumes that property relations take place only between a rightholder and a corresponding dutyholder. In reality, however, a "right-holder sees her right as good *against the world*; it is not a simple bilateral relation."[49] Human rights introduce a similar element of asymmetry into legal one-on-one relations by being good not "against," but "for" the world. Before they are enjoyed or exercised as mundane constitutional rights of citizens, human rights are *invoked* by speakers who address and appeal to the public. These speakers make *aspirational* assertions delivered from public platforms with the aim of activating moral commitments and solidary ties that often do not preexist but are created by discourse. Human rights assertions require *listeners* whose attention can today be captured worldwide.

Property rights, by contrast, are good "against the world" and have therefore always drawn fire from the dispossessed. IPRs are even more likely to fuel political conflicts because their subject matter includes intangibles like instantiations of the human mind or gene sequences. The emerging global IPR system appears to exclude, quite literally, humankind itself from access to important knowledge assets; moreover, it appears to exclude humankind from what might be considered a part of its essence (Table 1).

AIDS and the Human Rights-Based Critique of IPRs

Over the past 10 years, this seemingly abstract idea about the potential antagonism between IPRs and human rights has been worked out and turned into a tool for

[49] Lametti, fn. 30 above at 343; emphasis added.

mobilization. Interestingly, this process was spurred by one particular crisis which had repercussions not foreseen by the drafters of the TRIPS agreement: the global AIDS epidemic. In 2005 alone, HIV/AIDS has killed more than three million people, most of them in the developing world, particularly in southern Africa. Yet the protest against possible negative consequences of the TRIPS agreement started first as a local concern in the West. In the mid-1990s, consumer activists in the USA began to protest the TRIPS agreement which they saw as leading to further price hikes for medicines, thereby making health care even less affordable for poor citizens. This initial campaign gained enormous momentum and became global when, shortly afterward, Third World groups and aid agencies began to draw a connection between the granting of product patents for pharmaceuticals, the ban of parallel imports of cheaper generic substitutes for patented AIDS drugs, and the avoidable death of people living with the virus. Overall, the Campaign for Access to Essential Medicines, as it soon became known, was remarkably successful in drawing attention to the human rights implications of stronger patent regimes for the treatment of HIV/AIDS, in naming and shaming powerful pharmaceutical lobbies, and in encouraging poor countries to seek amendments of the TRIPS agreement.[50] The details of this story have often been told, so I confine myself to the following question: How have human rights arguments been used against the IPR regime and pharmaceutical companies, and does this use make sense?

The highly intuitive assumption that AIDS patients have a human right to whatever drug might help them (regardless of whether a corresponding dutyholder can be identified) has been expressed as part of a range of different moral narratives. Three of these narratives can be simplified as follows:

First, it has been maintained that the right to the best drugs can be inferred from the way in which “the West” was allegedly always implicated in the global spread of HIV or may have even fabricated the virus to wipe out the African population. This claim, which I just want to mention here without discussing it any further, was put forward, in particular, by the Kenyan ecologist Wangari Maathai who won the Nobel Peace Prize in 2004. According to this view, the West has deliberately pushed the non-swimming (African) child into the deep end.

Second, at the other end of the spectrum, the relationship between Western companies or governments and non-Western AIDS victims is modeled after the biblical tale of the good Samaritan – or the “bad Samaritans” who passed by the roadside victim without coming to his aid.[51] This is certainly the majority view held by the board members of the Global Fund to Fight Aids, Tuberculosis and Malaria, founded in 2001. They accept scientific evidence suggesting that the virus causing AIDS originated from wild chimps in Cameroon and spread in ways uncontrolled by Western interests, including those protecting intellectual property. Some would also agree that human rights considerations provide an important rationale for massive

[50] See Sell, fn. 19 above at 147–62; Shadlen, fn. 39 above; Steven Robins, “‘Long live Zackie, long live’: AIDS activism, science and citizenship after apartheid,” *Journal of Southern African Studies* 30(3) (2004), 651–72. See also the homepage of the Access Campaign: http://www.accessmed-msf.org/

[51] See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 126.

investments in treatment and prevention.[52] The rich countries are seen as being in the position of a good swimmer who can do a lot to rescue the drowning child who fell into the swimming pool.

Third, activists from the Access Campaign and their intellectual supporters, like Thomas Pogge of Columbia University, have chosen a middle path between these two alternatives by linking crucial aspects of the AIDS epidemic to the new IPR regime. The West is accused of not just *failing to benefit* the drowning child, but of actively *harming* her, although not being responsible for the bad situation, she was already in. Instead of pulling the child out of the water, the good swimmer has (perhaps inadvertently) switched on the 100-hp pump for artificial wave generation, making it more difficult for the child to reach the rim of the pool.

It is worth noting that even the second narrative, which is the least radical of the three, has strong human rights implications, if we take into account the growing consensus among legal philosophers and lawyers who have considerably narrowed the difference between "harming" and "withholding benefit," "acting" and "failures to act."[53] In Britain today, negligence claims against public authorities can be framed as breaches of human rights law.[54] Even if not strictly applicable to international relations, the duty of care is now taken much more seriously than in earlier times, when strangers had no right to be rescued.

The more provocative hypothesis, however, is advanced by the third narrative that suggests that the new IPR rules are actively violating the physical integrity rights of HIV-positive persons in poor countries. The plausibility of this charge depends on whether one can show that people living with HIV are worse-off than they would have been without the consequences flowing from those rules. In this case, a wrongful harm done to strangers would be directly attributable to IPRs and the political forces backing the global IPR regime. In my view, however, the empirical basis required for reaching such a conclusion is incomplete. Consider the following undisputed points. Treatment of people suffering from HIV/AIDS is possible thanks to drugs, in particular, antiretrovirals. Product patents tend to increase the price of antiretrovirals, which results in fewer people being able to afford them. Some countries like India produce generic equivalents of patented antiretrovirals, which are much cheaper, yet TRIPS has made the "parallel import" of generic versions of patented drugs illegal or very cumbersome. In late 2005, however, member states of the WTO, including the USA, decided to make permanent a waiver enabling poor countries, in particular those with inadequate production facilities, to obtain such generics by setting aside the original TRIPS provision. Among other things, competition from producers of generics is likely to force brandname firms to lower their prices, which allows for more people to be treated. In fact, prices for antiretrovirals in poor countries have *fallen*, the number

[52] See Nicoli Nattrass and Nathan Geffen, "The impact of reduced drug prices on the cost-effectiveness of HAART in South Africa," *African Journal of AIDS Research* 4(1) (2005), 65–7.

[53] Feinberg, above fn. 51, chap. 4; Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford: Oxford University Press, 2006), 316.

[54] Booth and Squires, ibid. at 28.

of people on antiretroviral therapy has massively *increased*, and overall access to AIDS drugs is *expanding*.[55]

Besides these things we know, there are other questions we simply cannot answer. Here are a few examples. We do not know whether, in the longer run, manufacturers of generic antiretrovirals in India, which satisfy around half of the world's demand, are going to face incentives to give up this particular business activity, partly because the waiver issued by the WTO may be difficult to use in practice, partly because other activities might yield higher margins.[56] We also do not know how a recent US Supreme Court decision to exempt preclinical drug research from patent infringement liability will affect AIDS vaccine development.[57] Furthermore, at the most fundamental level, we do not know to what extent pharmaceutical companies need to recoup their R&D expenditures through TRIPS-style patent monopolies to develop new drugs.[58] If such a link could be proven, attending to those who are worst-off *today* by suspending intellectual property protections might have the effect of reducing the available resources of those who will suffer *tomorrow*.

Given what we know for sure and what we do not know, we need to ask whether Thomas Pogge is right to claim that "the rich countries' IPR initiative goes in the wrong direction, foreseeably causing many additional premature deaths among the global poor by cutting them off from life-saving patented medicines."[59] Although it is true that the recent bolstering of intellectual property claims has tended to make access to many medicines more expensive, various *intervening variables* seem to have offset the much-feared consequence of making infected people in poor countries worse-off than they were before the new intellectual property arrangements. One of these intervening variables is an enormous increase in international funding for AIDS treatment and preventive HIV vaccine research. Between 1996 and 2005, funds for fighting AIDS in low- and middle-income countries increased 28-fold, from US$ 300 million to US$ 8.3 billion.[60] The world's most generous program that buys AIDS drugs for patients in developing countries is the President's Emergency Plan for AIDS Relief (PEPFAR), financed by the US government. Another variable is, of course, the widespread *colère publique* triggered by the

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[55] See Joint United Nations Programme on HIV/AIDS (UNAIDS), *2006 Report on the global AIDS epidemic*, 151–8.

[56] See Ken Shadlen, "Patents, India, and HIV/AIDS Treatment," *LSE AIDS Update 4*, April 2005. Available at: http://www.lse.ac.uk/collections/LSEAIDS/ (last accessed June 1, 2006).

[57] See *Merck KGaA v. Integra Lifesciences I, Ltd.* (03-1237), June 13, 2005; AIDS Vaccine Advocacy Coalition (AVAC), *2005 AVAC Report: AIDS Vaccines at the Crossroads*, 34–5. For the argument that, perversely, going soft on patent infringements might make drug development even more costly, see Beverly W. Lubit, "The Economic Impact of the Supreme Court Decision in Merck v. Integra," *BioPharm International*, January 1, 2006 (online edition).

[58] A high level of patent protection seems to stimulate innovation in some industries, but not in others. See William Fisher, "Theories of Intellectual Property," in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), 180–1.

[59] Thomas Pogge, "Montreal Statement on the Human Right to Essential Medicines," Equality and the New Global Order Conference, Harvard University, May 11–13, 2006, 9. Pogge claims that an alternative institutional arrangement of intellectual property protection is feasible, and that *relative to such a possible alternative regime* – not to other historical or subjunctive-historical baselines – the existing IPR regime violates basic human rights (personal communication, June 25, 2006).

[60] See UNAIDS, fn. 55 above at 224.

TRIPS agreement itself. This led, among other things, to the most recent amendments introducing more emergency-related exemptions for poor countries. Arguably, the narrative that has linked the emergence of a uniform global IPR regime to a scenario of exclusion of the most needy persons from life-saving drugs functioned as a self-defeating prophecy by causing many people to take precautions to avert that scenario.

Thus, given the multiplicity of causal factors at work, it seems unwarranted to single out IPRs as the main or proximate cause for the current suffering of people in poor countries living with HIV or other fatal diseases. In the presence of countervailing forces, some of which were actually generated by the new intellectual property rules, there is certainly nothing "foreseeable," as Pogge maintains, that will lead from IPRs to "many additional deaths among the global poor." Pogge also ignores the well-documented fact that only 17 out of 319 drugs on the World Health Organization's Model List of Essential Medicines are patented at all.[61]

Summing up these brief remarks, I can now answer my initial question whether and in what ways the invocation of human rights against the new patent regime makes sense. First, in our capacity as *observers*, we should tread with great circumspection when we try to identify the causally relevant factors that lead to the harming of HIV-infected people in poor countries. Undoubtedly, some people living with life-threatening diseases have been harmed by the new IPR regime, specifically in the sense of being worse-off than they would have been without those new rules. Yet, it is far less obvious whether today or in the near future HIV-infected people – in spite of the partly negative impact of that particular set of global rules – are not overall actually better-off than they were a decade ago when far less funds were invested in treatment and research. The trickiest question here is to what extent IPRs have not only generated a worldwide protest movement bent on changing some of the new rules, but might also have helped to bolster the commitment of private companies to develop new drugs.

Second, from the point of view of public health *advocates*, it is quite obvious that human rights talk has worked. Observers might insist that there is no unarguable hierarchy in rights claims and that human rights do not automatically "trump" other rights.[62] Yet, in reality, that is exactly what human rights talk often achieves. Due to their aura of sacredness, human rights trump lesser and more mundane rights. Moreover, we have seen that physical integrity rights, summarized under the supremely vague heading of a "right to health," can still trump property rights, whose advocates failed to convince policy-makers and the public that IPRs are just another subset of human rights. Unlike human rights, IPRs are a tool invented by the legal system to promote socially desirable outcomes. If the costs needed to produce this outcome appear too high, the invocation of a "right to health" – a claim right paired with an immunity right – can be effective in wrenching concessions from governments and corporations.

[61] See Amir Attaran, "How Do Patents And Economic Policies Affect Access To Essential Medicines In Developing Countries?," *Health Affairs* 23 (2004), 155–66.

[62] Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 2001), 20.

Third, I believe that the exaggerated focus on IPRs as *the* cause of easily avoidable misery has a number of hidden and problematic consequences. For one, this approach is highly western-centric in suggesting that whether AIDS patients in poor countries continue to suffer "is up to us," meaning the developed world. It leads one to believe that citizens in those countries themselves cannot affect the situation, and that they are wrong in stubbornly pointing to many other causal factors, apart from global IPRs, which appear to contribute to unnecessary suffering – from the social exclusion or persecution of AIDS victims to the irresponsible quackery favored even by some governments.[63] Furthermore, the attribution of a vast array of harmful consequences to IPRs fosters a worldview that represents distant others as needy and dependent on Western samaritanism and goodwill. In this sense, the discourse of IPR critics fits surprisingly well into the narcissistic post-Cold War search of Western elites for a meaningful self-image, to be realized by interventionist foreign policies inspired by higher aims beyond petty self-interest. Although this discourse is arguably more promising than a ruthless realpolitik, it may also drive and legitimize the extension of new mechanisms of external interference in weak countries.[64]

The Intellectual Property Regime as a Recognition Order

The language of human rights is caught in a dilemma. Either it is trivialized and used to cover the kind of minor injustices or setbacks that can be experienced even in Western societies (of which I gave an example earlier), or it is used in a "self-consciously minimalist"[65] manner that is more likely to be accepted by larger sections of humankind. In the latter case, however, it restricts attention to a small segment of extreme instances of oppression and negligence, while not capturing less conspicuous experiences of humiliation and disrespect. For this reason, I want to conclude this article by proposing a broader approach that is better suited to capture the potential for misrecognition and injustice built into the intellectual property order. Drawing on Axel Honneth's recent innovation in critical social theory, the global IPR regime can be redescribed as an institutionalized "recognition order."[66]

Without trying to summarize the complexities of the debate on the politics of recognition, I want to stress two important ideas. First, numerous authors concur that a just society is one that shows all its members due recognition. They differ with regard to the question of whether social struggles for *recognition* are separate from struggles over the *redistribution* of material resources or whether and how exactly

[63] See, for example, Adamson S. Muula and Joseph M. Mfutso-Bengo, "Important But Neglected Ethical and Cultural Considerations in the Fight Against HIV/AIDS in Malawi," *Nursing Ethics* 11(5) (2004), 479–88; John Moore and Nicoli Nattrass, "Deadly Quackery," *New York Times*, June 4, 2006.

[64] For an astute analysis of this irony, see David Chandler, "The other-regarding ethics of the 'empire in denial'," in David Chandler and Volker Heins, eds., *Rethinking Ethical Foreign Policy: Pitfalls, Possibilities and Paradoxes* (London and New York: Routledge, 2007), 161–83.

[65] Ignatieff, fn. 62 above at 56.

[66] See Axel Honneth, "Redistribution as Recognition: A Response to Nancy Fraser," in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political–Philosophical Exchange* (New York: Verso, 2003), 110–97. See also Simon Thompson, The Political Theory of Recognition: A Critical Introduction (Cambridge: Polity Press, 2006).

these two types of conflict are intertwined.[67] Second, in Honneth's reading of the concept, recognition encompasses more than the *rights* of persons. In particular, it includes *social esteem* deserved by individuals and communities according to their achievements as "productive citizens" who contribute to the welfare of society.[68] How do these ideas shed light on current discussions about new intellectual property arrangements?

Critics have characterized the global IPR regime as driven not so much by concerns about efficiency than by distributive norms and the desire to collect patent rents on a global scale.[69] Following Honneth, I believe that these distributive arrangements may not only often be unfair, but that they can be interpreted as an institutional outcome of underlying patterns of recognition and misrecognition. Every intellectual property order encodes deeply entrenched value preferences for certain kinds of labor at the expense of others, but as soon as this order becomes global, its potential for misrecognizing the achievements and qualification of others grows considerably. Beneath the obvious distributive consequences of the global IPR regime, we find imbalances in the way some achievements by some social groups are explicitly acknowledged, while others are taken for granted and go unrecognized. Moreover, observable distributive patterns and rent flows are, at least to a significant extent, the *consequence* of the underlying recognition order.

Most legal commentators readily accept that IPRs are about remuneration as well as recognition and that these two aspects are closely related. Modern societies tend to value both socially useful innovations and expressive intellectual activities that are seen as quintessentially human. Again, this belief in the immeasurable value of the "artistic and creative nature"[70] of human beings is by no means confined to the West. The granting of a patent or a copyright implies that society considers products of human ingenuity – and hence their producers – as worthy of "respect."[71] For this reason, few authors reject the idea of intellectual property in toto. On the contrary, even staunch critics of the current intellectual property order often advocate the creation of new IPRs to protect, for example, the indigenous knowledge of marginalized rural communities. Therefore, the real controversy is not about IPRs as such, but about how to protect physical instantiations of very different kinds of intellectual achievement in a way that adequately reflects a shared sense of value preferences. The TRIPS agreement has led to widespread criticism and protest because it is seen by many as the institutional expression of patterns of esteem that do not square with the self-perception of those who are affected by the agreement. Conflicts arise out of the growing impression that some achievements in modern society are overprotected by law, whereas others are underprotected and up for grabs. In this connection, farmers' rights and resource rights deserve a second look as symbols in a struggle for reevaluating the contributions of marginalized groups to global society.

[67] See Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political–Philosophical Exchange* (New York: Verso, 2003).

[68] See Honneth, fn. 66 above at 140–1.

[69] See May and Sell, fn. 2 above at 159–60, 187–8.

[70] Gandhi, "For contraceptives," in *Collected Works of Mahatma Gandhi Online*, Vol. 68, 344. Available at: http://www.gandhiserve.org/cwmg/cwmg.html

[71] Fisher, fn. 58 above at 193.

Honneth has referred to the example of the critical importance of childrearing and housework to the reproduction of society to show that feminist struggles for social services, tax benefits, or the remuneration of housework were in fact struggles for recognition or struggles against a dominant prestige order that had made the work of women invisible.[72] Similarly, activist social scientists, anthropologists, and others have pointed to the role of millions of small farmers all over the world in maintaining and developing plant varieties and their environment, thereby providing the "raw material" for more visible and rewarding activities like scientific plant breeding. These contributions by peasants and cultivators, many of them poor and women, are still vastly underappreciated despite the fact that they are as crucial for the reproduction of society as childrearing and housework. Like these latter activities, which over the last decades were at the center of feminist struggles, the unrecognized activity and qualification of caring for crop species or medicinal plants have given rise to transnational struggles for compensation and acknowledgment.

The crux of my argument is that, to explain those struggles, the sense of disrespect conveyed by the IPR regime is more important than its distributive effects.[73] Mobilization against the new rules originates from the perception that Western standards of comparative evaluation of contributions to social reproduction have been imposed on the rest of the world. This impression of a curious evaluative imbalance built into the intellectual property order has been nicely summarized by James Boyle: "Curare, batik, myths and the dance 'lambada' flow out of developing countries, unprotected by IPRs, while Prozac, Levis, Grisham and the movie *Lambada!* flow in – protected by a suite of intellectual property laws, which in turn are backed by trade sanctions."[74] Regarding the origins of recent struggles over fair intellectual property rules, an educated guess would be that the value preferences of Western industrial and commercial elites were asserted at the same time when consultants of international organizations, Western-educated locals, and aid workers rediscovered and re-emphasized the stunning wealth of the ancient but still utilized agronomic, botanical, and medical knowledge of the rural indigenous peasantry in many developing countries.[75] Against this background of a renewed emphasis on the hidden contributions of marginal groups to global welfare, the emerging IPR regime looked unfair and biased against the achievements of groups made invisible.

Seen in this light, the human rights-based critique of IPRs is unduly narrowing our attention to a segment of injustices possibly fostered by the global IPR regime. By their very nature, human rights discourses are emergency oriented. They are centered on situations that cannot be tolerated under any circumstances. The flip side is that, by focusing on exceptional situations, they tend to confirm the rule. Product patents are fine, we are prompted to think, as long as they do not lead to price hikes for medicines needed in Africa. The human rights-based critique correctly realizes the potential for

[72] See Honneth, fn. 66 above at 153–5.

[73] See ibid, 157.

[74] James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996), 125.

[75] See Kevin Healy, *Llamas, Weavings, and Organic Chocolate: Multicultural Grassroots Development in the Andes and Amazon of Bolivia* (Notre Dame, IN: University of Notre Dame Press, 2001), 89–94 and Chap. 5.

disrespecting relatively powerless individuals and communities inside and outside the West, but fails to see the big picture. It ignores the potential of the IPR regime for infringing upon rights other than human rights, as well as the potential for misrecognizing the labor of marginalized and "forgotten" groups who have a hard time attracting the attention of the world unless they find themselves in a humanitarian emergency.

Conclusion

Today, both human rights and IPRs are universal in scope and vision. Yet, the world order partly shaped by these rights is a "thin" one, which unlike a "thick" order, is not backed by a strong moral consensus on the universal applicability and fairness of those rights. Hence, instead of building a framework for managing conflicts, both sets of global rights often tend to exacerbate them. The foregoing discussion has sketched out a number of differences between ordinary property rights, IPRs, human rights, and other nonproprietary rights like farmers' rights and traditional resource rights. Whereas human rights are based on moral intuitions that shape the legal discourse, IPRs started their career as a highly specialized legal doctrine that was only subsequently reinforced through a moralizing narrative.

I have shown that the human rights-based critique of the emerging global intellectual property order galvanized around the HIV/AIDS crisis and, more specifically, around the role of product patents in making access to life-saving drugs more cumbersome or even impossible. This critique is simultaneously too radical and not radical enough. On one hand, the invocation of human rights against IPRs is often relying on questionable empirical claims about the causes of avoidable social suffering; too many consequences are attributed to a single cause, and local actors and institutions are regularly exonerated at the expense of global actors and institutions. As a result, the critique insinuates that "it is up to us" – enlightened Western elites – to fix the world.[76] On the other hand, the language of human rights is strongly emergency oriented. Its overuse limits our attention to exceptional situations like the HIV/AIDS crisis at the expense of less obvious long-term consequences of the *normal* operation of the new rules, particularly for developing countries. In this way, the AIDS epidemic as the privileged object of the human rights-based critique of IPRs has proved to be a red herring in the debate about intellectual property. Although of enormous human relevance, it has helped to deflect attention away from broader issues raised by expanding intellectual property claims. To address these issues, we need to learn from theories that situate human rights in the larger institutional context of multiple forms of recognition and misrecognition and their respective consequences.

Acknowledgments I wish to thank Thomas Pogge, Axel Honneth, Niranjan Rao, Michael Flitner, Susan Sell, and, in particular, an anonymous referee for helping me to shape my ideas about rights and recognition. Thanks also to Mark Hill for his assistance and suggestions.

[76] Pogge concedes that much "severe suffering would be avoided if rulers of the developing countries behaved better," but he believes that this behavior can in turn be explained by the workings of "global institutions upheld by the West" (personal communication, June 25, 2006).