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THE RIGHT TO INTELLECTUAL PROPERTY AND INTELLECTUAL PROPERTY RIGHTS. PATENT AND TRADEMARK RIGHTS *VERSUS* THE RIGHT TO HEALTH

EL DERECHO A LA PROPIEDAD INDUSTRIAL Y LOS DERECHOS DE PROPIEDAD INDUSTRIAL. DERECHOS DE PATENTES Y MARCAS *VERSUS* EL DERECHO A LA SALUD

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ABSTRACT

The aim of this article is to analyse the shaping of the intellectual property rights as human or fundamental rights. For this, a review for the main international instruments related to human rights where intellectual property rights can be identified is carried out. Likewise, there is an assessment on the main conflicts arising when intellectual property rights collide with other fundamental rights, namely the right to health.

Keywords: Human rights, Intellectual property rights, Collision between rights.

RESUMEN

El objeto de este artículo es analizar la configuración de los derechos de propiedad industrial como derechos humanos o fundamentales. Para ello se lleva a cabo una revisión de los principales textos internacionales relacionados con los derechos humanos en los que pueden identificarse derechos de propiedad industrial. Igualmente, se analizan los principales conflictos que existen cuando derechos de propiedad industrial colisionan con otros derechos fundamentales, concretamente con el derecho a la salud.

Palabras clave: Derechos humanos, Derechos de propiedad industrial, conflicto entre derechos.

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I. INTELLECTUAL PROPERTY SHAPING AS HUMAN OR FUNDAMENTAL RIGHTS: TRADITIONAL PROPERTY RIGHT

Human rights[1] and intellectual property rights have initially followed parallel paths, which converged, not entirely, in the last few decades. The development of the regulation of these two areas was approached in virtual isolation from each other[2]. Even though some instruments expressly recognize intellectual property as a fundamental right, the limits to such rights are also to be at stake in order to find a balance between intellectual property and human rights.

However, it is not so clear that IP rights have been totally out from the sphere of human and fundamental rights. A review of the main international instruments regulating human rights will show references to the conception of IP rights as fundamental ones.

As a stem point, it is to be assessed whether the concept of intellectual property falls within the wide concept of property. This issue is quite controversial, since there are two positions towards the factor of considering intellectual property similar to traditional property. Intellectual property right grants its owner with exclusive and excluding rights and includes as well the right to dispose thereof[3], being those typical notes of traditional property[4].

Detractors for this assimilation[5] claim that both intellectual property and traditional property are not comparable given that the features of the tangible assets as established in some Civil Codes, such as the Spanish, cannot be applied to intellectual property modalities.

The general concept of property is inevitably linked to the physical possession of the object. Contrary to this, intellectual property totally depends on the legal treatment of the national or regional legislation, which will confer privileges to the holder of the right. Although some of the rights granted by IP rights

[1] General Comment No. 17 (2005) - Committee on Economic, Social and Cultural Rights. United Nations 12 January 2006 refers to human rights as «*fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities*» and «*are timeless expressions of fundamental entitlements of the human person*».

[2] HELFER, L. (2003), p. 47.

[3] STURMA, P. (2006), p. 164. This commentary clearly sets out that the protection of intellectual property is an aspect of the right to property.

[4] SERRANO IRURZUN, J. (2017), p. 2.

[5] *Ibid*., citing D. Enrique García-Chamón Cervera, President of the European Union Trademark Court.

simply derive from the creation of the work, such as copyrights, in most cases, the protection granted by intellectual property rights derive from the proper registration on national Trademarks and Patents Offices. Therefore, it requires from the holders of the rights an endeavour on their part which is not usually required to the holder to traditional property rights.

However, the Spanish Civil Code[6] includes specific provisions for the so-called special properties, among which it comprises copyrights[7] and whilst no references to other intellectual property rights are contemplated, it is possible to consider the latter as a special property. Indeed, Spanish Supreme Court has concluded in several rulings that intellectual property rights are undoubtedly a type of special properties[8].

Moreover, the assimilation of the intellectual property rights to traditional property rights can also be found on the treatment conferred to these rights since they can be assigned or co-owned. The Spanish Trademark Act establishes provisions considering the trademark as the subject matter of property rights[9]. So does the Spanish Patent Act [10] which expressly includes provisions for patents applications and registrations as object of property law, including rules for expropriation and the Spanish Design Act[11] which also refers to the design as an asset for rights.

Furthermore, for the European Court of Human Rights[12], it appears clear that intellectual property rights and especially trademarks fall within the scope of the protection granted by the general property right established in the article 1 of Protocol 1 of the European Convention of Human Rights.

II. MAIN INTERNATIONAL AND REGIONAL INSTRUMENTS FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AS HUMAN OR FUNDAMENTAL RIGHTS

The Universal Declaration of Human Rights[13] (UDHR) is a landmark document in the history of human rights being the first document in which fundamental rights were universally recognized and protected[14]. A first reference to intellectual property right can be found in article 17[15] as far as intellectual property should be integrated into the broader concept of property. Despite the fact that nowadays, UDHR is accepted as customary international law, right to property provisions were nor originally binding[16].

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[6] Articles 428 and 429 of the Spanish Civil Code.

[7] Note that in Spanish the term «propiedad intelectual» refers to copyrights while the broad term «industrial property» includes additional modalities such as patents, trademarks, designs, indication of origin or plant breeders'rights.

[8] Supreme Court Decision 5690/1999 of 22 September 1999 (ECLI: ES:TS:1999:5690).

[9] Articles from 46 to 50 of the Spanish Trademark Act 17/2001 of 7 December 2001.

[10] Articles from79 to 89 of the Spanish Patent Act 24/2015 of 25 July 2015.

[11] Title VII of the Spanish Design Act 20/2003, of 7 July 2003.

[12] European Court of Human Rights Judgment of 11 January 2007, *Anheuser-Busch Inc*. vs. *Portugal*.

[13] Un General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[14] Oraá, J., and Gómez Isa, F. (1997), p. 11. According to the former president of the International Court of Justice Thomas Bergenthal, UDHR can be compared to the French Declaration of the Rights of Man and of the Citizen, United States Declaration of Independence due to its moral character and its political and legal relevance. It is therefore a landmark in the human fight for freedom and human dignity.

[15] Article 17 of the Universal Declaration of Human Rights states that «1. *Everyone has the right to own property alone as well as in association wit*h others; 2. *No one shall be arbitrarily deprived of his property*».

[16] Sprankling, J. G. (2014), p. 258.

In addition to the provisions referring to the general property right[17], there are also references in this Declaration that could be encompassed into the scope of intellectual property. This is the case of the right to obtain material and moral protection from the scientific, literary or artistic production and also the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits[18].

In contrast with other international agreements on the protection of IP rights[19], the protection of rights in the UDHR is not focused on economic and commercial issues but on ethic rights. This may be the reason why it appears that the protection of intellectual property rights is directed to those rights which can generate moral rights such as copyrights or patents[20], and it appears that those rights exclusively linked to commercial issues are not mentioned. The rights recognized in article 27 of the UDHR have been traditionally considered as cultural ones, which strengthen the idea of non-commercial based rights.

Moreover, the right to intellectual property is not only enshrined in one but in two ways, namely, it should be valuable not only for its owner, but also for the whole community. Article 27 firstly refers to those rights enjoyable by all individuals and grants them with a right to share scientific advancement and its benefits. Accordingly, these rights should be configured as human rights provided that they benefit a group rather than an individual itself. It does not appear a coincidence that community rights are placed in the first position of the article 27 and could reflect the relevance of the collective aspect over the individual one. This individual aspect is shown in the second part of the article which is more aligned with the protection granted in other international instruments as a substantial side could be found behind the terms «material interests», but again, it seems that from a more ethical perspective.

Further to the Universal Declaration of Human Rights, in the context of the United Nations, a rather recently resolution concerning intellectual property rights can be found related to the rights of indigenous peoples[21], namely Resolution adopted by the General Assembly 61/295 Declaration on the Rights of Indigenous Peoples[22]. In this Declaration, the United Nations recognizes the rights of the Indigenous Peoples to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions[23]. Moreover, it establishes obligations to the States

[17] Alcoberro, R. (2018), p. 23. As René Cassi explained, article 27 UDHR is a direct response to Goebbels´order which prevented Jewish from participating in the German culture expressions.

[18] Article 27 of the Universal Declaration of Human Rights.

[19] Early international Agreements on intellectual property rights such Paris Convention for the Protection of Industrial Property (1883) or Berne Convention for the Protection of Literary and Artistic Works (1886) did not include any reference to the configuration of intellectual property rights as human or fundamental rights. They regulated intellectual property rights as monopolies based on *ius prohibendi* and *ius agendi*.

[20] Janewa Oseitutu, J. (2015), p. 18.

[21] Several working groups were created in the context of the protection of indigenous peoples. In 1982, the Working Group on Indigenous Populations was established and was one of the six working groups overseen by the *Sub-Commission on the Promotion and Protection of Human Rights*, the main subsidiary body of the United Nations Commission on Human Rights The Working Group submitted a first draft declaration on the rights of indigenous peoples to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was later approved in 1994.

[22] Resolution adopted by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295).

[23] Article 31.1 of the Declaration on the Rights of Indigenous Peoples.

concerning these rights which should respect the Indigenous Peoples' intellectual property and culture. These provisions reflect the concerns on «Cultural appropriation», which is described as the act by a member of a relatively dominant culture of taking a traditional cultural expression and repurposing it in a different context. In this appropriation there is no authorization, acknowledgement and/or compensation and the act causes harm to the traditional cultural expression holder[24].

Similar provisions to those included in the UDHR concerning intellectual property rights can be found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly on 16 December 1966[25]. This multilateral treaty is one of the most important United Nations human-rights-related treaties and it is one of the two treaties, together with the International Covenant on Civil and Political Rights, ICCPR that give legal force to the Universal Declaration of Human Rights.

Since the scope of protection of the provisions related to intellectual property in ICESCR was not totally clear, the Committee on Economic, Social and Cultural Rights held a session in 2005 after which a general comment was issued in order to clarify article 15 of the Covenant. Concretely, the General Comment no. 17 was made with the aim of clarifying the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. The main idea that one can draw from the General Comment no. 17 is that the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is directed to benefit the whole community by fostering the progress. Nevertheless, General Comment clearly reflects that not all the intellectual property rights are covered by article 15 of the Covenant. The Committee established that any scientific, literary or artistic production exclusively refers to «creations of the human mind»[26] .

Whilst moral rights deriving from this article would appear clear, as they would cover the right to be recognized as the author of the work as well as the right not to suffer any distortion on the work, the scope of the protection of the economic interest could trigger further problems. General Comment no. 17 sheds some light in this point and states that the economic interests are very linked to the property right enshrined in article 17 of the UDHR as well as to the right of any worker to adequate remuneration included in article 7 (a) of the Covenant. The General Comment includes a rather interesting comment concerning the economic rights by stating that «*Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, but contribute to the enjoyment of the right to an adequate standard of living*»[27].

General Comment 17 establishes that intellectual property is a social product and has a social function[28] which therefore must be connected with other

[24] Vézina, B. (2019), pp. 6-7.

[25] The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 3 January 1976, in accordance with article 27.

[26] Paragraph 9 of the General Comment No. 17.

[27] Paragraph 15 of the General Comment No. 17.

[28] Paragraph 35 of the General Comment No. 17.

rights included in international or regional instruments such as the right to own property alone as well as in association with others, the freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, the right to the full development of the human personality and rights of cultural participation including cultural rights of specific groups.

Overall, it could be said that the protection of intellectual property as a human right in the way the above mentioned instruments enshrined it, essentially accomplishes a function relating to moral rights to the creator or author as well as economic rights which are essentially based on the whole community interest. Accordingly, limitations to the economic rights could be imposed in favour of the general interest.

At a regional level, two instruments protecting human rights can be cited due to their importance, the Convention for the Protection of Human Rights and Fundamental Freedoms and Charter of Fundamental Rights of the European Union.

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights was adopted by the states of the Council of Europe in Rome in 1950. It is the first instrument that materialized some of the rights set in the Universal Declaration of Human Rights by making them binding. Although the protection of the property was not originally included in the body of the agreement, Protocol 1, agreed shortly afterwards, expressly recognized in its article 1 the protection of property. In this instrument, however, one cannot find any references to intellectual property rights as it can be found in the UDHR.

Whilst the protection of IP rights from an economic and commercial perspective had its own development, the express recognition of this right as a fundamental right can be found in article 17 of the Charter of Fundamental Rights of the European Union which puts together the traditional right to property with intellectual property right. The Charter of Fundamental Rights of the European Union was initially proclaimed at the Nice European Council on 7 December 2000. Provisions included in the Charter of Fundamental Rights of the European Union were given the same force as the foundational treaties by means of the Lisbon Treaty[29] and set out that all the European Union provisions are governed by the fundamental rights[30].

There are other international instruments recognizing the right to property[31] and at a country level, most of the national constitutions acknowledge this right. That is the case of the Spanish Constitution which establishes the

[29] Treaty of Lisbon Amending The Treaty On Europe Union and the Treaty Establishing The European Community Art 6 (2007/C 306/01).

[30] Some direct references to fundamental rights can be found in the preamble of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights; Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

[31] The African Charter on Human and Peoples' Rights (1981) in Article 14, does guarantee the right to property, although it then goes on to recognise that that right may be encroached upon in the «interest of public need or in the general interest of the community». The American Convention on Human Rights of 1969 in Article 21(1) recognises a right of property, a right which no one is to be deprived of «*except upon payment of just compensation*».

right to private property in article 33 and whilst it is possible to limit this right, limitation also reflected Charter of Fundamental Rights of the European Union[32], only public or social interest can operate as a limitation thereof. On general basis, one can distinguish limitations of property that enables its owner to use the subject the property although a third party can also use it e.g. easement from those which prevent the owner from enjoying the property, namely expropriation.

Similar to traditional property, intellectual property is also configured with limitations linked to general interest and also the owner of an IP right can be obliged to «share» somehow its right or can be even prevented from using it. Examples of these limitations can be found in the Spanish Patent Act[33] when the owner which does not exploit a patent can be penalized with the granting of mandatory licences. Among the reasons for the granting of these mandatory licences, the Act includes the public interest. Moreover, the Spanish Patent Act also establishes that a patent be confiscated when there is public utility or social interest reasons and provided that there exists a fair compensation.

In the case of patents, which have a key role in the development of innovation and social development, limits to the property seem at first glance well motivated and understandable. However, one could ask whether the restriction arguments would have room for other intellectual property rights such as trademarks.

It is also relevant the provision which links the content of the Spanish Constitution to Universal Declaration of Human Right by means of which «*the provisions related to fundamental rights and freedoms that the Constitutions recognizes shall be interpreted in accordance with the Universal Declaration of Human Rights and the treaties and international agreements on the same ratified by Spain*»[34].

In the same way to the controversial consideration of intellectual property rights as human or fundamental rights, the holder of such rights has also been subject to debate. It has been discussed whether a corporation can enjoy human rights, which, as its name reveals are in principle granted to human being. Claims issued by corporations concerning human rights has been criticized as «*it is disturbing to see that corporate actors before the European Court of Human Rights may claim that their 'human' right to property has been violated*»[35]. However, even though it is true that there are rights exclusively granted to human beings, not all the human rights have the same characteristics, and some rights can be applied to legal persons as well. Accordingly, while the UDHR includes the terms «*all human beings are born free and equal in dignity and rights*», the rest of the articles refer to «*everyone*» which, for some rights, such as property, would also encompass legal persons. Yet, article 1 of the Protocol 1 of the European Convention of Human Rights explicitly recognises the rights of the corporations as it refers to every natural or legal person. Therefore, the

[32] Martín y Pérez de Nanclares, J. (2008), p. 352.
[33] Articles from 90 to 96 of the Spanish Patent Act 24/2015 of 25 July 2015.
[34] Article 10.2 of the Spanish Constitution.
[35] Goebel, B. (2009), p. 946, citing Klaus D. Beiter, The Right to Property and the Protection of Interests in Intellectual Property - A Human Rights Perspective on the European Court of Human Rights.

extension of the protection will depend on the fundamental right in question but «*it is not the nature of a legal person itself that generally excludes it from the protection through human rights*»[36].

III. COLLISION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND OTHER HUMAN RIGHTS

As it has been seen above, international legal instruments which recognize the right to intellectual property from a human right perspective also refer to the community right to enjoy the scientific progress and its applications. Moreover, there are other human rights which can be confronted to intellectual property rights, and as it will be explained below, a balance between these rights is not that easy to find. One could argue that there exist some requirements for an intellectual property right to operate as a human right. First of all, a direct connection between the product protected and the person or the community. Secondly, the recognition of the right must be essential for this persons' enjoyment of other human rights and lastly, that his human right must not take it more difficult for others to enjoy their own human rights[37].

However, acquiring a monopoly over an intellectual property right sometimes prevent others from enjoying their own rights. Notwithstanding, not all intellectual property rights face these collisions, being patents the most troublesome. This right is generally considered to go against the fundamental rights to health, dignity, education and food, among others. Likewise, trademarks entered into the «fight» between human and intellectual property rights through the so-called plain packaging.

In view of the dichotomy in the regulation of human rights and intellectual property rights, the collisions between the intellectual property rights and other human rights are hardly criticized since the economic sphere of the intellectual property rights is commonly superimposed to human rights.

1. Patents and the right to health

One of the most controversial issues concerning the collision of fundamental rights and intellectual property rights is the problem arising between patents and the right to health. References to the right to health can be found for the first time in the Constitution of the World Health Organization[38] by means of which it is established that «*The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition*». The Preamble of the Constitution places the responsibility for the attendance of this right not only on the individuals but on the States as well[39].

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[36] Goebel, B. (2009), p. 946.

[37] Haugen, H. M. (2007), p. 99.

[38] The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.

[39] Preamble of the Constitution of the World Health Organization sets out: *The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States*.

Moreover, article 25 of the Universal Declaration of Human Rights also establishes that «*everyone has the right to a standard of living adequate for the health and well-being*»[40] and the International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights[41] . It establishes in its article 12.1 «*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*».

Although these instruments do not refer to the human right of being healthy[42], as this would not be possible, they refer to the acquisition of an adequate standard of living, which of course would imply the access to the medical advantages whenever it is necessary by any mean, either drugs or medical diagnostic methods.

Despite this early recognition of the right to health in the above-mentioned instruments, for some commentators[43], the right to health has its origins in two key documents, namely, the General Comment on the right to health by the ICESCR Committee[44], and a resolution on IP and human rights by the UN Sub-Commission on the Promotion and Protection of Human Rights[45], both adopted in 2000. Moreover, there are other international and regional instruments in which the right to health is established[46].

However, this right to health is deemed inadequate as far as the access to the drugs or medical advances is not always possible as such improvements are protected by intellectual property rights, namely patents. As an intellectual property right, a monopoly is granted to the owner thereof who can decide the way the products are commercialized. This of course includes the price of the products, medicines, which may make these drugs unaffordable for a great amount of people.

Concerning international instruments on intellectual property rights, there are also references to the right to health. TRIPS in article 8 lays out that regulations and measures aimed to protecting intellectual property rights should be consistent with the protection of public health. Moreover, in addition to measures required from the members, a further consistency requirement with the right to health is mandatory for the rights' holders, by restraining holders' abuse.

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[40] Article 25 of the Universal Declaration of Human Rights states that «*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...*».

[41] Committee on Economic, Social and Cultural Rights Twenty-second session Geneva, 25 April-12 May 2000 «Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights» General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights).

[42] Un Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

[43] HELFER, L. (2015), p. 326.

[44] Un Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

[45] The Sub-Commission on the Promotion and Protection of Human Rights resolution 2000/7 «Intellectual property rights and human rights». Office of the High Commissioner for Human Rights.

[46] See International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989, European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10).

Substantively, TRIPS PLUS[47] include a higher standard of protection for intellectual property rights, which in the case of developing countries can influence the accessibility to drugs. Moreover, some countries adopt these provisions believing that it is recommendable to provide more protection to intellectual property rights while others adopted the agreement under external pressure[48].

One of the most controversial issues concerning the right to health and the patent system relates to the access to drugs. Whilst it is usually considered that the first generation of patients of a protected drug endure most of the marginal costs for production or distribution[49], drug makers are also said to take advantage from the patent system by filing a vast number of patent application to extend their monopoly beyond the twenty-year-period granted by most of the jurisdictions[50]. Numerous critics have arisen against the pharmaceutical companies which unreasonably increase the price of some medicines in developing countries, while they maintain a rather reasonable price in developed countries.

Although some developing countries have challenged such monopoly on emergency basis, as it is possible to import medicines from third countries where the prices are lower, sanctions have been imposed, or at least intended. Moreover, some countries produce themselves generic medicines which permit the access to medicines to a greater amount of people. Brazil, Thailand or India are some of the countries which have contributed to the development of the production of generic medicines in order to support medical emergencies.

Ms. Farida Shaheed, United Nations Special Rapporteur in the field of cultural rights made a categorical statement in the issue on the coexistence between patent rights and humans rights by declaring that «*where patent rights and human rights are in conflict, human rights must prevail*».[51] Contrary to what it could be construed from the fact that both Covenant and ONU declaration recognizes the human right to science and culture, and more particularly the right of every person to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author, such provisions do not establish a human right to patent protection.

While it is clear that protecting patents is highly necessary as otherwise, the progress would be slowed down, it also appears reasonable that special and effective measures should be taken in order to grant developing countries with access to medicines since otherwise the right to health cannot be supported.

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[47] In addition to the minimum provisions set out in TRIPS, countries have agreed further measures in the protection of intellectual property rights. This set of bilateral or multilateral agreements in this sense are commonly known as TRIPS PLUS.

[48] Ho, C. M. (2011), p. 226.

[49] Cullet, P. (2003), p. 141.

[50] I-MAK, *Report Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices*, available at *http://www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf*. In this report, conducted from the US perspective, the following figures are provided: there are 125 patent applications filed and 71 granted patents per drug. Prices have increased by 68% since 2012, and only one of the top twelve drugs has actually decreased in price. There are 38 years of attempted patent protection blocking generic competition sought by drugmakers for each of these top grossing drugs or nearly double the twenty-year monopoly intended under U.S. patent law. These top grossing drugs have already been on the U.S. market for 15 years. Over half of the top twelve drugs in America have more than 100 attempted patents per drug.

[51] The UN Secretary-General transmitted to the General Assembly in the 70th session of the General Assembly the report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, submitted in accordance with Human Rights Council resolution 28 /9.

In addition to the access to drugs, there are other issues to be considered when the right to health is at stake. The patentability of the human body is also an issue which has raised concerns about the collision with human rights, namely with the human dignity and health. Whilst the patentability of the human body has traditionally been rejected, there are also defenders for the patentability of the human body per se. In view of the ethic challenges that the patentability of the human body faces, they tend to make a differentiation between the patentability of the human material inside or outside the body and they claim for a protection of the latter.

At this stage, legislations seem to consider that, in light of the moral and human dignity issues involving the patentability of the human body, this should be excluded from the protection granted by a patent. The European Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions included in its preamble a reference to the human dignity and integrity as a reason for excluding the patentability of the human body[52].

Moreover, the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, signed in Oviedo in 1997 was defined as the first international agreement dealing with the human rights against the misuse of the biological and medical developments.

2. Trademarks and the right to health: plain packaging

On the basis on meeting the right of all people to the highest standard of health, the WHO Framework Convention on Tobacco Control (WHO FCTC) was the first treaty negotiated under the auspices of the World Health Organization[53]. This instrument covered both price and non-price measures in order to reduce tobacco consumption and among the non-price measures the ones directly relating to trademarks are those referred to packaging and labelling of tobacco products. This treaty set the general obligations for each Party to develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes based on which the national measures to comply with the tobacco consumption decrease is up to the States' provisions.

Some of the States have taken more severe steps in order to comply with the WHO FCTC by means of the so-called plain packaging. According to these provisions, tobacco packaging would be standardized and all brand imagery would be removed, including corporate logos and trademarks. Packages would display a standard background colour and manufacturers would be permitted to print only the brand name in a mandated size, font and position or even they will not be able to show their trademark at all. According to several studies,

[52] European Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions (*OJ* L 213, 30.7.1998, págs. 13-21*)* states that *«Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person...».*

[53] WHO Framework Convention on Tobacco Control was adopted by the 56th World Health Assembly in May 2003 and entered into force on 27 February 2005.

the plain packaging could lead to the desired results not only by making the packaging less attractive but also by making the health warning more visible[54]. Notwithstanding, tobacco producers endorse studies which reflect that the plain packaging measures do not lead to a tobacco consumption reduction[55].

The rights at stake in this matter are, on the one hand, the public health and the right to health and the impact that the reduction of smoking would have in the community and on the other, the IP rights acquired by the trademark's owners which can see how their rights to use their marks are restricted and the main function of the trademark, which is the differentiation of the goods and services from one company from other will not be fulfil. Hence, plain packaging is considered to jeopardize the main function of trademark as an indication of origin[56].

Although the mark will be able to continue existing within the official register, that is, that they will not be removed from the register, at least at an initial stage, it is possible that the word marks will not be used *vis-a-vis* by the end consumers, or at all[57]. Moreover, the consequences of this use within the cancellation for non-use proceedings and the proof of use[58] of opposing marks in the context of oppositions are still unclear.

The owners of these trademarks consider that an expropriation of their trademark rights is taking place since, on the one hand, they will not be able to identify their products with the trademarks and on the other, their marks will lose their main function which is the commercial function.

On the other side of the conflict, the proponents of the plain packaging argue that no expropriation is taking place, since the trademark owners will still be able to use the trademark on concrete features, namely colour and size. Moreover, even if they cannot use their marks on the tobacco products directed to the final consumer, they can show their trademarks in the boxes or containers to the wholesalers, based on which the commercial function of the trademark would remain. The owners of tobacco trademarks are of course not satisfied with these arguments, which they consider insufficient.

If one considers the prohibition of use of a tobacco trademark as an expropriation, legal requirements for the limitation to property must be met, namely, the limitation is to be done «*in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss*»[59]. Accordingly, the prohibition of using a registered trademark in tobacco packaging would result in the economic compensation for the trademark owners.

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[54] Bonadio, E. (2012), p. 599.

[55] Tobacco producer British American Tobacco acknowledges the following reports: Kip Viscusi, W. (2018) «An assessment of the effect of Australian plain packaging regulation: analysis of Roy Morgan research data, CITTS data, and NTPPTS data»; Dryden N. (2017), «The effects of standardised packaging: an empirical analysis».

[56] Bonadio, E. (2012), p. 600.

[57] Goebel, B. (2009), p. 950.

[58] Proof of use in the context of the opposition proceedings has been recently incorporated in some EU members as a result of the implementation in the national systems of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.

[59] Article 17 of The Charter of Fundamental Rights of the European Union.

Although the public interest in the prohibition of use the tobacco trademarks is clear, one could argue whether the State is entitled to limit the use of a trademark in products which are legal on the basis on public health. Whilst most of the legal systems prohibits the registration of trademarks which are contrary to the law, public policy or morality[60], the products which are sold under tobacco trademarks are not contrary to any of these standards, based on which one could find the justification for such limitation or expropriation rather unclear. Moreover, as there is a range of products which are also considered as rather harmful for the human health, such as alcohol, fats, among others, one could ask whether the marks protecting these products will at some point be also challenged for being contrary to human health. Indeed, plain packaging principles are considered a lesson on which further provisions related to health should be based in order to «de-normalise» excessive alcohol or calorie consumption[61].

Although there are new issues concerning plain packaging as the requirements for showing the tobacco brands on the packaging are becoming stricter, the European Court of Justice already dealt with cases in which tobacco trademark owners alleged the violation of trademark rights. The claims were based on the fact that the warning messages as well as the indication of the nicotine and CO content, which was mandatory, limited the space where the mark was shown. In the judgement of 10 December 2002 referring to the case The Queen vs Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.[62] the Court considered that, as far as the owner of the mark could continue using the mark, the limitation was proportioned and adequate to the public interest. Accordingly, the Court established that «*it must be held that the restrictions on the trade mark right which may be caused by Article 7 of the Directive do in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of that right*».

It seems adequate that, in light of the public interest, which is protecting the public health, some limitations on the tobacco packaging could be carried out since the right over a trademark and public health appears balanced.

However, from the perspective of the fundamental rights as enshrined in the UDHR or ICERSCR, one could argue that the trademark is simply configured as a property right and that only economic interest can be found behind. Accordingly, it is difficult to justify that trademarks are human rights and that they should prevail over the right to health or public health. For some commentators *trademarks are not human rights but property rights with human rights implications*[63].

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[60] Article 4 of the Spanish Trademark Act 1 /2001 and Article 4.1 *f)* of the Directive 2015/2436 states that cannot be registered «trademarks which are contrary to public policy or to accepted principles of morality».

[61] SHMATENKO, L., and SHAVERDOV, D. K. (2018), p. 316.

[62] Judgment of the Court of 10 December 2002, The Queen vs. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., Case C-491/01.

[63] CARPENTER, M. (2009), p. 927.

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