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## **Human Rights-Relevant Considerations in respect of IP and Competition Law<sup>\*</sup>**

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## **1. Introduction**

I shall argue in this paper that there are no irreconcilable tensions between human rights, intellectual property and competition, because of the relationship between the “right to intellectual property”, a human right, and “intellectual property rights” which are trade related rights. I will also urge that the nature of intellectual property as a human right is important in the design, interpretation and implementation of competition law and policy.

I proceed from the fact that the right to intellectual property is found in article 15(1) of the International Covenant for Economic Social and Cultural Rights (ICESCR) and that it is made up of *equal* components found in subsection 1(b) and sub section 1(c). I argue that there is a significant difference between the “right to intellectual property” and “intellectual property rights”, and that this fact may very well lead to an understanding of the perceived tension between “human rights” and “intellectual property.” I believe, however, that while the right to intellectual property is a human right, and intellectual property rights are trade related rights, intellectual property rights are capable of becoming human rights. This is because both types of right spring from the recognition of the inherent dignity of an author/inventor: but while the right to intellectual property represents the ideal, especially as I interpret it, intellectual property rights represent national and international manifestations of the right to intellectual property, albeit in different degrees.

Accordingly, what is regarded as the “tension” between intellectual property and human rights lies in the fact that the intellectual property rights in question may not correctly manifest the right to intellectual property. The tension becomes evident as the neglected component of the right to intellectual property in intellectual property rights seeks recognition and protection. Furthermore, I will demonstrate, using decided cases, that it is possible to infuse the missing component of a right to intellectual property into intellectual property rights. This will be done through the process of balancing of rights, which is well established in human rights systems, human rights generally not being absolute.

## **2. The right to intellectual property and intellectual property rights**

### **2.1 Theoretical Overview**

Article 15(1) of the ICESCR<sup>1</sup> recognizes a right to intellectual property. It provides that:

*1. The States Parties recognize the right of everyone*

*(a) To take part in cultural life;*

*(b) To enjoy the benefits of scientific progress and its applications;*

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<sup>1</sup> See also article 27(2) of the Universal Declaration of Human Rights (“UDHR”).

*(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

It is my opinion that article 15(1) is made up of two related components. The first is found in subsection 1(c), the private reward component; and the other is that found in subsection 1(b), which I regard as the public benefit component. Even though there is no clear guidance from the text of the article 15(1) as to the nature of this balance, it can be argued that this balance should be *equal*.<sup>2</sup>

A right to intellectual property should therefore contain and be defined by the two equal components. I acknowledge the fact that the two components may also be regarded as separate rights, claimed by the author/inventor on the one hand, and, on the other, by individuals in whom the right inheres as a result of the public benefit component. The Draft Comment No 18 regards the components as separate rights even though it is obvious that the two components are so related that regarding them

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<sup>2</sup> See the decision of the Canadian Supreme Court in *CCH v Law Society of Upper Canada* [2004] 1 S.C.R. 339, para 48

“... the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.” Commenting on this case professor Tawfik is of the opinion that “ In sum, by introducing the language of user rights and by adopting a broad and expansive interpretation of 'fair dealing' the Supreme Court has shifted the locus of analysis away from the preeminence of the copyright interest. What is therefore being advanced is equality of treatment of both rights holders and users in which neither takes precedence over the other.” See Myra Tawfik “ International Copyright Law and 'fair dealing' as a 'user right' *e-copyright Bulletin* April-June 2005 6. Available at [www.unesco.org](http://www.unesco.org). See the WIPO Development Agenda (Doc. W0/GA/31/11.) submitted at the 31<sup>st</sup> Session of the WIPO General Assembly. See also Philippe Cullet “Human rights and intellectual property: Need for a new perspective” IELRC Working Paper 2004-4 (hereafter “Cullet”) Available at [www.ielrc.org/content/w0404.pdf](http://www.ielrc.org/content/w0404.pdf); Audrey Chapman “ Approaching intellectual property as human right: obligations related to article 15(1)c” XXXV *e-Copyright Bulletin*. See also the Draft General Comment No 18 of the of the Committee on Economic Social Cultural Rights (CESCR) on article 15(1)c of the ICESCR (Hereafter “Draft General Comment No 18”) does not contemplate a right to intellectual property based on the twin components and certainly not their equality. According to paragraph 37 of the Draft Comment No. 18: “ The rights of authors and inventors to benefit from the protection of the moral and material interests resulting from their works cannot be seen in isolation from other rights recognized in the Covenant. States parties are therefore obliged to strike a balance between their obligations under article 15, paragraph 1(c ), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting all human rights, including the full range of rights guaranteed in the Covenant. In striking this balance, the private interests of authors and inventors should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration. ” Draft Comment No 18 is still under consideration]. The Draft Comment is largely based on the Statement of the CESCR on ‘Intellectual Property and Human Rights’ of 14 December 2001. (Hereafter “CESCR Statement 2001”) UN Doc. E/c.12/2001/15. In paragraph 2 of this statement the Committee declared its resolve to adopt a general comment on intellectual property and human rights. The Statement was designed to identify key human rights principles deriving from the Covenant that are required to be taken into account in the development interpretation and implementation of contemporary intellectual property regimes”. See also paragraph 4 of the CESCR Statement 2001: “ The Committee therefore encourages the development of intellectual property systems and the use of intellectual property rights in a balanced manner that meets the objective of providing protection for the moral and material interests of the author and at the same time promotes the enjoyment of these and other rights.

as separate obscures the distinct feature of their equality. Since the components are of *equal priority* none is inherently superior to the other.

As stated above, there is a distinction between “the right to intellectual property” as found in the two components of article 15(1) of the ICESCR, and “intellectual property rights” which existing international and national intellectual property regimes recognize.<sup>3</sup> The distinction between the two is that while the right to intellectual property, as I interpret it, is the ideal, intellectual property rights are an expression of municipal and international beliefs and agreements as to how to recognize the intellectual activity of authors/inventors on the one hand, and how to ensure that the public has access to the benefits of scientific progress and its applications. The nature of this balance found in intellectual property rights regimes varies. In many instances, however, it is in favour of the rights of the author and inventor, (for example in TRIPS<sup>4</sup>, and also in many national intellectual property rights regimes). For example the UK Copyright Patent and Designs Act 1988 contains detailed provisions of the *property rights* of a copyright owner in chapters 1, 2 and other parts of the Act, while chapter 3 contains *permitted acts* with respect to a copyright work. Thus the common model of national intellectual property regimes is such that while the rights of authors/inventors are elaborated in detail, the public benefit component of these regimes is found in exceptions and limitations<sup>5</sup>, in certain restricted cases which are often restrictively interpreted.<sup>6</sup>

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<sup>3</sup> Paragraph 1-2 of the Draft General Comment No. 18 has to say on this distinction: “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 is a human right, which derives from the inherent dignity of all persons...Human rights are fundamental in that they derive from the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity which society benefits. In contrast with human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.”

<sup>4</sup> See the UN Sub Commission on the Promotion and Protection of Human Rights in Resolution 2000/7 titled: ‘Intellectual property and Human Rights’ : Since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human right, including the right of everyone to enjoy the benefits of scientific progress and its application, the right to health, the right to food, and the right to self determination, there are apparent conflicts between the intellectual property regime embodied in the TRIPS Agreement on one hand, and international human rights law on the other hand.”

<sup>5</sup> See for example paragraph 42(a) of Draft Comment No 18 which states that “ the following are obligations of comparable priority: To protect the social function of intellectual property by striking an adequate balance between the need for an effective protection of intellectual property and States’ parties obligations in relation to health, food and education or any other right recognized in the International Covenants” Cullet’s opinion of this conclusion is put thus: “Section 42(a) may be understood as providing that there should be a balance between the human rights claims of authors/inventors and the social function of intellectual property rights. In other words the balance is not a question of the relative importance of the human rights to health, food and education on the one hand and intellectual property rights on the other hand. The balance is only the same basic ‘social’ balance which intellectual property rights regimes seek to achieve. This is of considerable importance because it downgrades fundamental human rights such as the rights to food and health as elements which are taken into account in a balance which is not first and foremost centred on human rights claims.” Note 2, p. 5.

<sup>6</sup> See for example the decision of the Canadian Federal Trial Division in *Michelin v CAW Canada* (1996) 71 CPR (3d) 348: “...exceptions to copyright protection should be strictly interpreted.”

I believe that it is this balance and the strident observations of its negative effect<sup>7</sup> that has led *inter alia* to the perceived tensions between “human rights” and “intellectual property”. Since I contend, however, that intellectual property rights are akin to human rights, tension in this area may be nothing more than a clash of rights that require balancing. The acknowledged primacy of human rights may lead to a conclusion that human rights should trump intellectual property rights. This need not be so and is not evident from the cases I examine below.

These cases indicate that a balancing occurs between the intellectual property right and the implicated human right. One critical point is the aim of this balancing. I submit that the balancing should be such that the “intellectual property right”, as interpreted and applied, manifests the twin equal components of the “right to intellectual property.” It can therefore be submitted that State parties to the ICESCR are under a legal obligation to ensure that their intellectual property rights as drafted, applied and interpreted are in consonance with the ideal “right to intellectual property”.<sup>8</sup>

In fact, it can be argued that the twin components of article 15(1) and its defining feature of *equality* represents the *utopia* which intellectual property rights regimes with its *unequal* characteristic should strive to attain. As stated earlier, when intellectual property rights are said to clash with other rights, it may just be a symptom that one of the components of article 15(1) of the ICESCR is lacking in that intellectual property right. From this insight, it may be possible to reconcile the

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<sup>7</sup> See for example Professor Baker, “Processes and issues for improving access to medicines: Willingness and ability to utilize TRIPS flexibilities in non-producing countries” paper prepared for the DFID Health Systems Resource Centre 2004 available at [www.healthsystemsre.org](http://www.healthsystemsre.org) (hereafter “Baker”) “In starkest terms, the current, expansive system of internationalised intellectual property rights (IPRs) means that research based drug companies can obtain patents that grant them exclusive territorial rights to market innovative pharmaceutical processes and products almost everywhere in the world. In turn, these globalised patents permit pharmaceutical companies to exclude low-cost generic competitors and to set profit-maximising monopoly prices. In addition to having expanded their patent rights internationally, research based companies are gaining increased protection for data supplied to drug regulators for purposes of establishing the safety, efficacy and quality of their medicines...Although this intertwined system of intellectual property protections for patents, data, and their associated high prices is often defended as providing resources and incentives for research and development for the next generation of life-saving medicines, there is little doubt that higher prices affect access to existing (and future) medicines that are often unaffordable to developing countries and their impoverished residents.” See also Executive Summary *TRIPS and Rights: International Human Rights Law, access to medicines and the interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*. p.i. (2001). Available at [www.aidslaw.com](http://www.aidslaw.com) : “ In recent years , in large measure because of the global HIV/AIDS crisis, the issue of access to affordable medicines in many of the world's poor and developing countries is finally receiving the attention it deserves. Nobody disputes that making medicines accessible to those who need them requires action on many fronts. Given the evidence to date, it is clear that one of the fronts is the role played by private patents in medicines in keeping drugs priced above prices that are affordable for many of those most in need of them.

<sup>8</sup> See paragraph 4 of the CESCR Statement 2001 “ “To be consistent with obligations to respect international human rights, intellectual property regimes must promote and protect all human rights” See also U.N High Commissioner for Human Rights : The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights: U.N Doc. E/CN.4?Sub.2/2001/13 “ Article 15 of the Covenant ...identifies a need to balance the protection of both public and private interests in intellectual property...article 15 could be said to bind States to design IP systems that strike a balance between promoting general public interests in assessing new knowledge as easily as possible and in protecting interests of authors and inventors in such knowledge”

“intellectual property rights” with other rights, in a way that recognises the equal priority of the right to intellectual property and ensure that the reality of the intellectual property right conforms to the ideal of the right to intellectual property.

To facilitate this process, the essential characteristic and function of an intellectual property right may have a significant impact in the manner in which it is reconciled with a human right. For example copyright can affect dealings with information, and as a result could affect freedom of expression and privacy. It is therefore often regarded as clashing with freedom of expression and access to information. Yet while article 15(1)(c) protects the right of the copyright owner to the fruits of his intellectual activity, article 15(1)(b) protects the right of the public, and ultimately the individual, to the information that is contained in the work protected by copyright. In truth, therefore, what is really clashing is the two components of article 15(1).

## 2.2 Case Analysis: Copyright

In the resolution of this clash, the critical question may be how to ensure that the copyright owner is rewarded for his effort, while ensuring that the information contained in the work that is protected by copyright is made available for public use. A very good example of this clash and its resolution is found in the case of *Ashdown v Telegraph Newspapers*.<sup>9</sup> The appeal in this case dealt with whether the Human Rights Act 1998 had impacted on the protection afforded to owners of copyright by the UK Copyright Designs and Patents Act 1988. The appellants (the Telegraph Group) contended that it had. They argued that when considering whether an actionable breach of copyright had occurred, or the remedies appropriate in the event of such breach, the Court must have regard to the right of freedom of expression conferred by article 10 of the European Convention of Human Rights (“ECHR”).<sup>10</sup> The lower court had rejected this contention and held that

*“...Article 10 cannot be relied on to create defences to the alleged infringement over and above those for which the 1988 Act provides. The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted. There is no*

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<sup>9</sup> [2001] ECWA Civ 1142 [CA]

<sup>10</sup> Article 10 of the ECHR provides:

*“Freedom of expression*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

*room for any further defences outside the code which establishes the particular species of intellectual property in question.”<sup>11</sup>*

The Court of Appeal made some interesting analysis of the relationship between copyright and the freedom of expression. Firstly it acknowledged correctly that copyright and freedom of expression concern information.<sup>12</sup> Secondly it declared that the two concepts conflict:

*“Despite ss.2(1) and 16(2) copyright is essentially not a positive but a negative right. No provision of the Copyright Act confers in terms, upon the owner of copyright in a literary work, the right to publish it. The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.”<sup>13</sup>*

If the two concepts concern information, then it is quite plausible, using the interpretation I have put forward above, to argue that copyright and freedom of expression are part of the “right to intellectual property.” This is on the basis that the ability to exclude others from making copies of the work represents the private reward component of the right, and the access to the information represents the public benefit component of the right. Within an intellectual property regime, however, the expression of the legal right may well conflict with my analysis. This may seem to be the thrust of the court’s approach in this regard.

The court further held, however, that:

*“Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.”<sup>14</sup>*

Furthermore it declared that:

*“we have reached the conclusion that rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the*

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<sup>11</sup> [2001] 2 WLR 967 at p.975F-G.

<sup>12</sup> Paragraph 24. The rights granted by Article 10 are generally referred to as “freedom of expression”. But as the first paragraph makes clear, it includes the right to impart both information and ideas.

<sup>13</sup> Paragraph 30.

<sup>14</sup> Paragraph 43.

*Act in a manner that accommodates the right of freedom of expression.”<sup>15</sup>*

The court in this case decided that, in furtherance of freedom of expression, the newspaper could publish. However, as this remained an actionable infringement of copyright, it entailed the payment of compensation to the copyright owner: freedom of expression does not mean a free use of another person’s work. Since information was the issue in question, the manner in which the court sought to deal with “the apparent conflict” seems commendable. It addressed the question of the public access to information, justifiable on the basis of article 15(1)(b) of the ICESCR; and also recognized the interests of the copyright owner, in furtherance of article 15(1)(c) of the ICESCR, in requiring that compensation be paid. In this way, no question of “trumping” of rights has arisen, and neither of the two components of the “right to intellectual property” seem to have been considered worthy of priority by the court: although a key contributor to this approach may have been that information itself was in issue.<sup>16</sup>

### 2.3 Case Analysis: Trade marks

The context of the balancing of the two components of article 15(1) of the ICESCR may be the key to understanding the recent decision of the Constitutional Court of South Africa in *Laugh It Off Promotions V South African Breweries*.<sup>17</sup> This case considered the interface between trade mark infringement and freedom of expression. Trade marks also affect information in some respects especially when they are able to prevent the publication or dissemination of certain expressions about the trade mark. Accordingly while the trade mark owner is entitled to the protection of article 15(1)(c) ICESCR, the individual, in pursuance of article 15(1)b, is entitled to the benefits from freedom of expression in respect of the manner in which he may deal with the trade mark. For example he may incur some liability with respect to his comment on the reputation of the trade mark, since the protection of the reputation of a mark is at the heart of anti dilution law. A claim that freedom of expression was a complete answer to a suit of trade mark infringement by dilution was rejected by the South African Supreme Court of Appeal. In that case the respondent is a trader of alcoholic and non-alcoholic beverages. It had acquired trade marks relating to CARLING BLACK LABEL from a South African firm. At the end of November 2001 the respondent came to know that the applicant had produced and was offering for sale public T-shirts, which bore a print that was markedly similar in lettering, colour scheme and background, to that of the respondent's CARLING BLACK LABEL trade marks. The only difference was in the wordings. The words “Black Label” was replaced, on the T-shirt, with 'Black Labour'; the respondent's “Carling Beer” was substituted with “White Guilt”; and where written “American Lusty Lively Beer” and “enjoyed by men around the world”, the applicant had printed “Africa's lusty lively exploitation

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<sup>15</sup> Paragraph 45

<sup>16</sup> It may be of interest to further inquire if information is far more amenable than other commodities in the resolution of clashes between rights especially in the light of emerging jurisprudence in the resolution of the clash between “privacy” and “freedom of expression” in many jurisdictions. See for example the UK cases of *Campbell v Mirror Group of Newspapers* [2004] 2 WLR 1232 and *Douglas v Hello*[2005] ECWA Civ 595.

<sup>17</sup> Case CCT 42/04

since 1652” and “No regard given worldwide”. The calls by the respondent to the applicant to desist from using the trade marks elicited no response. Consequently the respondent sought an interdict at the High Court which was granted. The applicant appealed to the Supreme Court of Appeal and lost, hence the appeal to the Constitutional Court where it was successful.

The Constitutional Court held that the proper approach when freedom of expression - a constitutionally guaranteed human right<sup>18</sup> - interfaced with legislative anti-dilution provisions, is to balance the interests of the owner of the trade marks against the claim of free expression, for the very purpose of determining what is unfair and materially harmful to the trade marks in these circumstances.

Since the relevant South African anti-dilution provisions seek to oust certain expressive conduct, the court assumed that this could be a limitation of freedom of expression reasonable and justifiable in an open and democratic society;<sup>19</sup> the court required, therefore, an interpretation of the anti-dilution provision that is most compatible with, and least destructive of, the right to free expression. Accordingly, the court determined the appropriate interpretation to be that the owner of a trade mark seeking protection of anti-dilution provisions to oust an expressive conduct protected under the constitution, must demonstrate likelihood of substantial economic harm or detriment to the trade mark.

The decision of the court means that substantial economic harm or detriment will oust a constitutionally protected expression. The court categorised the case as involving a human right and an intellectual property right:<sup>20</sup> the manner in which it sought to balance the two rights was such that it treated the intellectual property right a human right.<sup>21</sup> Certain *obiter* in the judgment recognize that a trade mark does not only confer rights on the owner, but has wider implications that resonate with public

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<sup>18</sup> Section 16 of the Constitution of the Republic of South Africa provides that

“16 freedom of expression

(1) Everyone has the right to freedom of expression, which includes

(a) freedom of the press and other media;

(b) freedom to receive and impart ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”

<sup>19</sup> S 36 (1) of the Constitution of the Republic of South Africa 1996 provides that the rights in the Bill of Rights may be limited only in terms of the law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society.

<sup>20</sup> Note Para 1.

<sup>21</sup> Note however that the court seemed to have agreed with the Supreme Court of Appeal that the right to intellectual property of the trade mark owner, and the owner’s freedom of trade, occupation and profession- a human right protected by s 22 of the Constitution of South Africa- were in issue.

concerns, that can find justification in article 15(1)(c).<sup>22</sup> A trade mark can therefore be said to confer rights on the owner and members of the public, albeit indirectly, to the extent that they can engage in expressive conduct, provided that no substantial economic harm or detriment is done to the trade mark. In this way I submit that the trade mark would conform to the twin component structure of article 15(1) ICESCR.

#### 2.4 Case Analysis: Contract

Another example of how the twin components of article 15(1) ICESCR can find relevance and recognition in an intellectual property right may be found in a contract for the sale of a product covered by an intellectual property right since human rights have some horizontal application. A contract would concern the right of the inventor or author to benefit from his inventive activity, in this case through the price of the product. This should be considered, on the other hand from the perspective of the buyer, who as an individual may wish to assert a right of access to the product as a fruit of invention based on article 15(1)b of the ICESCR. The individual's right does not mean that he is to have *free* access to the product, (in the sense of without payment) as it may rightly contemplate a "reasonable access" which could be an affordable price of the product in question. Accordingly, an excessive price may hinder this "reasonable access".

In this way a contract may be impugned for hindering access to the product. In addition, the foundational nature of the "right to intellectual property" may be such that the lack of reasonable access may impact other rights. An exemption clause in the contract indemnifying it against damage to a patient, except damage resulting from 'wilful default' was in issue in the South African case of *Afrox Healthcare v Strydom*<sup>23</sup> where it was urged, unsuccessfully, that the clause infringed the spirit and purport of the right to access to healthcare guaranteed by s 27(1)a of the South African Constitution.<sup>24</sup> The important point that this case, along with *Brisley v Drotzky*,<sup>25</sup> establishes is that for the reason of public policy, an otherwise unobjectionable contract could be interfered with by a court. Since fundamental human rights could very well represent public policy, it may not be too long before South African courts move from their present reluctance to deploy public policy as a

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<sup>22</sup> See para 30: "The interplay between free expression and intellectual property in the form of trademarks is not merely academic. It is a matter that has important and abiding implications for the workings of our economy and is of concern to the broader public." See also para 48: "Courts must be astute not to convert the anti-dilution safeguard of renowned trade marks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society"

<sup>23</sup> (2002) (6) 21 (SCA).

<sup>24</sup> Section 27(1)a of the Constitution provides that: "Everyone has the right to have access to health care services including reproductive health care."

<sup>25</sup> 2002 (4) SA 1 (CC) In this case a non variation clause in a contract for a lease was upheld in spite of the fact that the lessee invoked the provisions of section 26(2) of the South African Constitution as part of her defence to eviction when she was in arrears of rent. The Supreme Court of Appeal held that the principles of bona fides, namely, that a provision in a contract ought not to be enforced because it would in the circumstances be unreasonable, unfair and in conflict with the principles of bona fides to do so, could not be successfully invoked to escape contractual obligations.

tool to strike down contracts.<sup>26</sup> Thus it may not be far fetched to argue that the excessive price of an essential medicine may be challenged on the grounds that it breaches the “spirit purport and objects” of the right to healthcare.<sup>27</sup>

### **3. Human rights and competition**

There is significant doubt whether human rights have any role in competition law/policy. While human rights can be said to represent societal values and aspirations, competition policy is principally concerned about “the protection of the competitive process to ensure an efficient allocation of resources, lower prices and greater consumer choice.”<sup>28</sup> Competition is concerned with the exercise of market power in ways that seem largely outside the thrust of human rights. However, since human rights in general, and the “right to intellectual property” is about the well being of people;<sup>29</sup> and since markets are also about people; it is possible that they may affect each other. If intellectual property rights affect human rights, then any impact of competition law on intellectual property rights will in turn affect human rights, since all rights are indivisible and affect each other.<sup>30</sup> Therefore it is the manner in which competition law may affect the exercise of intellectual property rights that defines the relationship between human rights and competition law.

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<sup>26</sup> See G. Lubbe “ Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law” 121 *SALJ* 395; H. MacQueen “ Delict, contract and the bill of rights: A perspective from the United Kingdom” 121 *SALJ* 359.

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While the application of human rights in the area of contract is still unfolding, it has had a better ride in the area of civil wrong, evident in the cases in this area. See the following cases: in *Carmichele v Minister of Safety and Security* 2001 (2) SA 938 (CC) the Constitutional Court upheld the claim by the applicant that she was entitled to damages from the Minister of Safety and Security and the Minister of Justice and Constitutional Affairs because the South African Police Service and the public prosecutors in her area were negligent as they failed to comply with the legal duty they owed her to take steps to prevent her attacker from causing her harm; in *Van Eeden v Minister of Safety and Security* 2003(1) SA 389 (SCA) the Supreme Court of Appeal upheld the contention that the police were under a legal duty for failure to take steps to prevent a known dangerous criminal escaping from police custody. The case of *Minister of Safety and Security v Van Duivenboden* concerned the legal duty of the South African Police Service to take steps to deprive a person of firearms.

<sup>28</sup> M. Gangi “ Competition policy and the exercise of intellectual property rights” Available at [www.Archivioceradi.luiss.it/documenti/archivioceradi/osservatori/intellttuale/Gangi1.pdf](http://www.Archivioceradi.luiss.it/documenti/archivioceradi/osservatori/intellttuale/Gangi1.pdf)

<sup>29</sup> See paragraph 4 of the *CESCR Statement 2001*: “ The end which intellectual property protection should serve is the objective of human well being to which international human rights instruments give legal expression”

<sup>30</sup> In 1993 member states of the United Nations reaffirmed the fundamental interrelatedness of all human rights and the human rights obligations of States in the Vienna Declaration and Programme of Action adopted by 171 States at the UN's World Conference on Human Rights. This Declaration states that: “ All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

Intellectual property rights confer exclusionary powers, which enables right owners to exclude and determine how people use and enjoy the fruits of innovative activity. This includes the commercial use of innovative products and processes, especially when there are no substitutable technology and/or products. Since the exercise of market power in such circumstances would concern competition law, it becomes important to understand when and how competition law/policy will step in to restrain the market power engendered by intellectual property rights. When competition law/policy steps in, it essentially makes the products and processes available to the public, and in a sense enables society to have access to the fruits of invention - even if at a cost, albeit lowered; the point being that without competition law/policy, access would not be possible in some cases. In many instances, the goods and services that become readily available through perhaps lower prices affect the realization of one human right or the other. If the prices of HIV/AIDS drugs become cheaper and accessible to people, then a significant component of the right to health would have been fulfilled. In consequence of the *Magill*<sup>31</sup> decision information that would hitherto not been available becomes available to the public, it would be ensuring that citizens enjoy their freedom of expression. From this perspective, it may well be that competition law/policy can be instrumental in ensuring that an “intellectual property right” manifests the twin components of a right to intellectual property.

I shall now elaborate on the point that human rights can and should affect the design interpretation and implementation of competition law/policy. Let us begin with the design of a competition policy. As stated above, the peculiar realities of different countries find expression in the manner in which they apply human rights, and should also influence how they design their competition policy. In a developed economy, the ability of competition law to foster innovation along with the exercise of intellectual property rights is a legitimate concern of competition law/policy. For a developing country, critically in a shortage of intellectual property rights based products and processes, access to these products is of primary importance.<sup>32</sup> It may therefore be important to contemplate the use of competition policy for other purposes that may not be directly market driven. Thus it is valid that competition laws/policies of developing countries should have goals, which recognise more than the traditional goals of competition law.

The mandate for a development oriented competition policy can be found in TRIPS. Article 1<sup>33</sup> of TRIPS is especially important in this regard, as is article 8.<sup>34</sup> Within

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<sup>31</sup> *Radio Telefis Eireann(RTE) v Commission* [1995] ECR I-743.

<sup>32</sup> See J. Berger “Advancing public health by other means: Using competition policy to increase access to essential medicines” paper’ (Hereafter Berger) Available at [www.iprsonline.org/unctadictstd/bellagio/dialogue2004/bell3\\_documents.htm](http://www.iprsonline.org/unctadictstd/bellagio/dialogue2004/bell3_documents.htm)

<sup>33</sup> 1(1) Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

<sup>34</sup> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of

such a context, the “right to intellectual property”, foundational to the manner in which intellectual property rights are designed, can have a significant impact on the exercise of other human rights as we saw above. It can be argued that competition policy is also critical if an intellectual property regime is to equally prioritise the two components of article 15(1) ICESCR. In this way, the minimum core obligations with respect to food, education and health as required by the CESCR General Comment No 3<sup>35</sup> can be fulfilled. With respect to public health and access to essential medicines it is without doubt that the combined effects of articles 8<sup>36</sup>, 30<sup>37</sup>, 31<sup>38</sup> and 40<sup>39</sup> of

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intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.

<sup>35</sup> On the Nature of States’ Obligations Imposed by Article 2(1) of the ICESCR.

<sup>36</sup> “1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology”

<sup>37</sup> “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

<sup>38</sup> “Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

- (a) authorization of such use shall be considered on its individual merits;
- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;
- (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;
- (d) such use shall be non-exclusive;
- (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
- (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;
- (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;
- (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

TRIPS; the Doha declaration on the TRIPS agreement and public health;<sup>40</sup> and decision of the General Council on 30<sup>th</sup> August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health<sup>41</sup>, enable a developing country to design a competition policy geared towards ensuring the fulfilment of its public health obligations especially access to affordable medicines.<sup>42</sup> Professor Baker argues that a robust competition policy reform might lead to rules prohibiting abusive or excessive pricing leading to a gap in access; refusal to issue voluntary licence; lack of access to an essential technology or facility especially important with respect to sourcing fixed-dose combination medicines; and patent holder restrictions on the right to 'parallel export' to developing countries.<sup>43</sup> In

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(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

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1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

<sup>40</sup> Available at [www.who.int/medicines/areas/policy/tripshealth.pdf](http://www.who.int/medicines/areas/policy/tripshealth.pdf)

<sup>41</sup> Available at [www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm)

<sup>42</sup> See Baker, note 7: "Although the principal focus of reform under the TRIPS and Paragraph 6 regime concerns authorization for the issuance of compulsory licenses and government use orders, policy makers in developing countries should also focus on reforming competition policy and regulating voluntary licenses in the pharmaceutical sector." P. 43

<sup>43</sup> Baker, pp.44-45.

addition, he urges the application of competition principles to voluntary licensing of pharmaceutical products.<sup>44</sup>

An example of a development oriented competition policy, albeit unacknowledged, is found in the South African Competition law. Its goals are set out in section 2 of the Competition Act, which declares its purpose to be to:

*promote and maintain competition in the Republic in order (a) to maintain the efficiency, adaptability and development of the economy; (b) to provide consumers with competitive prices and product choices; (c) to provide employment and advance the social and economic welfare of South Africans; (d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic; (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.*

The preamble to the Act clearly implicates South Africa's past as the reason for the thrust of the competition law.<sup>45</sup>

With regard to the interpretation of this competition law with the assistance of human rights, it is not clear as to the manner in which these "public interest goals" may be used, as there is scant jurisprudence on the issue. Whether they are to be significant or ancillary is still not clear. For example would a national emergency influence the decision of competition authorities? It is submitted that there should be the possibility for certain human rights to influence the manner in which an act or conduct is declared anti-competitive. South Africa is a good example in this regard. Given its apartheid past and the overarching constitutional values of freedom equality and dignity,<sup>46</sup> it is not surprising that the South African Competition Act has goals that resonate with human rights concerns.<sup>47</sup> Indeed, it may be argued that the enforcement of socio economic rights in South Africa<sup>48</sup> ought to be a factor in the competition

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<sup>44</sup> Baker: Many developing countries have legislation that allow its agencies to assess the anti-competitive content of agreements for the transfer of technology that usually involves intellectual property. See for example s 69 of the Industrial Property Act of Kenya 2001, and the Nigerian National Office for Technology acquisition and Promotion Act 1990.

<sup>45</sup> The said preamble declares that the people of South Africa recognise: *That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans; That the economy must be open to greater ownership by a greater number of South Africans; That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy; That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.*"

<sup>46</sup> S. 1 of the Constitution of South Africa 1996.

<sup>47</sup> See "Competition law and policy in South Africa" OECD Global Forum on Competition Peer Review. Available at [www.oecd.org/dataoecd/52/13/2958714.pdf](http://www.oecd.org/dataoecd/52/13/2958714.pdf)

<sup>48</sup> The Bill of Rights in South Africa contain a number of rights which have been judicially endorsed as constituting socio-economic rights in that country. These are the rights found in s. 26, 27 and 28 of the South African Constitution.

policy in that country. Thus even though the promotion and maintenance of competition is the principal goal, other goals that address human rights issues should be taken into consideration in the determination of compliance with the Act. In this way, human rights may be regarded as complementary to competition law and the market *envisaged* by South Africans.

As stated above, however, there are no broad guidelines to guide the manner in which human rights can be factored into a determination of anticompetitive activities in South Africa. For example s 8 of the Competition Act prohibits abuse of dominant position<sup>49</sup> – a fact common to all competition regimes. Excessive pricing<sup>50</sup> is one of the prohibited acts a dominant firm should not be involved in. How does a competition authority determine what excessive pricing is? Should it rely only on competition and economic factors as the Competition Act clearly mandates, even where it clear that the definition of excessive pricing is vague, or should it also consider other socio economic issues? It seems that the public interest goals of the South African Competition Act make it important that the effect of prohibited acts on the enjoyment of human rights is taken into consideration in its deliberations.<sup>51</sup>

Unfortunately the possibility of clear jurisprudence on this issue was missed because of the settlement of the complaint<sup>52</sup> initiated by the South African Competition

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<sup>49</sup> S. 8 provides as follows: “ It is prohibited for a dominant *firm* to – (a) charge an *excessive price* to the detriment of consumers; (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so; (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or (d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act – (i) requiring or inducing a supplier or customer to not deal with a competitor; (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible; (iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or (iv) forcing a buyer to accept a condition unrelated to the object of a contract; selling *goods or services* below their marginal or average variable cost; or (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

<sup>50</sup> Excessive pricing is determined by the South African Competition Act to mean “a price for a good or service which – bears no reasonable relation to the economic value of that good or service; and is higher than the value referred to above;

<sup>51</sup> This is a view that will meet with strenuous objections. See for example “Competition law and policy in South Africa” note 38. Commenting on the complaint lodged against the multinational companies, the Review at p. 13 states that: “The Commission and the Tribunal may thus have to decide how the Competition Act can be used to control prices in a case that presents two complicating factors: the relationship between competition policy and intellectual property rights including international recognition of those rights, and the public interest in dealing with large scale public health problems represented by AIDS. The ‘public interest’ as such is not a basis for the decision under the Competition Act, of course.”

<sup>52</sup> See paragraph 50 and 51 of the complaint made to the South African Competition Commission:

“ 50: Because high prices result in lack of access to treatment, the high prices of ARVs result in many avoidable opportunistic infections, preventable deaths and the resultant social and financial implications accompanying high levels of morbidity and mortality. Having established this, there can be no doubt that the high prices that are currently being charged in the private sector for ARVs are to the detriment of consumers.

51. The detriment that is caused is particularly grave by virtue of its direct bearing on the ability of consumers fully to enjoy their constitutionally protected rights and in particular the rights to life, dignity and equality, and access to health care services. The high prices also have the effect that

Commission against two multinational companies-GlaxoSmithKline (GK) and Boehringer Ingelheim (BI).<sup>53</sup> There is no doubt that the constitutional guarantee of the right to access to health care services provided the general context of the complaint. This context is important because s. 39(2) of the South African Constitution requires that the letter, purport and spirit of the Bill of Rights must be taken into consideration in the interpretation of any legislation which in this case was the Competition Act. With the settlement,<sup>54</sup> the opportunity was lost for guidance and understanding in respect of what seems to be a crucial issue. However, certain lessons can be gleaned from the entire process and one of them is the broad public concern that the issue generated.<sup>55</sup>

Could this broad public concern have influenced the Competition Commission in its decision to refer the matter to the Competition Tribunal? In the statement of the Commission, reacting to media concerns after the referral, it said that:

*“ ... the concern raised that the Commission’s finding ...was largely based on sentiment and not on sound legal and economic principles is incorrect...the Commission’s finding is rooted in competition law. What the finding also showed however is that competition law exists not only for the benefit of large companies as is commonly thought but is ultimately there for the benefit of ordinary citizens as well”*<sup>56</sup>

#### **4. Concluding remarks**

My contribution examines a small part of a complex and unfolding concept. In examining the nature of the “right to intellectual property” and its relationship with intellectual property rights and competition law/policy, many questions are left unattended given the evolving nature of the subject and the space available for this contribution. For example is it really conclusive that “intellectual property rights” are not human rights? What would be the result of a consensus that they are human rights? Should human rights issues form part of the jurisprudence of the WTO dispute settlement? An answer in the affirmative raises the question of the extent.

These and other questions can only be answered by deeper reflection along sectoral lines. This is why I discussed the function of an “intellectual property right” as being facilitative of a balancing process. I also believe that the state of the development of the country or region should be of importance. What may be ideal for a developing country may not be of importance to a developed country. Finally it seems to me that

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the best interests of children cannot properly be served.” Available at [www.tac.org.za/Documents/DrugCompaniesCC/HaazelTauAndOthersvGlaxoSmithKlineAndOthersStatementOfComplaint.doc](http://www.tac.org.za/Documents/DrugCompaniesCC/HaazelTauAndOthersvGlaxoSmithKlineAndOthersStatementOfComplaint.doc).

<sup>53</sup> The Commission initiated complainants against GlaxoSmithKline and Boehringer Ingelheim in 2002 after identical complaints by citizens were lodged. After concluding investigations the Commission concluded that the two firms had abused their dominance and contravened sections 8(a) (excessive pricing); 8 (b) (refusing a competitor an essential facility); and 8c (an exclusionary act) of the Competition Act.

<sup>54</sup> See terms of settlement at [www.cptech.org/ip/health/sa/settlement/209203.pdf](http://www.cptech.org/ip/health/sa/settlement/209203.pdf)

<sup>55</sup> See Berger, note 30.

<sup>56</sup> See Competition News, Edition 15 March 2004. p.1. Available at [www.CompCom%20News%20March%20ps1.pdf](http://www.CompCom%20News%20March%20ps1.pdf)

the cases I examined above indicate that the judiciary has shown an uncanny understanding of the way in which issues involving human rights and intellectual property should be handled, and that we may be better off paying attention to what can be gleaned from these cases.